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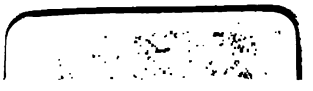

CASES

DECIDED IN THE

COURT OF SESSION, &c.

THIRD SERIES.—VOL. XI.

COURT OF SESSION,
July 20, 1872, *to July* 20, 1873.

HOUSE OF LORDS,
July 30, 1872, *to July* 20, 1873.

CASES

DECIDED IN

THE COURT OF SESSION,

TEIND COURT, &c.

AND

HOUSE OF LORDS.

COURT OF SESSION, FROM JULY 20, 1872, TO JULY 20, 1873.
HOUSE OF LORDS, FROM JULY 30, 1872, TO JULY 20, 1873.

REPORTED BY

MIDDLETON RETTIE, ARCHD. C. LAWRIE, J. B. L. BIRNIE,
WILLIAM GUTHRIE, AND GEORGE F. MELVILLE,
ESQUIRES, ADVOCATES.

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JUDGES

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Lord President, The Right Hon. JOHN INGLIS.

Lord DEAS.

Lord ARDMILLAN.

Lord KINLOCH.*

SECOND DIVISION.

Lord Justice-Clerk, The Right Hon. Sir JAMES MONCREIFF, Bart.

Lord COWAN.

Lord BENHOLME.

Lord NEAVES.

---

* Lord Kinloch died on 30th October 1872, and was succeeded in the Inner-House by Lord Jerviswoode.

PERMANENT LORDS ORDINARY.

Lord JERVISWOODE.*
Lord ORMIDALE.
Lord MURE.
Lord GIFFORD.
Lord MACKENZIE.
Lord SHAND.*

REGISTRATION APPEAL COURT.

Lord BENHOLME. Lord ARDMILLAN. Lord ORMIDALE.

Lord-Advocate, The Right Hon. GEORGE YOUNG, Q.C.
Solicitor-General, ANDREW R. CLARK, Q.C.
Dean of Faculty, EDWARD S. GORDON, Q.C.

HOUSE OF LORDS.

PEERS

WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE PERIOD OF THESE REPORTS.

Lord Chancellor, Lord SELBORNE,

Lords CHELMSFORD, COLONSAY, CAIRNS, and HATHERLEY.

---

* In December 1872 Lord Jerviswoode was succeeded in the Outer-House by Lord Shand.

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THE HOUSE OF LORDS.

1873.

No. 1.

Feb. 14, 1873.

Gowans v. Christie.

AMES GOWANS, Appellant (Pursuer).—*Pearson, Q.C.—A. Taylor Innes.*
BRATHWAITE CHRISTIE, Respondent (Defender).—*Sol.-Gen. Jessel—Glasse, Q.C.*

Minerals—Landlord and Tenant—Lease—Sterility.—Held (in *aff.* judgment the Court of Session) that a tenant was not entitled to reduce a lease of nerals on the ground that they could not be worked to profit, even if no rent re to be paid.

Observations on sterility as a ground for reducing agricultural and mineral ses.

(IN the Court of Session 8th February 1871, *ante*, vol. ix. 485.)

Ld. Chancellor (Selborne).
Lord Chelmsford.
Ld. Colonsay.
Lord Cairns.

In February 1866 James Gowans took a lease from Alexander Christie, :n proprietor of the estate of Baberton, of the whole freestone and other nerals in the estate, with certain small exceptions, for a period of enty-one years from Candlemas 1866, at a fixed yearly rent of £200; being provided that the rent should not be exacted for the first year, :ept in the event of Gowans lifting minerals from the estate during that riod, in which event he was to pay a modified rent of £100. The lease :n declared it to be "in the power of the lessee and his foresaids, on ·ing six months' notice of his intention to do so previous to any term of ndlemas occurring at the end of the third, seventh, or fourteenth years this tack, to remove from the subjects hereby let; and this tack, on the ıant's giving such notice at any of these periods, shall cease and determe, it being hereby declared that in the event of the tenant availing nself of the break at the end of three years he shall be obliged to restore ground broken up in such a manner as that it may be ploughed up

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count and reckoning in regard to the rents paid by him under the lease to Alexander Christie and Brathwaite Christie.

The pursuer alleged that, on the faith of certain representations, and in reliance on them, and under an essential error as to the subject of the lease which was induced by them, he, on 2d February 1866, signed the lease. He further alleged that the result of his boring operations "has been the discovery that, while there is some freestone on the lands of Baberton, there is no such amount of freestone as was represented to him (on the faith of which representation he entered into the lease); nor is the said freestone, or any other mineral or material or substance, in the lands so let, nor are all of the said substances together, capable of being worked to a profit in a mineral lease [*even if no rent were to be paid*]; * and still less are said minerals capable of being remunerative at the rent stipulated for in said lease. The pursuer has tried the said lands at all points shewing indications of freestone, but he has in every case been unable to turn out such a quantity as would repay his outlay, even upon the most economical methods which can be used for the efficient working of minerals." The first break in the lease took place at Candlemas 1869. The pursuer averred that at that date he had already so far experimented on the ground as to be led to suspect "that the lease was not workable to profit, and that there was no such freestone or other mineral in the said lands as had been represented to him. He had not, however, been able within that time so exhaustively to experiment on the said grounds as finally to act upon this, and he declined in the meantime to acknowledge the lease as an existing one, by acting on the break provided in it. He accordingly continued his operations for another year. The defender, the present Mr Christie of Baberton (who had now succeeded his brother as heir in possession of the said entailed estate), was quite aware, as were also his agents, of the experimental and doubtful way in which the pursuer was carrying on the operations both before and after the said break. The pursuer having continued his investigation for another year, finally ascertained the unworkableness to profit of the lands and minerals let to him."

The pursuer pleaded;—(1) The mineral lease entered into between the deceased Alexander Christie and his successors on the one hand, and the pursuer, on the other, being unworkable to profit [*that is, incapable of reimbursing a tenant for the outlay necessarily expended by him in working the same, and still more of yielding him any return over and above his rent*], and having been so from the beginning of the said lease, the same ought to be reduced, and the pursuer found to be free from the same, in terms of the declaratory conclusions of the summons. (2) The said lease having been entered into under essential error on the part of the pursuer as to the subject of the same, which error was induced by the representations of the said Alexander Christie and those for whom he was responsible, the said lease ought to be reduced, in terms of the conclusions of the summons. (3) The rents and other prestations exigible under the said lease having been exacted from the pursuer and paid by him while the lease was really unworkable to profit [*as aforesaid*], but before he had finally ascertained this, the pursuer is entitled to repetition of the same, or at least to count and reckoning in respect of the same, both against the executors of the late Alexander Christie and against the present possessor of the entailed estate. (4) In the event of the defenders denying the fact of the unworkableness to a profit of the said lease they are bound to refer the question to arbitration,

* The passages in italics were allowed to be added to the record when the case was in the Inner-House.

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or to consent to the ascertainment thereof in such form as may be agreed to by the parties, or as the Court in its discretion may see fit.

The defenders pleaded;—(1) The pursuer's statements are not relevant or sufficient in law to support any of the conclusions of the summons, or at least the same are not relevant or sufficient to support the said conclusions in so far as the same are directed against the present defenders. (3) The action cannot be maintained, in respect that the pursuer did not avail himself of the break at Candlemas 1869, but continued to work the freestone after as well as before the said break.

The Lord Ordinary, on 2d November 1870, pronounced this interlocutor:—"Finds that the pursuer's statements are not relevant or sufficient in law to support the conclusion in the summons for reduction of the lease, on the grounds set forth in the pursuer's second plea in law, and therefore repels the said second plea in law for the pursuer: *Quoad ultra*, before answer, allows the parties a proof of their respective averments, and to each a conjunct probation."

The defender reclaimed.

The Court allowed the pursuer to amend his record by the additions printed in italics.

The First Division, on 8th February 1871, pronounced the following interlocutor:—"Recall the interlocutor: Find that the pursuer's averments are not relevant nor sufficient in law to support any of the conclusions of the summons for reduction of the lease between the pursuer and the defender's, Braithwaite Christie's brother, or the relief of the pursuer, as tenant, from any of the stipulations of the said lease: Therefore dismiss the action, and decern, and find the pursuer liable in expenses: Remit," &c.

The pursuer appealed.

LORD CHANCELLOR.—My Lords, this is an action by a tenant of a mineral lease against the present owner of the property and the representative of the deceased owner. The Lord Ordinary thought it right to allow proof before answer in support of certain averments in the condescendence of the appellant, the pursuer, by which he undertook to shew the unprofitableness or incapacity of producing profit to himself of this mineral lease. The parties by their pleas in law have raised the question of the relevancy of those averments, and by allowing proof before answer the Lord Ordinary did not decide one way or the other that question of relevancy. The Inner-House thought, on the case coming before them upon a reclaiming note, that there was no relevancy in the averments, and if that was the correct view I think that they very rightly were of opinion that it was not in any way proper to burden the parties with the expense of what might turn out to be very voluminous and lengthened proofs upon matters ultimately irrelevant. The real question, therefore, before your Lordships is whether the Inner-House were right or wrong in holding these averments to be irrelevant.

The burden of proof undertaken by the appellant in this case is certainly a very heavy one, because he asks for the reduction of this lease as a lease which is vitiated or void between the parties by reason of the failure—as I understood the argument—as to the subject-matter of the lease. Mr Innes did not at all shrink from the principle involved in the form of remedy which is sought. He said that there was no lease at all in the view of the law; that there never had been any lease in the view of the law, and that there was nothing at all to be leased. That was a startling proposition, when we look at the lease and consider the nature of the subject-matter which it comprehends, viz., all the minerals and materials under particular lands, freestone being specially but not exclusively mentioned, and all other minerals, of whatsoever kind they might happen to be, being included in the lease. The principle of the argument was this: that by the Roman law adopted into the law of Scotland there is a warranty, implied or express (I do not know which it may be, but that there is certainly a warranty in one way or the other), of possession of a subject capable of producing the contemplated fruits or profits.

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Now, in one point of view such a doctrine may be, and I venture to say is, perfectly intelligible and perfectly reasonable. When there is that which in the language of the law of this country would be called a total failure of consideration; when the landlord has not the thing to let which he purports to let, and which is the consideration for the rents, it is perfectly reasonable that the whole lease should fail *ab initio*, and be capable of reduction. Nor is it a very wide extension of that same principle to say that if a landlord warrants a continuation of the subject-matter for a certain number of years, a failure of the subject-matter before that number of years has elapsed shall involve a reduction or termination of the contract at the time of that failure and thenceforward. Those views are at all events perfectly intelligible. But your Lordships will see that they all resolve themselves into either the original non-existence of the subject, the failure of the landlord to put the tenant in possession of the subject-matter of the lease, or the subsequent exhaustion or failure of that subject-matter, so that from a given time it ceases to exist.

And when the authorities which have been referred to are considered they will be found with a few, if any, exceptions, to turn entirely upon that principle so understood. When the authorities on the Roman law referred to in the case as illustrations of the principle, *si frui non liceat*,[1] come to be looked at, they prove to be all of that kind. They refer to cases where possession is not given, where there is no prestation of the subject-matter, or where some external *vis major* not inherent in the subject-matter, and not the fault of the tenant, takes the subject-matter away, it may be either temporarily or permanently; but the principle is always the same, resting on the destruction *pro tanto*, or entirely, of the subject-matter. But Lord Stair,[2] the authority on the law of Scotland chiefly relied upon, goes further, and as it seems to me lays down the true principle in the most unequivocal terms. He says that there is a peril or risk undertaken by the tenant, that he is at the risk of the quantity and the value of the subject-matter, but he is not at the risk of the being or existence of it. Now, just consider how that will apply to the case of a mineral lease. If there had been in this case a lease of some particular description of minerals,—only, for instance, of a bed or seam of coal or of a bed of freestone, and if there had been no such thing in existence, then, according to Lord Stair's principle, the tenant would not have been at the risk of the being of the coal or the freestone. But that of course cannot apply to a case where the lease is of all minerals, for although there is necessarily some uncertainty and speculation in such a lease, because the minerals may turn out to be of greater or less value, yet some minerals there necessarily must be under every parcel of land, and therefore the peril of the being of the minerals is a peril which no tenant of a mineral lease incurs; nor does the landlord incur it either. But with respect to the quantity and value, which is the whole matter in controversy here, as I understand the case, according to Lord Stair's doctrine the whole peril of the quantity and value is upon the tenant; so that authority is directly against the appellant's case. Then we are referred to Lord Bankton,[3] who, in the passages quoted, seems to say that the landlord warrants a capacity to produce fruits. What is the meaning of that? A capacity to produce the kind of fruits which, according to the substance of the contract, the tenant is to receive. What are the fruits within the meaning of that principle? If, for instance, land is let as good arable land, and it turns out to be totally incapable of any agricultural produce, I can understand that in that case the principle might apply, and that there is a failure of the warranty to produce fruits. Again, I can understand that if in the case of a mineral lease the landlord in substance represented that there was a workable coal, and the coal turned out, as in the case of Murdoch v. Fullerton,[4] to be so nearly exhausted that there was no area of the least value for working, in other words, nothing which could be worked, a thin seam, for example, of a finger's length,—something which was not practically useful for the purpose of working at all,—it may be said that in such a case there was a failure of the landlord's warranty. But the fruits in this case are minerals

[1] Dig. 19, 2, 15.
[2] Stair, i. 15, 2.
[3] Bankton, Inst. 1, 2, 14.
[4] Feb. 12, 1829, 7 S. 404.

to be got by working, and according to Lord Stair the quantity and the value of them, if they can be got by working, are at the risk of the tenant; if the minerals can be got, there are the fruits, and there is no failure whatever of fruits in such a case. There is no sterility as long as there are minerals which may be got.

All the cases, as it appears to me, go to the same point. The case of Edmiston v. Preston [1] might very possibly be differently decided at the present day, when we should no longer regard a want of proper ventilation of a mine, or a want of maintenance of proper roofing, as a thing arising from the act of God or from *vis major*. Such a defect would doubtless be regarded at the present day as a thing for which the tenant was responsible. But the principle upon which that case was decided was evidently the same as if an earthquake or some natural convulsion had made the mine practically unworkable.

The case of Dixon v. Campbell,[2] as far as it is fit to refer at all to an authority turning upon contract, and not upon general law, is strongly against the appellant's argument, because in that case, there being an express contract that if the mine should cease to be capable of being worked to advantage by reason of that class of accidents which all these authorities contemplate, the tenant might throw it up, it was expressly laid down that he could not throw it up for faults which did not occur in the mine, but in the fruit on account of variations in the market price. What has arisen in the present case but a question of market price?

The 3d article of the condescendence tells us that there is freestone under the land of Baberton, that four years were occupied in boring and in other operations to obtain it. I pass over the allegation that the quantity was less than was represented, for nothing now turns upon that. The appellant goes on to say "nor is the said freestone or any other mineral or material or substance in the lands so let, nor are all of the said substances together, capable of being worked to a profit in a mineral lease, even if no rent were to be paid." I will stop reading that sentence there, because I agree with Mr Innes that he does not take issue merely upon the point which follows, that the minerals are incapable of being remunerative at the rent stipulated for in the lease. He also says that even if no rents were to be paid they are not capable of being worked to a profit. He goes on: "The pursuer has tried the said lands at all points shewing indication of freestone, but he has in every case been unable to turn out such a quantity as would repay his outlay even upon the most economical methods which can be used for the efficient working of minerals." That allegation is consistent with the existence of an unlimited quantity of minerals, capable of being worked, and having a market, but what he says is that they are not capable of being worked to a profit, that so far as he has worked he has been unable to turn out such a quantity as would repay the outlay. Therefore the proposition really is this, that according to the principles laid down in the law of Scotland the landlord guarantees the tenant against loss by reason of any of these elements extrinsic to the mine, and independent of the nature of the subject-matter within the mine which go to the determination of the question of profit and loss. What are these elements?—the quantity, the quality, the cost of labour, the cost of materials, the demand and supply varying in the markets themselves, and the means of conveyance, all of which are things entirely extrinsic to the mine, and certainly not within the view of the principles laid down by any of the authorities to which a reference has been made. On the contrary, they are exactly those things as to which Lord Stair has said that the tenant runs the risk of quantity and value.

In that state of things it appears to me that even the authorities relied on by the appellant are against him, and independently of the special stipulation in this particular lease the reason of the case wholly repels in my mind the view of the law which the appellant suggests. When we come to look at the stipulation in the particular lease we find that conclusion fortified by those stipulations. It is admitted that it is a very common thing with parties entering into mining leases to contract expressly that the tenant shall not be obliged to go on with the lease when he cannot work the mine at a profit, and the parties very wisely, because that question is a very difficult one in its nature, frequently add a clause providing

[1] Jan. 13, 1675, M. 15,172. [2] 2 Shaw's App. 175.

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for an arbitration. There is nothing of that sort in the lease before us, but there is a provision that at the end of three years, or at the end of seven, or at the end of fourteen years, the tenant may break, as it is called, or throw up the lease. The object of the provision obviously is, that if he finds it cannot be worked with profit he may relieve himself from it in that way by throwing up the lease.

Now, it appears to me that such stipulations are absolutely irreconcileable with the whole principle of the argument of the appellant, because if the lease was vitiated from the beginning, which the argument assumes, and which the doctrine of reduction assumes, it must have been upon grounds which are wholly independent of the exercise of an option at certain periods to retain or throw up the lease. Suppose that at the end of three years the tenant had chosen to throw it up;—I had really great difficulty in understanding whether it was seriously meant to be contended that because he had made no profit in that time, and then concluded from the experience he had had that he would make no profit if he went on working till the end of the lease, he would not only have a right to throw it up, but he would also have a right to repetition of the rent he had paid. That seemed to me to be almost a necessary consequence of the argument for the appellant; but that is entirely inconsistent with the whole intent and purpose of the express contract between the parties, which clearly shews that the landlord is to receive a stipulated rent, that during the first year that rent is to be reduced in amount on account of the outlay of the tenant, and the risk incurred by him in the whole of the earlier years (it being probably in the contemplation of all parties entering into such leases that during the earlier years while an outlay is going on the undertaking is not likely to be remunerative), and that it is agreed that the tenant shall be allowed to say at the end of three years whether he wishes to go on or to be released from his contract. In this case he determined to go on. The third year elapsed, and he did not break the lease, but after the expiration of another year he brings his action and asks for the reduction of the lease. It seems to me that both upon the grounds on which the judgment of the Inner-House expressly rested, and if it were necessary upon broader grounds still, the pursuer is wholly wrong, and therefore the interlocutors appealed from ought to be affirmed, and the appeal dismissed, with costs.

Lord Chelmsford.—My Lords, I entirely agree with my noble and learned friend that in this case the interlocutors appealed from must be affirmed. The question is, whether the appellant was entitled to be admitted to proof of the averment in his condescendence that the mineral lease was incapable of reimbursing the tenant for the outlay necessarily expended by him in working the same, and still more of yielding him any return over and above his rent; in other words, supposing that averment had been proved, whether it would have furnished a ground for the reduction of the lease—whether it was relevant, in fact, to the conclusion of his summons for the reduction of the lease.

The law of Scotland upon the subject of renunciation of leases, either for the non-existence or the failure of the subject-matter, is very shortly stated in a passage in Mr Bell's Principles of the Law, at section 1208, in these terms:—"The contract of lease implies a subject let, and if it turn out that no such thing exists as the parties intended to be the object of agreement the tenant cannot be bound to pay rent. Where the subject fails (as where a house is burnt, where a farm is by a flood or a hurricane reduced to sterility)," which must mean absolute barrenness, "where a coal-mine is exhausted suddenly and unexpectedly, the tenant's obligation to pay rent will be discharged." It is quite clear, therefore, that where there is a total destruction or exhaustion of the subject-matter of a lease, there, by the law of Scotland, the lessee is entitled to abandon it.

But I am not aware, from any of the cases which have been cited in the course of the argument, that where it is a case of sterility merely, short of exhaustion, the tenant has any such right to renounce or abandon the lease. The old authorities upon the subject rather to my mind indicate directly the contrary. Take, for instance, the passage which has been cited from Lord Bankton. He says:—"The tack-duty is on account of the fruits," and "sterility or vastation liberates in whole or part." Elsewhere he says:—"In other subjects beside rural posses-

sions the tack-duty is remitted or abated, when by accident, without the tacksman's fault, the thing becomes unprofitable, or the use of it is interrupted." Again he says :—" Sterility is not understood where the increase satisfies the expense of the seed and labour."

So that he says, where there is sterility merely, and not absolute vastation, the rent may be suspended or remitted. The question of whether altogether, or for the partieular year, will remain to be considered hereafter. Sir George Mackenzie says,—" If the ground be absolutely barren the hire will not be due. If the land yields some profit, though never so little, the hire will be due, if the profit but exceed the expense of the seed and labouring." And from the passage which has been read by my noble and learned friend it appears that the authority of Lord Stair is applicable exactly to the same extent, namely, that where there is sterility as distinguished from destruction, or exhaustion, it is not a ground for a reduction of the lease, but merely for a suspension or abatement of the rent.

There is very great difficulty in applying this right of suspension of the rent in the case of sterility, and that was observed upon in a case that was cited in the course of the argument, viz., Fleeming v. Baird,[1] in which Lord Neaves said :—" The question of sterility, even in agricultural leases, is not free from difficulty. When a subject becomes flooded or sanded over, and is therefore made quite different from what it was, that is a stronger case ; but I doubt whether in agricultural leases the repeal of the corn laws would have entitled a tenant to abandon his lease on the ground that it was not profitable. I also doubt whether every year is to be taken by itself in a continuing lease. Supposing an Egyptian in the time of Joseph had had a fourteen years' lease of land, and had got his first seven years of plenty with his barns crowded, and the years of scarcity had followed, I think it would be hard on the landlord that the tenant should get his full measure of the harvest during the first seven years, and then pay no rent at all for the next seven." That applies to agricultural leases. There seems to have been a distinction taken between agricultural and mineral leases, upon the ground that a lease of minerals is a hazardous speculation ; and Lord Deas says in this case that he knows no case where a mineral lease has been brought to an end upon the ground of sterility.

With regard to mineral leases it appears that it has been usual in leases of that kind in Scotland to introduce a clause that the lease may be abandoned when it is unworkable at a profit, and in a passage from Mr Bell's Lectures on Conveyancing it is stated :—" The mineral lease being of a subject which may be untried, or the extent or quality of which is not fully known, is a speculation on the tenant's part. Provision is therefore necessary for enabling the tenant to be quit of the obligations, in case the trials shall fail, or the field not prove workable to profit ; in other words, in case, after a fair and full endeavour on the tenant's part to turn the lease to good account, the speculation shall not succeed. With that view the lease generally allows breaks to the tenant at intervals of five years upon previous written notice of six or twelve months, and without any cause assigned."

That is the case in the present instance, and that is the ground upon which the Court of Session came to a determination that in this case the appellant was not to be admitted to proof, because he had, by the contract which he entered into, fenced himself round against the possibility of loss by reason of the sterility of the subject-matter. He stipulates, in the first place, that for the first year no rent whatever shall be payable, that is, the year ending at Candlemas 1857. He then further stipulates that upon giving six months' notice at the termination of the third, the seventh, or the fourteenth year, he may, without any cause assigned, abandon the lease. Now, this is entirely for the benefit of the tenant, because the landlord has no corresponding right of giving notice, and turning the tenant out of possession. Therefore it seems a most reasonable thing to hold that where a special contract of this description is entered into, even supposing the common law would give the right of reducing the lease in a case of this description (to which I am quite certain from the authorities it would not), still,

[1] March 18, 1871, *ante*, vol. ix. 730.

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as the tenant has chosen to enter into this particular contract, and to guard himself against the consequences of loss by reason of the lease turning out to be unproductive, that is a ground upon which it is impossible to say that he can fairly and reasonably be entitled to reduce the lease, even supposing circumstances existed, which without a contract would have entitled him to do so.

Under these circumstances I agree with my noble and learned friend that the interlocutors must be affirmed, and the appeal dismissed, with costs.

LORD COLONSAY.—My Lords, I do not consider it necessary to say much upon this case after what has been said by my two noble and learned friends who have preceded me. It appears to me that the appellant, the pursuer in the action, has failed in presenting a case which entitles him to proof of what he says he can establish. The parties come before us as parties to a particular contract, which relates to a mineral subject. It is quite correct on the part of the appellant to say that minerals may be the subject of lease, and that the law of lease applies to them. But it does not follow, although the law of lease applies to them, that in all particulars the application is the same in the case of an agricultural lease as in the case of a mineral lease. The nature of the two subjects is so very different, the perils which naturally present themselves to the eyes of parties when they enter into a lease are so very different in the two cases that it does not follow that all these conditions which are imported into an agricultural lease naturally are imported into a lease of minerals.

The question in this case is, whether the pursuer has presented such a statement as entitles him to be relieved from the contract altogether by a reduction of that contract, in respect of that fact, as he himself explains it, that he cannot work these minerals to profit,—in this sense, that the cost of working and raising the minerals leaves nothing for him to pay his rent with, or perhaps leaves him out of pocket. I am not aware of any case in which that has been decided in regard to a mineral lease. All the cases, without exception, which have been put before us, are cases substantially of non-existent subjects, or exhaustion of that which has been the subject of the lease. Even in one of the earlier of those cases, the case of Wilson v. Mader,[1] the Court looked to the fact alleged, that the coal after the second year could not be found—that no coal remained—that it was impossible for the tenant to go on paying his rent according to the condition of the contract which he had entered into, whereby he was limited to the working of a certain number of collieries, and if he worked a larger number he was to pay an increased rent, and looking to all the terms and conditions of the contract, the Court were of opinion that, under the particular circumstances of that contract, it was not the meaning of the parties (that is the expression used in the decision), that the tenant should remain bound. The Court, therefore, in the case treated the nature and condition of the contract, and the inferences to be deduced from it, as an important element in the question. In other cases I think similar grounds seem to have existed. At all events, exhaustion was the ground of the decision in some of them. In the treatise of Mr Hunter,[2] which has been referred to with a commendation which it fully deserves, that writer says :—"The cause of loss must not be such as, although natural, can be deemed to have been in the contemplation of the lessee when he contracted. Increase of depth or accumulation of water in a mine does not give liberation or abatement to the lessee, although the addition to the expense of working should create positive loss."

I think there has been no case referred to at all indicating a release from the payment of rent in a mineral lease, or liberating from a lease, on the ground of an allegation that the tenant could not work the mine to profit. I think the only case that was referred to in which the tenant was released from the payment of the rent was the case in which the judicial factor applied to the Court for authority to reduce the rent of a mineral tenant upon the estate of which he was the judicial factor, because he found that the tenant could not pay the rent, and that he must either render him bankrupt, thereby probably deteriorating the value of the subject in the market, or give him relief. A landlord might in these circumstances

[1] 1699, M. 10,125. [2] Hunter on Landlord and Tenant, ii. 405.

have given relief to the tenant, but the judicial factor had not the power of doing so. He was an officer of the Court, and he applied to the Court for the power to give relief to the tenant, and the Court, upon inquiry, gave him that power. But that does not by any means establish that the tenant had at law any right to such relief.

Now, in this case, looking to the condition of the contract between the parties, it appears to me that the tenant has fenced himself round with protection with reference to any kind of occurrence that could take place under the lease. In the first place, he is going to make a trial, and for the first year of the trial he is to pay no rent. Then he has a period of three years, during which he may continue the trial, and if he has no profit in these years he may abandon the lease, and he has a similar power of breaking the lease at other periods. He does not introduce into the lease, and he did not under the circumstances require to introduce into the lease, any clause such as is very common in modern mineral leases, that in the event of the subject being unworkable at a profit he shall be entitled to have relief by means of a reference to an arbitrator. It is said that he relied upon the common law. If so, he was relying upon an undecided and very shadowy thing, and it has turned out that he had very little common law to rely upon. But he fenced himself round, and protected himself, as you might have expected him to do if he had not a basis of common law to rely upon, or if it was a doubtful basis, by a condition which enabled him to break the lease at the end of either three, seven, or fourteen years, as it was said in the case of Wilson v. Mader, that it was not in the contemplation of the parties when they entered into the contract that it should continue after the coal was exhausted. So I think here the Court has taken the right view in looking at what was in the contemplation of the parties, and in holding that the parties have provided themselves with a contract which, looking to the terms of it, is in every respect so favourable to the tenant, leaving it to his own choice whether to relinquish the lease at the end of certain periods or not, that he has shewn no ground for the relief he seeks. Therefore I think the appeal must be dismissed, with costs.

Lord Cairns.—My Lords, in this case there appears to me to be an attempt to make use of a suit which was instituted upon a different basis, for the purpose, that basis having failed, of obtaining relief upon a ground which was not in contemplation at the time when the suit was instituted. And it is, as it appears to me, an example of an effort to strain a well known and a well founded principle of law to a purpose to which that principle was never intended to apply.

When I say, in the first place, that it is an attempt to use the suit for a purpose for which it was not originally intended, what I mean by that is this: If your Lordships will take the trouble of referring to the condescendence and pleas in law in this case you will find the whole foundation of this suit originally was an allegation that there had been a specific representation made by the lessor of this property—in other words, that there had been an express and specific warranty given by him with regard to the property. For in the first article of the condescendence you will find it is stated that the pursuer was induced by the representation of Mr Christie to enter into the lease now sought to be reduced, and then the pursuer goes on to say that these representations were to the effect that there was a large stratum of freestone in the lands proposed to be let of a superior quality, and capable of being worked at a profit by a tenant, and in particular by a tenant becoming bound for the rent, and under the stipulation in the said lease; and again, there being no statement whatever of any implied warranty in law in the first article, the second article pursues the same subject of the representation, and says that on the faith of these representations and in reliance on them, and under an essential error as to the subject of the lease which was induced by them (that is, by the representations), the pursuer signed the lease in question. Again, in this third article, he states that the result of these exertions has been the discovery that while there is some freestone in the lands of Baberton, there is (as he avers) no such amount of freestone as was represented to him (on the faith of which representation he entered into the lease), nor is the said freestone

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or any other mineral or material or substance in the land so let, nor are all of the said substances together, capable of being worked to a profit in a mineral lease. Again, in the fourth article he states that at a particular date he had been led to suspect or believe that the lease was not workable to profit, and that there was no such freestone or other mineral in the said lands as had been represented to him.

Following up that *catena* of allegation the plea in law states that the mineral lease entered into between Mr Christie and the pursuer being unworkable to a profit, that is, incapable of reimbursing a tenant for the outlay necessarily expended by him in working the same, and still more yielding him any returns over and above his rent, and having been so from the beginning of the said lease, the same ought to be reduced,—I take it that that plea in law was obviously introduced as an offer by the pursuer to prove that one of the representations upon which he relied was a representation which was unfounded. The second plea appears to me to be nothing more than a general plea of general misrepresentation so as to open up the area of proof, and to enable some more proof to be given, for example, as to the other representations with reference to the stratum of freestone. But I believe firmly that both pleas were placed upon the record for the purpose of shewing a readiness on the part of the pursuer to disprove the truth of the representations which he said had been made to him.

In that state of things the case came before the Lord Ordinary. The Lord Ordinary thought that the allegations of representations were not relevant or sufficient, and with that decision, I understand, the pursuer is and was contented, for it was not contested upon the reclaiming note, and therefore the question of representation is now altogether out of the case.

Then these averments to which I have referred being now out of the case, there is an attempt (which is the attempt to which I alluded at the beginning of my observations) to use the suit for a purpose which I say never was contemplated at the outset, namely, for the purpose of making out that although there was no specific and express warranty, there is a law in Scotland which implies a warranty to the same purport, which in the first instance the pursuer had undertaken to shew had been actually made to him.

Before I leave that point I cannot refrain from saying that it appears to me that the observations of the Lord Ordinary, in dealing with the questions of express warranty and representation, are very applicable also to the questions of warranty implied by law, as to which, nevertheless, the Lord Ordinary was disposed to allow some proof. Your Lordships will find that the Lord Ordinary makes these observations :—"Then as regards the representation that the freestone was capable of being worked to a profit by the tenant, such capability depends upon many contingencies, as, for example, the skill and capital of the tenant, the rate of wages, the state of the market, costs of transit, and many other elements of hazard. Such representations are, it is thought, a mere matter of opinion, which, even if erroneous, could not form a good ground for reducing the lease."

It is not stated that the alleged representations were fraudulent. I entirely agree with those observations of the Lord Ordinary, but I own I am at some loss to understand why they are quite as applicable to the idea of a warranty implied by law as they are to the idea of an express warrant averred to have been made by the lessee; and I am at some loss to conceive, when the Lord Ordinary felt that there would be these difficulties in allowing a proof as to express warranty, that it did not occur to his mind that to a much greater degree they were impediments in the way of allowing proof as to what I have termed for shortness an implied warranty of law.

I said that it appeared to me that the case was also an example of an attempt to strain a well known principle of law to a purpose to which that principle was never intended to apply. By that I mean this: Your Lordships will observe that the averments as to the state of the mine now amount to this,—not to any averment that there are no minerals or that there is no freestone, but merely to an averment that the freestone and the minerals which the averment implies to exist there, are not capable of being worked to a profit, an averment which not only is consistent with there being minerals, but implies that there are minerals consistently with that averment. There may be minerals of unbounded quantity.

There may be hundreds of thousands of tons of those minerals, as to which, however, it may not stand true in any commercial sense that you may get a profit out of them. That is the character of the averment in the condescendence.

Now, upon that averment the way in which the case is put is this: There is a common form of covenant in mining leases with which your Lordships are perfectly familiar, a covenant that if the minerals included in the demise cannot be worked to a profit, either generally or in a particular time, there shall be an opportunity to the lessee of giving up the lease upon certain terms stated in that covenant. I think your Lordships will have found, according to your experience, that that covenant is generally, if not always, accompanied with some specification and standard as to profit, and some means for ascertaining by the award of arbitrators, or by the opinion of experts, whether it can be predicated of the mine at a particular time that it can or cannot be worked at a profit. That is an express covenant which is very frequently inserted in mineral leases. I must observe with regard to that express covenant that the word "profit" is there used in a sense altogether different from that in which the pursuer would use it here, because where you have an express covenant of that kind, "profit" does not mean gain after paying for work and labour, but it means gain after paying for work and labour and the rent of the mine—a very different position of things from that which the pursuer contends.

That being a common, or at least a very ordinary form of covenant or provision to be found in a mining lease, there is, on the other hand, a well known principle of the civil law imported into the Scotch law, and into other laws which follow the civil law, that where there is a demise, and where the subject-matter demised either turns out to be non-existent or to be exhausted, or where the working of it turns out to be utterly impracticable, in any of those cases the tenant is released from the obligation of the lease. That being a well known principle, it is attempted in this case, and it has been attempted for the first time in this case, to bring up that principle, and to say that after all it means nothing more or less than this, that it gives to a tenant relief just in the same way that the express provision which I have referred to as being common in mining leases where minerals cannot be worked at a profit would give the tenant relief.

That is a very startling proposition, and one which requires to be examined certainly with some care. I asked the learned counsel for the appellant in the first place, Is there the authority of any decided case in support of that proposition? The learned counsel who argued for the pursuer at your Lordships' bar were unable to produce any. Undoubtedly it is perfectly accurate to say, with regard to all the decided cases, without going through them, that they are cases which range themselves as illustrations of the principle that I have described, namely, cases where the thing demised was either non-existent or exhausted, or the working of it was impracticable. Apart from decided cases, what is the authority? Some institutional writers have been referred to, and I take Sir George Mackenzie as an example of them. Sir George Mackenzie speaks of a tenant not being obliged to pay rent where there is sterility, and he says, describing it negatively, that there is not sterility where the fruit, the crop, the harvest, exceeds the value of the labour, and of the seed.

Even with regard to agricultural subjects I should venture to doubt whether at the present day that *dictum* of Sir George Mackenzie, and other institutional writers, is to be taken without very considerable qualification. Operations of husbandry are now so extended, and cover so large a space of time in comparison with what was the case at the time when many of these writers wrote, who looked more to the immediate outlay for one harvest than to the consequence of an outlay in succeeding years, that one might doubt very much whether it would be possible to deal with labour and seed in the way in which Sir George Mackenzie evidently was dealing with those in his own mind when he used those expressions which I have referred to. Again, I took the liberty of putting the case to the counsel for the pursuer, that there might be a lease of waste or moor land, which a tenant might well be content to take, intending to reclaim it by degrees, and as to which in any one year, or in any small number of years, it might be utterly impossible to say that there had been any fruit exceeding the seed and the labour;

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and yet it would be a very strong proposition to hold that the tenant could give up a lease of that kind because the fruit had not exceeded the seed and the labour. Again there might be land which might be allowed to run down into sterility, and become unproductive by the fault of the tenant himself. There also the *dictum* would not apply.

But without pursuing the question with respect to agricultural leases further I should doubt extremely whether *dicta* of this kind apply at all to the leases of mineral subjects. In point of fact, though we speak of a mineral lease, or a lease of mines, the contract is not in reality a lease at all, in the sense in which we speak of an agricultural lease. There is no fruit, that is to say, there is no increase, no sowing or reaping in the ordinary sense of the term, and there are no periodical harvests.

In point of fact, what we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there, if he can find them, and to take them away just as if he had bought so much of the land. It is very difficult to apply to a case of that kind *dicta* which evidently relate to the ordinary process of agriculture, to reaping and sowing above ground. Further than that, it is obvious that if these *dicta* were held to apply to mineral leases, the consequence would be that mineral leases, instead of being what they have always been considered, highly speculative and uncertain contracts, would become contracts absolutely safe and free from any risk whatever, because the tenant, if he found his lease profitable, would continue to hold it, and reap the profit from it; but if he found it unprofitable, he would certainly give it up, and the loss would be not his, but the landlord's.

Again, it would be impossible to apply these *dicta* to mineral leases without some knowledge of the area of time over which you were to spread the account of profit or loss. I asked Mr Pearson, who opened the case with great ability for the appellant at your Lordships' bar, to what time he would refer the question of the profit or loss, and I think he was obliged to admit that he would take the whole period covered by the lease (without counting the breaks), which in the present case would be a period of twenty-one years. Then I asked, how would it be possible at the end of the third or the fourth year of the lease to speculate as to what the profit or loss would be if it were spread over the whole period of the lease. How can you at the end of the third or fourth year of the lease tell what the price of labour may be in future years, or what machinery may be introduced in future, which may dispense to a certain extent with labour, or what the market value of minerals of the same kind will be at a future period, or what the effect upon the market value of those minerals may be of the discovery of other minerals of the same kind in the same neighbourhood? All those things are perfectly uncertain. The moment you admit, as you must admit, that you cannot confine the question of profit and loss to the transactions of one year, but that you must spread it over the whole series of years comprised in the lease, that moment you confess that to take beforehand a speculative contract with reference to the future loss and profit for the whole period of the lease is a thing which it is simply impossible to do.

Then, finding that there is no decided case which is an authority for the contention of the pursuer, and that there are no *dicta* of institutional writers which can properly be applied to a case of this kind, I have no hesitation in saying that it appears to me that the pursuer has utterly failed to establish that there is in the case of a lease of this kind any implied warranty in law approaching to that express warranty which in the first instance he asserted had been made by his landlord. It is upon this ground that I should wish to rest the decision of the case. And I do so the more readily for this reason that I observe some of the learned Judges in the Court below were rather inclined to rest it to some extent upon another ground, namely, to assume there may be the common law right for which the pursuer contends, but that, on the other hand, that common law right is ousted by the express provisions contained in this lease with regard to breaks. If I found that there was a common law right such as has been alleged I should have great hesitation in saying that anything in the lease did oust that right.

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If there is such a common law right I do not see that it is in the least degree impossible that it should co-exist with a lease containing a provision for breaks. I do not therefore hold that the common law right is excluded by the provisions of this lease, but I look upon the provisions of this lease as a proof to my mind that it never was imagined by those who entered into it that there was any such common law right. It appears to me that these provisions, to a great extent at all events, would have been unnecessary. But I believe the provisions to have been introduced because there was no such common law right, and because no one ever supposed that there was such a common law right.

I think, under these circumstances, that the interlocutors appealed from ought to be affirmed, and the appeal dismissed, with costs.

INTERLOCUTORS affirmed, and appeal dismissed, with costs.

J. DODDS, Westminster—LINDSAY & PATERSON, W.S.—GRAHAME & WARDLAW—HAMILTON, KINNEAR, & BEATSON, W.S.

No. 2.
Mar. 10, 1873.
Buchanan, &c. v. Andrew.

D. C. R. C. BUCHANAN AND HENDERSON & DIMMACK, Appellants (Respondents in Sheriff-Court).—*Lord-Adv. Young—Sol-Gen. Jessel—Trayner.*

WILLIAM JACKSON ANDREW, Respondent (Petitioner).—*Sir Richard Baggallay, Q.C.—Cotton, Q.C.*

Minerals—Superior and Vassal—Feu-Contract.—A superior bound his vassal to build and maintain on his feu a house of a certain value, and reserved to himself the minerals, with power to work them at pleasure, and to remove as much stone, &c., as might be necessary for the proper working of the minerals, it being expressly agreed that he should not be liable for any damage to the vassal that might happen through the working of the coal, &c., by longwall workings or otherwise. *Held* (*reversing* judgment of the Second Division) that the vassal was not entitled to an interdict against the superior working the minerals under his house on the ground that the workings would probably injure or destroy it.

(IN the Court of Session February 24, 1871, *ante*, vol. ix. 554.)

Ld. Chancellor (Selborne). Ld. Chelmsford. Ld. Colonsay.

William Jackson Andrew, solicitor in Coatbridge, acquired from James Porteous a feu on the estate of Colonel Buchanan of Drumpeller, on which a house and offices were built of the value of £900. The feu-contract between Colonel Buchanan and Porteous, dated in 1859, contained the following clause:—"Reserving always to the said first party and his heirs and successors whomsoever the whole coal, fossils, fireclay, ironstone, limestone, freestone, and all other metals and all minerals in the said piece of ground, with full power to work, win, and away carry the same at pleasure, as also to remove as much stone and other matter as may be necessary for the proper working of the said coal, ironstone, and others, and that free of all or any damage which may be thereby occasioned to the said second party and his foresaids; and it is expressly agreed that the said first party and his foresaids shall not be liable for any damage that may happen to the said piece of ground, buildings thereon or existing hereafter thereon, by or through the working of the coal, fireclay, ironstone, freestone, or other metals or minerals in or under the same, or in the neighbourhood thereof, by longwall workings, or otherwise, or which may arise from or through the setting or crushing of any coal waste or other excavation presently existing, or which may exist hereafter within or in the neighbourhood of the ground hereby disponed, through the said first party or his foresaids working or draining the said metals or minerals, or others as aforesaid;" . . . . . "And further the said James Porteous binds and obliges himself and his foresaids to erect, in so far as not already done, a single or double dwelling-house or villa of one storey with attics, or a dwelling-house of one and a half or two storeys in height,

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which house or villa shall be for the occupancy of one family only, and shall yield a yearly rent equal to triple of the foresaid feu-duty (£5), and to maintain and uphold the foresaid building in a proper and sufficient state of repair, so as always to yield such a yearly rent, and of an equally good style of architecture in all time thereafter; and in building said dwelling-house and offices the said James Porteous and his foresaids will observe, as he hereby binds and obliges himself to observe, the regulations, and fulfil and perform the whole obligations underwritten."

The seam of coal referred to was let in 1847 to Mr Wilson of Dundyvan, and at the date of the feu-contract was wrought by his trustees, who in working it left sufficient pillars of solid coal to support the surface. The subsequent tenants, Henderson and Dimmack, without making any provision for the support of the surface, proceeded to work out the pillars and to work other adjoining seams.

Andrews then presented a petition in the Sheriff-court of Lanarkshire against Colonel Buchanan and Henderson and Dimmack, for interdict to prevent them removing or working out the pillars in the seam of coal underneath and adjacent to his feu.

The petitioner averred that the walls, ceilings, and partitions of his property had been rent and shaken, many of the doors would not shut, and that several of the stones in the front and back walls of the house were rent and damaged.

The respondents declined to do anything to prevent further damage.

The Sheriff-substitute (Logie) ordered proof, and the Sheriff (Glassford Bell) adhered.

The respondents advocated. Henderson and Dimmack pleaded;—(3) The petitioner is barred by the terms of his own feu-contract from insisting either for interdict or damages against Mr Buchanan, the owner of the coal and minerals, or against the present respondents as his tenants. (4) The petitioner, not being the owner of the coal and minerals, is not entitled to object to the owner or his tenants working or carrying away the same.

Colonel Buchanan pleaded;—(1) The respondent's title gives him no right in the lands of which he alleges himself proprietor beyond those conferred by his author by the feu-contract entered into between him and the advocator, Mr Buchanan, and the terms and conditions of that feu-contract are binding *in toto* upon the respondent. (3) The right to work said minerals by longwall workings or otherwise having been specially agreed to in said feu-contract by the respondent's author, the respondent is not now entitled to interdict against such workings as craved by him.

The petitioner pleaded;—(1) The operations of the first-named respondents being reckless, unfair, and unskilful, and being carried on to the loss, injury, and damage of the petitioner, he has good grounds to insist on the same being discontinued. (3) The petitioner being bound to uphold and maintain the houses erected by him on his feu, it is incompetent and illegal for Colonel Buchanan to grant authority for working or for the respondents to work out the coal under or in the neighbourhood of the petitioner's feu, so far as the same may be necessary to be left for the safety and protection of the petitioner's property, unless other ample means and support are provided and taken.

The Lord Ordinary (Ormidale) renewed the order for proof, and after a proof pronounced this interlocutor:—"Finds as matter of fact (1) that the respondent (petitioner in the Sheriff-court), Mr Andrew, is the proprietor of a piece of ground situated at Merriston of Coatbridge, extending to one rood two poles and eighteen yards or thereby, which he holds in feu from the advocator (respondent in the Sheriff-court), Mr Buchanan,

the annual feu-duty payable for which is £5; that on this piece of ground there is a dwelling-house, with washing-house and other out-houses attached thereto, which were erected within the last few years, and prior to Whitsunday 1866, at a cost of several hundred pounds; and that it is a condition of the feu-contract under which the respondent holds his property from Mr Buchanan, as superior, that on the one hand the superior should be entitled to work the minerals under the ground feued, without being liable in any damage thereby caused to the feuar, and that on the other hand the feuar should be bound and obliged to erect on the said piece of ground a dwelling-house or houses and pertinents which should yield a yearly rent equal to triple the amount of the annual feu-duty payable by the feuar, and to uphold and maintain the same in a proper and sufficient state of repair, so as always to yield such yearly rent in all time coming: Finds also as matter of fact (2) that the advocators (respondents in the Sheriff-court), Robert Henderson and Richard Dimmack, carrying on business under the firm of the Drumpeller Coal Company, are at present, and have been since the term of Whitsunday 1866, the lessees of the coal in certain parts of the lands and estate of Drumpeller, belonging to the other advocator, Mr Buchanan, comprehending the coal in the respondent's foresaid piece of ground, and lands adjacent thereto; that they were, at the date when the respondent applied in the Sheriff-court for interdict against them and Mr Buchanan, working out one of the seams of said coal under or in the neighbourhood of the respondent's house and ground; that the seam of coal so being wrought out had been at a former period prior to Whitsunday 1866 let to the trustees of the late John Wilson of Dundyvan; that the trustees of the said John Wilson, in working the said seam of coal under and adjacent to the ground now belonging to the respondent left pillars of solid coal to support the surface of the petitioner's feu, and buildings thereon; and that notwithstanding of this the advocators, Messrs Henderson and Dimmack, carrying on business as aforesaid, proceeded to work out many of the said pillars of solid coal so left by the said trustees under or in the neighbourhood of the property of the respondent, and have not left, and are not leaving, a due and proper support for the surface, and for the buildings belonging to the respondent: Finds also as matter of fact (3) that in consequence of the advocators' Henderson and Dimmack's mode of working as aforesaid, the respondent's dwelling-house on the piece of ground held in feu by him as aforesaid has been seriously injured, and will be entirely destroyed if the advocators work out or impair the foresaid pillars of coal within 100 yards of the property belonging to the respondent, or of the corresponding space subjacent thereto: Finds also as matter of fact (4) that the advocators, Messrs Henderson and Dimmack, have, nevertheless, threatened to work out said pillars of coal, and all the coal under and in the neighbourhood of the said piece of ground belonging to the respondent, and have intimated their determination to do so, and that the workings of the advocators, Messrs Henderson and Dimmack, complained of, as well as their determination to continue these workings to the effect of removing the foresaid pillars and all the coal under and in the neighbourhood of the respondent's property, have been and are approved of, and authorised by the other advocator, Mr Buchanan: Finds, in these circumstances, that, as matter of law, the respondent is entitled to interdict against the advocators to the extent and effect following: Therefore suspends, interdicts prohibits, and discharges the advocators (respondents in the Sheriff-court), each and all of them, from removing or working the seam of coal at present or which was at the time the interdict was applied for in the Sheriff-court being wrought out by the advocators, Henderson and Dim-

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mack, at any point or points underlying the surface within 100 yards of any part of the respondent's foresaid piece of ground, or of the corresponding space lying under or beneath the same; and reserves to the respondent all claims competent to him against the advocators for the loss and damage already sustained, or that may yet be sustained by him, in consequence of the operations of the advocators, Henderson and Dimmack, and to the advocators their answers thereto as accords, and decerns: Finds the respondent (petitioner in the Sheriff-court) entitled to expenses," &c.

Henderson and Dimmack reclaimed.

The Second Division (the Lord Justice-Cerk Moncreiff dissenting) adhered to the Lord Ordinary's interlocutor, with this variation,—" (1) that in the third finding thereof the word 'dwelling-house' be substituted for the word 'property' and that in the subsequent part of the said interlocutor the words 'any part of the respondent's foresaid piece of ground' be omitted, and after the words 'within 100 yards' there be inserted the words 'the respondents dwelling-house:'"

Colonel Buchanan and Henderson and Dimmack appealed.

LORD CHANCELLOR.—My Lords, in this case the petitioner (who is the respondent here), is the feuar of certain land at Coatbridge in Scotland, under one of the defenders (who is the appellant here), who is the superior and the owner of the subjacent minerals. The Second Division of the Court of Session have pronounced an interlocutor, from which Lord Justice-Clerk Moncreiff dissented, interdicting the appellant and his lessees from removing or working a particular seam of coal, called the Kiltongue seam, under the feued land in question at any point or points underlying the surface within one hundred yards of any part of the respondent's dwelling-house, erected upon that ground. The ground, as I understand it, of the interlocutor thus pronounced, from which, as I have said, the Lord Justice-Clerk dissented, was, that in the judgment of the Court any working within the prohibited distance would be dangerous to, and would probably destroy, a dwelling-house belonging to the pursuer, which under certain covenants in the feu-contract he had erected upon the land in question; and that the mineowner was not at liberty, under the terms of the feu-contract, or having regard to its proper legal effect, to work the mines in any way which would, at least by the operation of causes which could be foreseen and guarded against, be likely to produce the effect of letting down or injuring the buildings upon the surface of the land.

Now, my Lords, with respect to the law, I apprehend that there is no difference between the law of England and law of Scotland in this respect. There is no doubt that, generally speaking, when a man grants the surface of land, retaining the minerals, he is guilty of a tortuous act if he so uses his own right to obtain the minerals as to injure the surface or the things upon it, and he would be answerable in damages for doing so. And as the act would be wrong, and as he would be answerable in damages for it, and as prevention in such a case is a better remedy than any damages, the Court would be justified in granting, and probably would be called upon to grant, an interdict to prevent him from doing so. And if this were an ordinary case of that character, assuming that the evidence justified, as I think probably it might be found to justify, the particular limits of prohibition, the interdict would undoubtedly be right. But, on the other hand, I apprehend it is the clear law of England, and also of Scotland, that when two persons meet and contract together and settle together the terms of a contract for the purchase, or sale, or letting of a property, they are at liberty to enter into such terms as they may think fit, provided always of course that they do not agree to do anything contrary to the public law of the land; and if the owner of surface lands, in buying those surface lands from the person who was previously the owner of the soil, is willing to take the risk of any injury which may be done and any damage which may be sustained by the working of the subjacent minerals, and contracts accordingly, it is perfectly lawful for him to do so. Nor, as I apprehend, can any Court hold such a contract

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to be unreasonable, for that would be to make the Court, instead of the parties, the judge of what it is reasonable or not for them to do with their own. It is to be presumed, if such a contract is made, that the risk is taken into account in settling the terms of the entire bargain between the parties. If it is considered to be a serious risk, it is to be presumed that the feuar or the purchaser gives less for the surface than he otherwise might have been willing to give. If it is not a serious risk, it will not have the same influence upon the price and the terms; but still it is a risk which he contracts to undertake—the whole contract being voluntary and for valuable consideration between both the parties, and the person who was previously the owner of the entirety of the land being under no antecedent obligation whatever to part with any portion which was previously his own except upon such terms as are mutually agreed upon.

In such a case, therefore, everything depends upon the construction of the contract, and the whole question between the parties resolves itself into a mere pure and simple question of construction. No doubt upon doubtful words in this or in any other contract there may be grounds for saying, that of two open constructions that which is the more consistent with the general scheme of the whole instrument, or the more apparently reasonable under all the circumstances of the case, is to be preferred. But no views of a conjectural kind as to what is or what is not reasonable can be admitted if the construction of the contract is plain and free from any real ambiguity.

With respect to the state of the property, as I collect from the evidence of both parties to this contract, which we are called upon to construe, all that is material appears to be this—It was in a populous neighbourhood, or, at all events, in a neighbourhood in many parts of which there were inhabited dwellings; and, on the other hand, there were various seams of coal under it, of which the two upper seams had been already worked out upon what was described in the evidence as the old stoop-and-room system of working, which seems to be a system of working which leaves thin and not very permanent walls to support the surface, the entire coal being taken out with the exception only of those thin walls or supports which remain, those supports being under possible circumstances liable to decay and to give way without the use of any means to remove them, and being still more liable, indeed certain, to fall in and break down, thereby letting down the surface, if any seams lying either immediately below or in the neighbourhood of them should be to any material extent worked. That was the condition of the two upper seams, and there was below them a lower seam called the Kiltongue seam, which may or may not have been partially worked before the date of the lease of this particular property, but which appears to have been a seam of considerable value and thickness, and which, if it had been at that time worked at all, had been worked upon what is called the modern or the improved stoop-and-room system. The nature of that system is this—that more important and solid pillars are left as the coal is worked out, but when the coal has been taken out from the excavated spaces called rooms, then the mineowner comes back, and by degrees works out the whole of the pillars which had been left, so that, if no regard is to be paid to the support of the surface above, the effect will ultimately be that the entirety of the coal will be removed.

I may mention that the same effect would be produced if another known system, called the longwall system, were adopted, according to which no supports are left at all in the course of the working, except such as may arise from the accidental accumulation of rubbish in the spaces from which coal has been taken out, and which rubbish, at all events under the circumstances of the mine, if left, would not be sufficient to prevent an extensive subsidence of sufficient importance to cause the injury which the interdict granted in this case would obviate.

Now, that being the state of the mine under the property, the parties meet together, and the owner of the land severs the surface from the mine, and sells it to the pursuer upon the terms which are expressed in the feu-contract before us.

I will first consider what is the effect of the portion of the feu-contract which expressly refers to the particular subject, and then, whether there be any legiti-

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mate inference, consistent with sound principles of construction, to be drawn from any other portion of the contract, so as to vary the interpretation which we should otherwise have arrived at.

After the usual terms of "feu," these words follow—"Reserving always to the said first party, and his heirs and successors whomsoever, the whole coal, fossils, fire-clay, ironstone, limestone, freestone, and all other metals and minerals in the said piece of ground, with full power to work, win, and away carry the same at pleasure, as also to remove as much stone and other matter as may be necessary for the proper working of the said coal, ironstone, and others, and that free of all or any damage which may be thereby occasioned to the said second party and his foresaids."

I pause there, my Lords, for a moment, and will consider, first, what the effect of those words by themselves might be if the last clause which I have read—"and that free of all or any damage which may be thereby occasioned to the said second party and his foresaids"—had not been contained in the instrument. Without those words it would have been a mere reservation of the minerals, with full power to work, win, and away carry the same at pleasure, and also to remove as much stone and other matter as might be necessary for the proper working of the minerals. The effect of such a reservation, standing alone, according to the law of both countries, would have been this—the whole property in the mineral strata would have been reserved to, and would have remained in, the previous owner, and he would have had an unlimited power of dealing with that as his own in the way of working, but he would have been subject to the general restriction which every owner of property is under, expressed in the maxim *Sic utere tuo ut alienum non lædas.* When one man's property stands in such a position to another man's that by certain modes of using it he might destroy the property of the other, his own rightful use over his own property is limited by the obligation which he is under not to destroy the property of his neighbour. Therefore, although he would have been at liberty to take away, if he could do so without injuring his neighbour, everything reserved to him, yet he was not at liberty in taking it away to injure his neighbour. Consequently, the interdict which has been granted would have been right and proper had the matter rested there.

But then come in the words "and that free of all or any damage which may be thereby occasioned to the said second party and his foresaids." Now, those words, even if they had stood alone, might, perhaps, have made a very important difference in the case, because your Lordships will see that the only thing which had been reserved was the whole minerals—the power to work was the power to work the same, that is, the whole minerals; and when it is superadded that that may be done "free of all or any damage which may be thereby occasioned,"—these words being put in for some purpose,—it is very difficult to understand what they can mean, except this, that to the full extent of that which is reserved the working may take place, though it occasions damage, and that he is not to be responsible for damage.

However, it is not necessary to dwell further upon that clause, standing alone, because the parties appear to have been anxious to make their meaning more clear than it would have been had the contract rested there; and they go on to state their express intention in these words—"It is expressly agreed that the said first party and his foresaids shall not be liable for any damage that may happen to the said piece of ground, buildings thereon, or existing hereafter thereon, by or through the working of the coal, fire-clay, ironstone, freestone, or other metals or minerals in or under the same, or in the neighbourhood thereof, by longwall workings or otherwise, or (another kind of damage) which may arise from or through the setting or crushing of any coal waste, or other excavation presently existing, or which may exist hereafter, within or in the neighbourhood of the ground hereby disponed, through the said first party or his foresaids working or draining the said metals or minerals, or others, as aforesaid." Your Lordships will see that this express agreement to exclude claims for damage is not confined to some particular description of damage, but that it extends to any damage—the words being, "and shall not be liable for any damage."

And, secondly, it particularly takes notice of the buildings, and of the liability of those buildings to damages through the workings; and it says that the superior shall not be liable for any damage which may happen to any buildings then upon the property, or afterwards to be there. The importance of that reference to buildings will be seen presently, when we come to refer to the latter part of the deed, which relates to that particular subject. Thirdly, it takes notice of the modes of working by which such damage may happen, and puts foremost "longwall workings,"—which is a remarkable thing, because that was not the mode of working actually in use, or which ever had been in use there, and it was a mode of working which would extract, if it were followed, the whole of the coal, without leaving any supports whatever, except, as I have said, such limited supports as might arise by rubbish left in the mine, and which, according to the evidence relating to this mine, would have been clearly insufficient to prevent damage by subsidence.

I ought further to remark, that it notices the two kinds of damages,—the one a direct kind of damage, by the working of the seams remaining to be worked; and the other—what I may describe as indirect damage—by the subsiding of the wastes in the two seams already worked, in consequence of those excavations. It deals with the damage arising from the loss of collateral support, occasioned by workings in the neighbourhood, as well as with the damage arising from the loss of support, occasioned by workings immediately under the surface in question. Can anything possibly be more clear than that the intention of the parties on both sides was that the landlord was to have the unrestrained right of taking out the whole and every part of the reserved minerals, the whole risk of any damage being undertaken under the contract by the feuar?

It has been suggested that the exclusion of damage may not exclude the right to an interdict. But, my Lords, I apprehend that a right to an interdict is founded only upon this, that the act is already ascertained to be injurious and wrongful. Every act which is injurious and wrongful is an act for which there must be a liability to damage; and therefore it is only because it is such an act as would carry with it a liability to damage that the better remedy of interdict can be applied. The moment the damage is renounced it becomes a *damnum sine injuriâ*, and to a *damnum sine injuriâ* neither interdict nor action for damages applies. Therefore it appears to me to be as clear as possible, upon the application of any ordinary principles of construction to this clause, that the intention of the parties was upon the one side to renounce all claims, and on the other to save themselves from any liability whatever for damage that might occur from getting out the whole of the minerals.

But it is said that this construction may be limited by assuming a proper mode of working, and to that, if the word "proper" is rightly understood, I entirely agree; and I observe that no controversy is raised upon that subject in the appellant's printed papers. The landlord in entering into this contract only contracts for power to work and get the coal, and to be exonerated from any damage which may arise through the working of the coal. The very words, "proper working," occur incidentally in one place, although not in the principal clauses in this part of the contract; but that only means that if he does that which is not needful or proper to the getting of the coal, and if the act so done —not being needful or proper for the getting of the coal—leads to the subsidence of the surface, it is an act not within the scope or intention of this contract, and therefore the landlord is not protected by this clause in such a case. To let down the surface is not the thing which he contracts for—he contracts for power to work his reserved coal, and he is not to be answerable for damage by subsidence arising in that way. Wanton, reckless, or improper working, therefore, is a thing which is not in the view of either of the parties. If this working, which is prohibited by the interlocutor, were wanton, reckless, or improper, doubtless there is nothing here which would prevent its being interdicted. But is it so?

The question is, what is the meaning of "proper working" for the purpose of the application of that principle? I apprehend such working as is right and proper for the purpose of getting out the minerals in the ordinary and proper

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course of mineral working—such a mode of working as would be proper between a landlord and a mineral tenant if the landlord had let the mine to the mineral tenant with an express declaration that he was not to be answerable for any surface damage in a case in which there were no buildings, and the whole surface was also let to the mineral tenant himself. The word "proper," so used, has reference only to the subterraneous working—the mineral working; it has nothing whatever to do with the maintenance of the surface. The obligation to maintain the surface where it exists is independent of the right of working; and however proper the mode of working might be, if it let the surface down, and if that was a thing which the mineral owner was not at liberty to do, the mineral owner would be answerable in damages for so doing. Of course there is a very intelligible sense of the term "proper working," which refers, where it exists, to the upholding of the surface, but that, I apprehend, is not the sense in which it could be introduced into a contract which expressly stipulates that the mineral owner shall be exonerated from damage arising either to the surface or to the buildings upon it.

So far, my Lords, I have to observe that the construction which I am advising your Lordships to place upon this contract is exactly the same as that placed by Lord Hatherley, when Vice-Chancellor, upon a contract in this respect precisely similar in its substance in the case of Williams v. Bagnal.[1] His Lordship there had to deal with arguments very similar to those which have been suggested in this case; and when it was said that you could possibly suggest some description of damage which might be provided against, short of subsidence by ordinary workings, he said that that was not consistent with the language of the contract, which said that the party was not to be liable for any damage. He said, also, with regard to the suggestion of working so as to uphold the surface, that to introduce such a limitation would simply be to defeat the whole object of those stipulations. And I cannot but observe that the suggestion which has been made—that this may be limited to such damage as, through causes incapable of being reasonably foreseen or provided against, might happen to the surface or to the buildings thereon, either from the working or from the subsidence of other excavations, whatever care might be taken to keep up the surface and to work the minerals so as to maintain the surface, and notwithstanding that the parties proceeded in view of that obligation to work in that manner—appears most unreasonable, for, in the first place, the parties, if that had been their meaning, might have expressed it, and would have expressed it, in appropriate terms, utterly unlike the terms which we find here. The very suggestion of such a limitation also suggests the manner in which it could have been and ought to have been expressed, if it was intended. But, secondly, the thing is so remote and so improbable—it so reduces the stipulations practically to a mere nullity—as to make it quite unreasonable to suppose that that can be what the parties meant.

Then, I say, if we rest on this portion of the contract, there really is no ambiguity and no uncertainty. The feuar has deliberately taken upon himself this risk, and this interdict imposes upon the landlord an obligation which it was the express object of the contract to relieve him from.

I assume in the respondent's favour that the effect of the interdict is not to take away the whole right of working any part of the reserved minerals. The evidence is a little obscure upon that subject, but still it has been contended, and perhaps rightly, that after the date of this feu-contract some portions of the coal were removed by the old stoop-and-room system, leaving the stoops standing; and the whole question is now as to the right of taking those stoops away. Taking that to be so, of course the argument would reduce the entire reservation of all these powers to an absolute nullity. But in all other respects the view which I have submitted to your Lordships as to the effect of the contract remains the same.

But then it is said that cannot be the meaning of the contract, because we find in the later portions of it what did not exist in the case of Williams

[1] 15 W. R. 272.

Bagnal, or in any other case, namely, an express stipulation that the feuar is to build a dwelling-house or a building of a certain description and value, to be worth three times the feu-duty, which is £5 a-year, and to maintain and keep that house in repair upon the property, the building being erected according to a plan rather elaborately defined, the whole of that stipulation being an onerous and obligatory stipulation so far as relates to the feuar. It is said, How can it be possible that you can construe this contract so as at once to impose upon the feuar the obligation of putting a building upon this land, and maintaining it there, and at the same time so as to say that he is not to receive compensation, or is not to have a right to any damage if the superior proceeds to do in the course of his mineral working that which will destroy that building, and which may afterwards, on its being reinstated, destroy it more than once? To those who have not before them the materials upon which these parties determined for themselves what it was for their mutual interests to agree to, it may seem that this was perhaps an improvident contract. But what I am at a loss to understand is, when the feuar does contract to build and repair—whatever may be supposed to be the legal effect of that obligation to repair (that may be a question)—how that fact can alter the construction of the previous words, which expressly relate to the right of the mineral owner to work the minerals, and contain an express stipulation that he shall be exonerated from all liability for damage arising from subsidence to any buildings that may hereafter be erected upon the property in consequence of such working. One thing is quite plain, that although the feuar agreed with the superior to erect buildings, both parties did contemplate that the buildings so erected might be damaged or destroyed by the mining operations of the superior, in respect of which he was not to be responsible, and for which he was not to make compensation. Buildings being expressly in contemplation, it seems to me that that is quite enough, whether it be that he contracts to build them himself, or whether it be that he is at liberty to do it by contracting with another party. In Williams v. Bagnal it is clear that the land was sold as building land, and that buildings were in contemplation—they were buildings, I think, of rather a more valuable kind than those which are in view here—namely, ironworks and machinery. But in that case the Vice-Chancellor did not think that that circumstance prevented the parties from being capable of contracting that the whole risk of any damage by subsidence should be with the owner of the buildings, whatever were his obligations in respect of them, and that the mineral owner should have as free and unfettered a right to work out the whole of his minerals, without being liable for any damage whatever, as he would have had if he had not granted the surface to any other person.

This, then, is the agreement which the parties have made, and in the latter portion of it there is not a single word which has a legitimate bearing upon the construction of the words which are to be found in the earlier clause which I have referred to; and therefore the interdict which has been granted is in truth an interdict relieving the feuar from his contract, without any action of reduction, or any cause that I can perceive why he should be so relieved. Therefore, my Lords, the motion that I shall make to the House is, that these interlocutors be reversed, and that the appellant be assoilzied from the conclusions of the action.

Lord Chelmsford.—My Lords, the question in this appeal turns entirely upon the construction of the feu-contract, by which a piece of ground, of which the respondent is now the proprietor, was feued by Mr Buchanan with a reservation of the minerals within it.

Mr Buchanan is the proprietor of the estate of Drumpeller, and of the coal and minerals therein. In 1847 he let the coal under part of the lands to Mr Wilson of Dundyvan, by whom, and afterwards by his testamentary trustees, it was worked; and at the expiration of this lease the coal remaining unworked was let to the appellants, Henderson and Dimmack.

The lease binds the tenants to work the coal in a regular, systematic, and proper manner. The piece of ground of which the respondent is the owner lies within the coal field in the lands of Drumpeller.

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Before the date of the feu-contract in 1859 a new mode of conducting the mining operations, called stoop-and-room, had been introduced. The former method of stoop-and-room was to leave permanent pillars; but under the modern system the coal is completely excavated and removed; the mode of working being to leave large pillars in the forward working from the place where the operations begin and then to work back and remove all the pillars which had previously been left standing.

The evidence shews that at the time of the feu-contract Wilson's trustees had been working forward on the modern stoop-and-room system, leaving stoops or pillars for back working. They had taken out some of the stoops which they had thus left, and Henderson and Dimmack, when they succeeded, proceeded to remove the remaining stoops, beginning at the place where Wilson's trustees left off. There can be no doubt that, although the workings had not arrived at the piece of ground of the respondent, they had approached sufficiently near to occasion damage to the house which had been built upon it. The respondent thereupon petitioned the Sheriff for an interdict to restrain Mr Buchanan and his tenants, Henderson and Dimmack, from working and removing the coal so far as the same might be necessary to be left unwrought for the safety and support of his ground and buildings. The case was advocated to the Court of Session by the present appellants, and after proceedings before the Lord Ordinary, he by his interlocutor interdicted the advocators from removing or working the coal at any point within 100 yards of any part of the respondent's piece of ground. This judgment was reclaimed to the Court of Session; and the Judges adhered to the interlocutor, subject to the alteration that they limited the interdict to working the coal within 100 yards of the respondent's dwelling-house, instead of to within 100 yards of the piece of ground.

The question turns on the construction of the feu-contract, and more especially upon the clause of reservation of the minerals contained in it. By the feu-contract, which is dated in March 1859, Mr Buchanan sold and disposed to James Porteous and his heirs a piece of ground containing one rood eighteen poles and two yards, and thereby the feuar bound and obliged himself to build a dwelling-house which should yield a rent equal to triple of the feu-duty (being £5), and to maintain and uphold the building in a proper and sufficient state of repair, so as always to yield such yearly rent, and of an equally good style of architecture, in all time thereafter. Very minute provisions are made in the feu-contract as to the character and description of the house to be built, and the feuar is thereby bound to bear one-half of the expense of keeping up and maintaining streets to be formed at the expense of the superior, ten feet of which streets were included in the contents of the ground feued; and the feuar also bound himself to make and keep in repair a footpath, and to contribute to the expense of the main sewers. The reservation of the minerals is in the most general and comprehensive terms. They have been read by my noble and learned friend, and therefore I will not trouble your Lordships by reading them again.

It is admitted that, if the reservation is to be construed according to the ordinary meaning of language, there can be no restraint upon the right of the mineral proprietor to remove every particle of the coal under the piece of ground feued, though the inevitable consequence must be the total destruction of the respondent's dwelling-house. But it is contended by the respondent that the object of the feu-contract being to have a dwelling-house of a particular description built and maintained, the generality of the words of the reservation is to be restrained by reference to this object, and that the only proper working of the coal must be intended to be such as shall consist with an upholding of the surface and building.

This construction is maintained by the Judges who decided the case in the respondent's favour, on the assumption that the feuar would never have entered into a contract obliging him to build and maintain a house which at any time might be destroyed by the exercise of rights belonging to the person who imposed the obligation upon him. Lord Cowan puts this very strongly. He says—"Suppose it had been in express words stated that the superior and his

mineral tenants were to have full power at their pleasure to put the pursuer's property into this certain peril, and it were asked whether the feuar would have entertained such an unreasonable and disastrous proposal. He certainly never would." But, with great submission, this appears to me to be determining what has been done by a conjecture of what was likely to have been done. And, then, in even stronger language, Lord Cowan says—"It appears to me that to enable the advocators to maintain their construction, the clause behoved to have in express terms provided that the feuar was to submit to have his property destroyed without redress, should the superior or his mineral tenants resort to the modern system of stoop-and-room working." It is difficult to see in what more precise language the feuar could have submitted to this contingency than by agreeing to a reservation by which the whole of the coal is reserved to the proprietor, with full power to work, win, and away carry the same (*i.e.* the whole of the coal) at pleasure, it being expressly agreed that he shall not be liable for any damage that may happen to the piece of ground and buildings thereon by or through such working. Lord Cowan, in the passage which I have read, seems to consider that the destruction of the property will be the necessary consequence of resorting (as he calls it) to the modern system of stoop-and-room working. But this system seems to have superseded the former one (of course in cases only where there was no obligation to uphold the surface) at the time of the feu-contract. Porteous, when he became the owner of the piece of ground, and the respondent at the date of the disposition from him, must be taken to have made themselves acquainted with the nature of the underground operations, and to have entered into their contracts with reference to them, and the modern system of stoop-and-room working was not resorted to after the feu-contract, but was the mode of working in use at the time by Wilson and Wilson's trustees, and was continued by Henderson and Dimmack when they succeeded as the mineral tenants.

It cannot, then, be said that this, which was the ordinary mode, was not a proper mode of working, supposing the proprietor of the minerals had a right to get the whole of the coal, and was not bound to leave a support to the surface. Of course he must be liable for any damage which may happen to the surface from unskilful or negligent working, but I am at a loss to understand how working in the ordinary way upon an established system can be properly characterised (as it is by Lord Benholme) as "a reckless mode of working."

Lord Benholme puts the propriety of the interdict upon a ground which it appears to me, with great respect, cannot be supported. He supposes the mineral proprietor to say, "You must not look for any reparation in the shape of damages. If you were to attempt any such thing, the absolute clause in your feu-contract would put you out of Court, and that is the reason why you shall not be allowed to protect yourself by interdict from the doing of the deed, against the consequences of which you have no redress against me." And then his Lordship goes on—"Prevention is ever preferable to cure. But prevention becomes absolutely indispensable when the threatened injury admits of no redress." What is this but to say to the person asking for the interdict, You have weakly and foolishly entered into an agreement whereby you have given to another person the liberty to do you damage without being answerable for it. We will interpose to protect you from the consequences of your folly by preventing that being done which you have agreed that the other party to the agreement shall have the right to do. This would be, if not to make a new contract, at least to annul the provisions of the existing one.

Lord Neaves, following Lord Benholme's view, held that if it is plain and demonstrable that the consequence of the mode of working would be a destruction of the surface, that would not be proper working. And he adds that he cannot presume such to have been intended without words far more explicit than are contained in the clause of reservation. He even doubts whether a clause of this kind explicitly made could be enforced. No doubt of this nature, however, was expressed in the course of the argument. On the contrary, I put the case to the learned counsel for the respondent, of land feued with an obligation to build a house and keep it in repair, with a reservation to the superior of

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the power to remove the house at any time if it interfered with the exercise of rights which he possessed. And he admitted that such an agreement would be perfectly valid. Indeed to deny this would be to adopt the dictum of Lord Denman in Hilton v. Lord Granville,[1] which was frequently doubted, and at last has been distinctly overruled.

Sir Richard Baggaley, in his clear and able argument, did not rely upon the improbability of the respondent having entered into a contract which left his property at the mercy of the mineral proprietor, nor deny that the words of the reservation, taken by themselves, would be sufficient to give the mineral proprietor the right to remove the whole of the coal from under the piece of ground belonging to the respondent, but he contended that the clause must be read in connection with, if not in subordination to, the object of the feu-contract, which was to provide for the building and keeping up a house on the ground feued. And therefore he insisted that the words "the proper working of the coal" contained in the reservation, must be construed with reference to this primary object of the contract. He endeavoured to shew that Wilson's trustees had worked so as to leave pillars as a support to the surface; and he therefore contended that if Henderson and Dimmack were removing these pillars they were not pursuing a proper mode of working.

But the operations of Wilson's trustees were not such as that described. On the contrary, it is proved that they were getting the coal on the modern stoop-and-room system, and accordingly in their forward working they had left large pillars; but they had commenced in working back to remove some of these pillars when their lease came to an end, and Henderson and Dimmack succeeded them. Mention is made of a pillar of coal of larger size than usual left under a house called Dr Wilson's feu—for what reason that particular house was to be saved is not stated, nor whether the support to it was to remain permanently. But there is no evidence of any intentional protection given to any other house. And when a witness said "We leave masses of coal to protect any important building, but if it is a trifling house we let it down," he is speaking of cases in which there is the surface to be attended to as well as the coal.

If the respondent is right in saying that under the reservation the working of the coal must be carried on with reference to the security of the building, then the mineral tenants must not come within one hundred yards of the dwelling-house, which the witnesses say would be a reasonable distance to keep off to ensure absolute safety. So that the mineral tenants would be deprived of a quantity of coal beyond the limits of the rood of ground feued to the respondent. In this view it is not an inaccurate description of the argument of the respondent given by the Lord Advocate that the protection to be afforded to him is to prevent the mineral proprietor working to within such a distance of the respondent's house as a skilled person would say he ought not to come.

The whole argument of the respondent is involved in the asserted restriction of the generality of the words of the reservation in order to render it subservient to the obligation to the feuar to build and maintain the dwelling-house. But this mode of dealing with the reservation seems to be adopted, although not avowedly, on account of the assumed impossibility of any person entering into a contract which it is taken for granted is a highly imprudent one. But this is resorting to conjecture instead of resting upon construction. For how can it properly be assumed that there is imprudence in the contract? It may have suited Porteous' purpose to become the owner of the piece of ground upon the agreed terms; or, assuming that his entering into such a contract was an act of imprudence, is that any reason why full effect should not be given to it? There is no ambiguity in the reservation; it plainly and clearly reserves to the mineral proprietor the whole of the coal within the piece of ground feued, and empowers him to work it without being liable for any damage which may happen to the ground or building thereon through such working. Why should this plain, unambiguous language be construed to mean—You shall not take

[1] Feb. 10, 1845, 5 Ad. and E. (Q. B.), 701.

away the whole of the coal, but only so much of it as you can get without damaging the ground and building?

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It is the safest and best mode of construction, upon all occasions, to give the words free from ambiguity their plain and ordinary meaning; and, following this course, it appears to me that the reservation gives to the mineral proprietor the power to work the mines in the proper and accustomed mode of working, and to remove the whole of the coal without leaving any support to the surface, and without being answerable for any damage which may be thereby occasioned to the ground and dwelling-house of the respondent, except such as may occur through unskilful or negligent working.

It is unnecessary to advert to the cases of Rowbotham v. Wilson,[1] and Wakefield v. The Duke of Buccleuch,[2] as authorities upon this occasion; because, as the learned counsel for the respondent observed, they are distinguishable from the present case inasmuch as in neither of them was there any burden laid upon the owner of the surface. But the case of Williams v. Bagnal, cited from the "Weekly Reporter"[3] and the "Weekly Notes,"[4] approaches very nearly to this, because, although there was in that case no obligation on the plaintiff, the purchaser, to build, yet it appears from the statement in the "Weekly Notes" that the grant was made to him for building purposes. The reservation of the minerals, with the power of working them without being answerable for any damage, was as large as in the present case. And the lessee of the minerals having by his workings caused a subsidence of the land, the purchaser sought to restrain his further working, on the ground that a grant of the surface included by implication of law everything necessary for its support, and that a man could not derogate from his own grant. But the Vice-Chancellor held that the implication of law was swept away by the express terms of the contract, which were plain, clear, and simple, and dismissed the bill with costs.

I cannot better conclude my opinion of this case than in the words of the Lord Justice-Clerk,—"I look on these obligations to the mineral owner as part of the consideration for the feu, and I can see no reason for permitting the feuar, while he retains the benefit, to repudiate the conditions of his right."

I think the interlocutors appealed from ought to be reversed.

Lord Colonsay.—My Lords, I cannot say that this case is free from difficulty, looking to the difference of opinion which has existed upon it in the Court below. I think there has been in some degree a misapplication of a very well known doctrine, namely, the general obligation upon a mineral owner to leave vertical and lateral support for the surface, even where that is not expressly stipulated for. It is an implied obligation. That point was very fully put, and with very good illustrations, by Lord Cranworth in the case of The Caledonian Railway Company v. Sprot.[5] His Lordship there pointed out that the construction of such a clause might be materially affected, and in many cases would be materially affected, by the nature of the ground, and the particular purpose for which the surface was granted away. In applying the last part of his Lordship's observations to this case I think too much effect has been given to the obligation to erect buildings and to maintain them, because in doing so that observation, and the effect of it, have been applied, not merely to a case in which there was a simple reservation of minerals, and the right to work them, but also to a case in which there were express stipulations providing for events which were expected, or were in the contemplation of the parties as possible, if not probable, at the time when the feu was granted.

Now, my Lords, I think that this reservation clause, or, I should say, the stipulation as to the right of working the minerals, is of a kind that is not common. It is a peculiar stipulation, and one especially applicable to the condition of these mineral fields at the time that the feu-contract was entered into. We know from the evidence in the case that at that time the seams which existed above the one now under consideration had been wrought out for a con-

[1] 6 E. and B. 593. [2] L. R. 4 Eng. Ap. 377. [3] 15 W. R. 272.
[4] Dec. 10, 1866, 392. [5] March 4, 1856, 2 Macqueen's Ap. 449.

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siderable time. I think there were three—the Pyot Shaw seam, the Main seam, and the Splint seam. Those seams had been worked in the ordinary stoop-and-room manner, that is to say, stoops or pillars had been left in order to support the roofs. But this new seam, which was going to be worked when Mr Wilson took the contract to work it, had not previously been worked, and at the time when Mr Porteous came to take his feu Mr Wilson had been in possession of that seam for a considerable number of years. I think that Wilson's lease was in 1846, and that Porteous' feu was in 1859.

We have it in evidence that the working by Wilson and Wilson's trustees in that seam was a working by the new or modern system of leaving large pillars of coal in going forward, and taking them out in returning. That is evidenced by the fact that the pillars which remained were of that class and size which were adapted for that kind of working, and by the further fact that Wilson's trustees had commenced to remove the pillars on their return. It might not have been well ascertained or known what was to be the consequence to the wastes above of this mode of working below. It was a comparatively new mode, but it was a mode recognised, and it was a mode in use in this particular seam at the time when Porteous took his feu. And, accordingly, we find in the clause of reservation that very matter expressly provided for, namely, the wastes above being affected and brought down by the working by the new mode in the seam. There would be no danger of their coming down except by the ordinary action of crumbling, or by the action of water, if there was any, which there does not seem to have been to any extent—but by the working below it was possible that the wastes might be brought down. Accordingly, in the feu which Mr Porteous took in 1859 there is not merely a reservation of minerals—not simply a right to work without being liable for damage—but an express provision with reference to any evil which might result from the giving way of the pillars above, in consequence of the workings which might take place under Mr Wilson's lease.

My Lords, it appears that the danger which was contemplated as possible has arisen. The fact has occurred that crushings have taken place in consequence of this mode of working below, and it is by reason of that that the damage has occurred of which the respondent complains, and which has extended itself to other houses in the neighbourhood—I think to the houses of persons of the names of Martin and M'Lachlan. It is plain to me that under this clause of reservation the parties protected themselves against that very and precise result which is now the subject of complaint on the part of the pursuers; and although I think that if there had been no such express reservation of the right to work without damage—if it had been merely a right to work the minerals, as occurred in the case of the Caledonian Railway Company v. Sprot, there would have been a clear ground for requiring this party to leave a proper support; yet where there is a stipulation such as we have here, introduced plainly on purpose to protect the mineral owner or his tenants from any consequences which might result either to buildings erected upon the surface, or to the surface itself, devoted to other purposes, by subsidence, I think it is impossible to deny effect to that clause; and I cannot see how effect can be given to that clause without rejecting the pleas of the respondent.

I see that it is said in the Lord Ordinary's judgment that it would be absurd (I think that is the expression) to suppose that it could have been in the contemplation of the parties that there was to be an obligation to rebuild, and an obligation to maintain houses—the feu being taken for the purpose of building—if it was to be in the power of the mineral owner to do that which would destroy the buildings. He says that there may have been some other injuries ("destroy" is the word used there) for which the mineral owner would not be liable, and against which he has protected himself. But his Lordship does not illustrate this, and I do not think that a greater or smaller amount of injury to the buildings would affect the principle of the case.

The ground upon which the majority of the Court below proceeded was a very broad one, namely, that the workings were not proper workings, and that they could not be proper workings, because they produced the result that is

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complained of. I venture to think that that is a mode of reasoning in a circle. If the fact that they produced the injury is enough to determine the character of the workings as to whether they are proper workings or not, there is no effect given to this clause at all, and there is no occasion for going further into any examination of the contract. But I think that those words—"proper working," have reference, in the first place, mainly to the mineral owner. I think they are inserted principally for his sake, as between him and his tenant. But, also, I can conceive that there may be some very irregular proceedings which would be unnecessary for taking out the coal, and which would go further than merely taking out the coal, and cause injury of another kind, for which there would be no excuse under a reservation of the right to get the coal. But I do not see that there is any allegation here that the modern mode of working by stoop-and-room has not been pursued with all propriety by these tenants as far as the mode of working is concerned.

It is said, further, that it is impossible to suppose that the feuar would have taken the feu if the landlord or the mineral owner was to have the power to do what he purposes doing here. Now, we do not know all the circumstances under which the feu was granted. We do not know what was in the contemplation of Mr Porteous. Mr Porteous was probably not a good engineer, and he may have been under the belief that no working at that depth would affect the surface above; or, he may have been of opinion that it would not be carried to an extent which would affect the surface. At all events, he did not protect himself; but, on the contrary, the landlord protected himself against any consequences resulting from the working of the whole of the coal. If Mr Porteous was under any misapprehension of that kind, or, if he thought that the risk was so small that it was worth his while for a feu-duty of £5 a-year to have a house there until some unfortunate result should come at some distant period of time, I can easily comprehend it. He soon got rid of the matter, and then came his successor. Mr Porteous only had it for a short space of time. At all events, we cannot go into this question. We cannot tell the motives which influenced the parties—they had their own views of their interests, and they bargained freely.

I cannot concur in the view of one learned Judge in the Court below, that because the superior has protected himself against the claim for damages for working, therefore it is the more necessary to grant an interdict against his doing so. It does not appear to me that that is the right view of the case. I think the very stipulation of not being liable for damages contemplates the power of working so as to occasion injury, otherwise there was no use in making such a stipulation. Upon the whole, although I see that there is a strong ground for holding, in a case where the stipulation is not so clear as it is here, that the feu being made for the purpose of building, with an obligation to maintain buildings upon the property feued, the working must be consistent with that purpose, I do not see in a case like this, where the stipulation is express, that it is possible to get over it. I may say as to the obligation to rebuild, which seems to have been in the view of both parties, that I am not disposed to express any opinion upon the point. I am not quite prepared to say that the obligation to rebuild in a contract of this kind could be enforceable, That is not a question which it is necessary for us to decide, and I give no opinion upon it.

I therefore concur in the judgment.

IT was ordered and adjudged that the appellants be assoilzied from the conclusions of the action, with expenses in the Court of Session and the Sheriff-court; and that the expenses ordered to be paid by the Court below be repaid to them.

GRAHAMES & WARDLAW, Westminster—DEWAR & DEAS, W.S.—W. ROBERTSON, Westminster—J. & R. D. ROSS, W.S.

No. 3.

JAMES MACKINTOSH, Appellant.—*Lord-Adv. Young—Asher.*
EMILY MARIA MACKINTOSH AND OTHERS (Trustees of James Mackintosh), Respondents.—*Dean of Faculty Gordon, Q.C.—Pearson.*

day 19, 1873. Mackintosh v. Mackintosh's Trustees.

Heir and Executor—Tract of Future Time—Succession—Testament—Relief.—A person who was possessed of considerable property, both heritable and moveable, executed an entail of certain lands, binding himself, his heirs, executors, and successors whomsoever, to free and relieve these lands of all his debts and obligations. Thereafter, by antenuptial contract of marriage, the entailer settled upon his spouse, in the event of her surviving him, an annuity secured over the entailed lands, but with power to himself, his heirs, executors, and successors, to purchase in lieu thereof an annuity from an insurance company, in which case the widow was bound to discharge the entailed estate. *Held*, on a construction of the two deeds (*rev.* judgment of the First Division), that the obligation in the first deed to relieve the entailed estate of the granter's debts and obligations applied to the annuity with which the estate was burdened by the second deed, and that the heir of entail was entitled to be relieved of the annuity out of the entailer's general trust-estate.

ord Chelmsford. d. Colonsay.

(IN the Court of Session March 2, 1870, *ante*, vol. viii. 628.)

In 1857 Mr James Mackintosh executed a deed of entail of his estate of Lamancha in favour of himself; whom failing, his eldest son James, and the heirs-male of his body; whom failing, &c. By this deed the heirs of entail were empowered to infeft their wives or husbands, and the wives or husbands of heirs-presumptive, in liferent annuities out of the rents of the lands, not exceeding a third part of the free rental, and to burden the estate with provisions for their younger children. The deed also contained a provision that in case adjudication should pass against the lands before disponed, or any part or portion thereof, for payment of any debt or claim affecting the same, or for payment of any public or other legal burdens, then and in every such case the heirs of entail respectively in possession for the time should be obliged to redeem such adjudication, and to disburden the said lands thereof, and that within three years from the date thereof; and in case of their failing so to redeem, they should respectively, for themselves, forfeit their right to the said lands. Further, the deed of entail contained the following clause, viz.:—"I oblige myself, and my heirs, executors, and representatives whatsoever, to free and relieve my lands before disponed of all my debts and obligations."

In addition to the entailed estate, Mr Mackintosh was possessed of property, both heritable and moveable, to a large amount; and in 1865 he executed a last will and settlement, whereby he conveyed the same to trustees and executors, whom he directed, as soon as convenient after his death, to make payment, without constitution, of the whole debts which might be due by him at the period of his death, and after payment of certain special bequests, to divide the residue of the trust-estate into six equal shares, whereof one-sixth was to be made over to his son James, another sixth to his son George, and the remaining four-sixths to be equally divided between his daughters Sarah and Emily.

By an antenuptial contract of marriage, dated 12th January 1867, between Mr Mackintosh and Miss Mary Ann Burn, he bound and obliged himself, his heirs, executors, and successors, to pay to his said spouse, in the event of her surviving him, *inter alia*, an annuity of £150, and a further annuity of £70 in the event of the marriage of his daughter Emily; and for further security and more sure payment of these provisions Mr Mackintosh bound and obliged himself, and his foresaids, "to infeft and seize the said Mary Ann Burn in the said free liferent annuity of £150 sterling, and also of the said yearly sum of £70 sterling, both payable, and with interest and penalties, as herein before and after written,

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to be uplifted and taken furth of All and Whole" the entailed lands of Lamancha: . . . . . "But declaring that it shall be in the option and power of the said James Mackintosh, and his heirs, executors, and successors, to secure the said annuity of £150 and yearly sum of £70 to the said Mary Ann Burn, by purchasing at his and their own expense, from any respectable insurance company to be selected and approved of by her, an annuity payable to her, the said Mary Ann Burn, in the terms before provided, equal in amount to the said annuity of £150, and yearly sum of £70 hereinbefore provided to her; and upon the purchase being effected and completed to her satisfaction, and the writs securing the same being delivered to her, she binds herself and the trustees after named, but at the expense of the said James Mackintosh and his foresaids, to discharge and disburden the several subjects and others before-mentioned and described of the said provisions secured over them as aforesaid." Mr Mackintosh was infeft in January 1867.

Mr Mackintosh died on the 17th February 1869, survived by the four children mentioned in his last will and settlement, who were the issue of his first marriage; and also by the said Mrs Mary Ann Burn or Mackintosh, who was his third wife.

Thereafter James Mackintosh, who succeeded his father as heir of entail in the estate of Lamancha, and the trustees acting under the last will and settlement of the deceased, presented a special case craving the judgment of the Court upon the following questions, viz.:—1st, Whether the heir of entail in possession of the estate of Lamancha was entitled to be relieved of the said annuities by the general trust-estate of the said deceased James Mackintosh, and to obtain repetition therefrom of such sums as he might have advanced in payment of said annuities? 2d, Whether the heir of entail was entitled to be relieved of certain rent-charges for money borrowed from the Enclosure Commissioners for improvements on the estate of Lamancha?

The First Division held that the heir was not entitled to be relieved of either of the annuities or of the rent-charges.

Mr Mackintosh appealed against the judgment upon the first question.

Lord Colonsay.—My Lords, this is an appeal from a part of a judgment of the First Division of the Court of Session, pronounced on a special case stated by the parties. Two questions were submitted to the Court for decision. The first is that to which the present appeal relates. The Court of Session found that the heir of entail was not entitled to the relief he asked.

That judgment was rested mainly on two grounds—1st, That by the law of Scotland, as a rule, a liferent annuity, or a debt secured on heritable estate, is to be borne by the heir succeeding to the heritage in the case of intestate succession; and that the same rule holds in the case of testate succession, unless a contrary intention is made to appear. 2d, That the clause in the entail on which the heir founds cannot in the circumstances be understood as applying to the particular annuities in question. The first of these propositions is admitted, but the appellant contends that a contrary intention is made to appear. The second proposition is disputed.

The late James Mackintosh of Lamancha left three deeds, which are referred to in the special case, viz.:—1st, Deed of entail of the estate of Lamancha, dated in 1857; 2d, Last will and settlement, dated in 1865; 3d, Contract of marriage with his third wife, dated in 1867.

The first of these deeds contains the clause on which the heir of entail mainly founds, and which is thus expressed:—"I oblige myself, my heirs, executors, and representatives whatsoever to free and relieve my lands before disponed of all my debts and obligations." The second of the said deeds conveyed his whole estates, heritable and moveable, other than the estate of Lamancha, to certain trustees, and directed them to pay "the whole debts which may be due by me

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at the period of my death," and also to pay certain legacies and bequests, and to divide the residue into six shares, to be distributed in certain proportions among his four children, all of whom were by his first wife. It also contained a clause revoking "all wills and settlements executed by me at any time heretofore, excepting a disposition and deed of entail of my lands and estate of Lamancha, which shall stand and subsist in full force and effect."

The third of the said deeds made certain provisions in favour of his third wife, including the two annuities of £150 and £70 now in question, and for "her further security and more sure payment" of the said annuities he bound and obliged himself to infeft her in the estate of Lamancha. This deed also contains the following clause, on which the heir of entail founds:—"But declaring that it shall be in the option and power of the said James Mackintosh, and his heirs, executors, and successors, to secure the said annuity of £150 and yearly sum of £70 to the said Mary Ann Burn by purchasing at his and their own expense, from any respectable insurance company to be selected and approved of by her, an annuity payable to the said Mary Ann Burn in the terms before provided, equal in amount to the said annuity of £150 and yearly sum of £70 hereinbefore provided to her; and upon the purchase being effected and completed to her satisfaction, and the writs securing the same being delivered to her, she binds herself and the trustees after named, but at the expense of the said James Mackintosh and his foresaids, to discharge and disburden the several subjects and others before mentioned and described of the said provision secured over them as aforesaid."

In January 1867 Mrs Mackintosh was infeft in the estate of Lamancha on the contract of marriage. In February 1869 Mr Mackintosh died without having exercised the said option.

It appears from the special case that the rental of the entailed estate was about £700 per annum, and that the public, parochial, and other burdens payable by the proprietor amounted to £100 per annum. It also appears that the general trust-estate comprehended a house in Charlotte Square, Edinburgh, heritable and personal estate in Calcutta of considerable amount, and personal estate in Britain exceeding £27,000; and that the two-sixths of his estate falling to the share of each of his daughters will be "more than £10,000, and less than £20,000."

The heir of entail now claims to be relieved of the annuities by the general trust-estate. I am of opinion that he is entitled to be so relieved.

The clause in the entail was certainly intended to impose an obligation somewhere to free and relieve the estate of Lamancha of all Mr Mackintosh's debts and obligations, and I have no doubt that it was meant to extend to future debts and obligations. The words are quite general, and the Judges in the Court below appear not to have attached importance to the circumstance that the obligation in question was contracted at a date subsequent to the entail. Indeed it does not appear, and is not alleged, that at the date of the entail there existed any debt or obligation, and if there was none the clause must have been intended to apply to future debts and obligations. The purpose of it appears to have been that the estate of Lamancha should be launched under the entail free from debt; and the conception of the clause appears to have been, not with the view of effect being given to the ordinary rule of law as between heir and executor, but with the view of making a special arrangement because of the entail. The ordinary rule of law as between heir and executor in regard to the incidence of debt is founded on the presumption that the heritage is capable of bearing all the burdens incident to it. The heir who succeeds to it, if he is not fettered, can deal with it as he pleases, and turn it to the best account for his own relief. But if he is only to be put into possession under the fetters of an entail his condition will be materially different, and if the entailer intends that the estate he is entailing should be started free from debt it is quite reasonable that he should make provision for doing so out of his other means, and the more so if his other means are ample, as in this case they are said to be.

The obligation to free and relieve Lamancha was imposed by the entailer on himself, his heirs, executors, and representatives whatsoever. That appears to have been with him a primary or leading object. If he had himself redeemed the obligation he must have done so out of his general estate, which would have

been to that extent diminished. Not having done so, on what part of his estate did he intend that the obligation to relieve should devolve. It could not be on the estate of Lamancha, because that was the estate to be relieved. His only other estate was the general estate; therefore, if the relief was to be given by him or by his estate it was to be given out of his general estate.

It appears to me that this view is supported by the terms of the trust-settlement. It is true that in the general case a direction to trustees in a *mortis causa* trust-deed to pay the debts of the deceased does not of itself imply any deviation from the general rule of law as to the incidence of heritable and moveable debts. But an expressed intention to start an incipient entail, or to add other lands to an existing entail, introduces another element, and gives rise to other considerations, leading to the inference that the testator intended the lands so dealt with to be cleared of debt, even if there was no express declaration to that effect, as the continued existence of debt on these lands might result in defeating the object of the entail.

Here there is the declaration, or rather the obligation, of the testator himself in the deed of entail, which is referred to in the trust-deed as forming part of his settlement, and he directs his trustees to pay all his debts, to record the entail, and to put the heir into possession of Lamancha under and in virtue of the deed of entail.

Taking these two deeds together, I do not doubt that Mr Mackintosh's intention was that the estate of Lamancha should be freed and relieved out of his general estate, unless there are special grounds for holding that the particular annuities in question are not within the range of the debts and obligations to which the clause in the entail has reference.

Up to the time when the trust-settlement was executed there did not, so far as we see, exist any debt that would have affected Lamancha according to the ordinary rule of law as between heir and executor. But then came the marriage-contract, by which a security over Lamancha was given to the lady for the annuities in question, and by the same deed Mr Mackintosh reserved to himself, his heirs, executors, and successors, the option and power to purchase for the lady, from any respectable insurance company to be approved of by her, an annuity equal to those in question, and she bound herself thereupon to discharge the security over Lamancha, and disburden that estate thereof.

Upon this deed several observations have been made. First, it has been observed that the burden it imposed was subsequent to the date of the entail. I have already shewn that this circumstance is immaterial, and may be dismissed. Secondly, an observation to which some importance appears to have been attached in the Court below was, that as Mr Mackintosh was wealthy and could have provided for his widow otherwise, it is difficult to understand why he should have imposed the burden on the entailed estate if he intended it to be borne by his general estate. I am not much moved by that observation. It may be that Mr Mackintosh could have provided for his widow by placing funds in the hands of trustees for that purpose, or by coming under obligation to do so, or to provide her with a jointure. But we do not know how his funds were employed at that time. He may not have been disposed to disturb his investments, or to lock up funds in the hands of his trustees. The lady or her advisers may have preferred immediate substantial security over Lamancha to an obligation *de futuro* to be implemented out of floating capital. Thirdly, it was contended, and that appears to have been the main ground of judgment in the Court below, that the annuities secured over Lamancha are not a debt, or at least are not a debt in the sense of the clause in the entail; that they are not a capital sum due which might be at once paid off, but are a continuous security over the rents for the termly annuities as they fall due, and similar to the right which the present or future heirs of entail would have to make provision for their widows under the Aberdeen Act, or under the powers given by the entail, which are similar to those of the Aberdeen Act. I am not satisfied with that view. The clause of relief in the entail applies to "all my debts and obligations." I am of opinion that these annuities constitute a debt in the ordinary sense of the word. They are a debt in which the widow is the creditor, and the representatives of Mr

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Mackintosh are the debtors, and for payment of which the estate of Lamancha may be attached unless the relief sought be given. But whatever ingenious criticism may be made on the word "debts," it is impossible to escape the generality of the word "obligations." Neither can the obligation be assimilated to a provision under the Aberdeen Act. It does not profess to be anything of the kind. It has none of the requisite conditions or limitations as to amount or liability or mode of recovery. The only similarity is that it is a provision for a widow. Nor does the circumstance that it is an obligation for an annuity, and not for a capital sum, appear to me to raise any practical difficulty. The clause in the marriage-contract provided for and sufficiently meets any difficulty of that kind that might have been raised. It reserves the power to relieve the lands, and prescribes the mode. The only question is as to the incidence of the obligation, and I would here again observe that at the very moment of imposing the burden on Lamancha Mr Mackintosh had in contemplation the removal of it by himself or his representatives, and must have intended the relief to come, not out of Lamancha, but out of his other means—that is to say, out of the general estate. The respondents say that they cannot purchase an annuity, as no direct power to do so is conferred on them by the trust-deed. But if I am right in holding that the clause of relief in the entail was intended to attach to the general estate, it follows that the power reserved in the marriage-contract may be exercised by the respondents as the trustees of that estate. They also say that they have no interest in purchasing an annuity, which would be an expensive proceeding. The same observation would apply to the appellant. But if the obligation to relieve Lamancha has devolved on the general estate, the respondents must give the relief in the mode provided, unless they can find a less expensive and equally effectual mode of doing so.

For these reasons, I am of opinion that the interlocutor of the Court of Session, of date 2d March 1870, in so far as appealed from, should be reversed, and that judgment should be pronounced in terms of the third of the alternative forms set forth in the joint case, in so far as regards the subject-matter of this appeal. If your Lordships concur in the view that I have expressed it may be a question whether there ought not to be a remit to the Court of Session, because a decerniture may be required upon which proceedings may be taken. Perhaps the parties will consider that.

Lord Chelmsford.—My Lords, I agree in the motion that has been made.

"It is ordered and adjudged . . . that the said interlocutor . . . of the First Division of 2d March 1870, in so far as complained of in the said appeal, be and the same is hereby reversed; and this House doth find and declare that the appellant, James Mackintosh, as heir of entail of the estate of Grange called Romanno Grange or Lamancha, is entitled to repetition of" . . . (sums paid by him to Mrs Mackintosh, widow of the late James Mackintosh, on account of her annuity and additional annuity), "out of the estate falling under the last will and settlement of the said deceased James Mackintosh, . . . and to be relieved out of the last mentioned estate of all payments to accrue due hereafter in respect of said annuities; and further, that the executors and trustees of the said deceased James Mackintosh are bound, at the expense of the said last mentioned estate, to obtain from Mrs Mackintosh, and register in the Register of Sasines, a proper and valid discharge and renunciation of said annuities in favour of Mr James Mackintosh and the heirs of entail, and disburdening the same of the said annuities"—[*Here followed corresponding decernitures*]—"and cause remitted to the Court of Session to do herein as shall be just, and consistent with these findings and declarations, and this judgment."

Tatham & Proctor—T. & R. B. Ranken, W.S.—Loch & Maclaurin, Westminster—Lindsay, Howe, & Co., W.S.

No. 4.

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Glendonwyn v. Gordon, &c.

WILLIAM R. D. SCOTT GLENDONWYN, Appellant (Pursuer).—*Lord-Adv. Young—Pearson, Q.C.*
SIR ROBERT GLENDONWYN GORDON, BART., and OTHERS, Respondents (Defenders).—*Sol-Gen. Jessel—Asher.*

General Disposition—Special Destination—Presumption—Entail—Institute.—A lady in possession of an entailed estate, to which she had succeeded as institute, executed a disposition and settlement whereby she specially conveyed to her nephew certain lands of which she was the fee-simple proprietrix, and generally her whole estates, heritable and moveable. After her death it was ascertained that the fettering clauses of the entail were directed merely against "the heirs of entail or substitutes" therein mentioned, and an action was raised by her disponee to have it declared that, as institute, she was not bound by the fetters, but was absolute fiar of the entailed estate, and that the same was carried to him by the general conveyance in her disposition and settlement. *Held* (*aff.* judgment of Court of Session) (1) that the fettering clauses of the entail did not include the institute, and that, as fiar, she had power to dispose of the estate; but (2) that the general conveyance in her settlement did not carry the entailed lands.

Opinion (*per* Lord Chancellor) that general words, purporting to dispose of a man's whole property, in a will or *mortis causa* deed, are (unless there be something in the instrument itself to control that presumption) to be understood as applicable only to property the succession to which, after the death of the testator, is not already regulated by a special destination to a particular class of heirs in a prior instrument, either made by the settlor himself, or under which he holds.

Observations on the cases of Campbell v. Campbell, H.L., M. 14,855, and 1 Pat. 343; Farquharson v. Farquharson, M. 2290; Thoms v. Thoms, *ante*, vol. vi. p. 704.

Observations (*per* Lord Chancellor) on the admissibility of extrinsic evidence by the law of Scotland in the construction of testamentary deeds.

Observed (*per* Lord Colonsay) that from the cases on the effect of a general disposition in evacuating or superseding prior destinations of heritage the following inferences are deducible:—(1) That in determining what effect should be given to the words of general disposition the question has always been treated as one of presumption or presumed intention; (2) that a general disposition *mortis causa* does not derogate from a prior special destination, unless it be made clear that it was intended so to do; (3) that in dealing with such cases the Court has taken into consideration circumstances calculated to throw light on the intention or purpose of the testator, whether found within the deed or collected from external sources.

Question (*per* Lord Colonsay) whether a letter written by a testator after the date of his settlement may be referred to as extrinsic evidence in its construction.

(IN the Court of Session July 20, 1870, *ante*, vol. viii. 1075.)

Ld. Chancellor (Selborne). Ld. Chelmsford. Ld. Colonsay.

William Glendonwyn, proprietor of the estate of Parton, in Kircudbright, had three daughters, viz., (1) Mary Lucy Elizabeth, married to Sir James Gordon of Letterfourie; (2) Xaveria, who was never married; and (3) Ismene, who was married to Mr William Scott.

In 1809 William Glendonwyn sold his estates to his son-in-law, Mr Scott, but after his death, which happened shortly afterwards, his daughter, Lady Gordon, brought an action to reduce the sale, in which, however, she proved unsuccessful. Mr Scott's affairs subsequently became greatly embarrassed, and the estate of Parton was brought to a judicial sale in three lots viz., (1) the lands of Cowgarth and others; (2) Parton Place; (3) Boreland. The first of these lots was purchased by Mr Frederick Maxwell, who was married to a sister of Mr William Glendonwyn; and the second and third lots were acquired by Miss Xaveria Glendonwyn.

In 1821 Mr Frederick Maxwell executed a deed of entail, recorded in 1824, whereby "for certain good causes and considerations, in the event of my decease without heirs of my *own body*," he conveyed the lands of

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Cowgarth and others, which he had acquired at the judicial sale of the Parton estate, and also certain other lands which he had puchased subsequently, "to and in favour of Agnes Glendonwyn or Maxwell, my wife, in liferent, during all the days of her life, and, after her decease, to Xaveria Glendonwyn, second daughter of the deceased William Glendonwyn of Parton, and the heirs whatsoever of her body; whom failing," &c.

The first condition of the entail immediately followed the destination, and was in these terms:—"That the said Xaveria Glendonwyn, and the whole heirs of entail and substitutes above written, shall be bound and obliged to bear and retain the sirname of Glendonwyn, after their obtaining possession of the said lands and estate, in virtue hereof, along with their other sirname, arms, and designation."

This condition was followed by others, and by prohibitory, irritant, and resolutive clauses, all of which were throughout made binding "upon the heirs of entail or substitutes above specified." By the said deed the entailer resigned the lands thereby conveyed into the hands of the superiors, of whom the same were held, for new infeftment to be granted "to the said Agnes Glendonwyn or Maxwell, in liferent as aforesaid, and to the said Xaveria Glendonwyn, and the other heirs and substitutes particularly above mentioned in fee."

By the precept of sasine infeftment was directed to be given to "the said Agnes Glendonwyn or Maxwell in liferent, during all the days of her life, and after her decease to the said Xaveria Glendonwyn, and the other heirs of entail and substitutes above-named in fee."

Mr Maxwell, the entailer, died without issue in 1823. He was survived by his widow, the liferentrix under the entail, who was not infeft, but possessed the entailed lands until 1835, when she died. At her death Miss Xaveria Glendonwyn entered into possession of the estate. She was infeft in 1842, and possessed the estates until her death in 1858.

In 1834 Miss Xaveria executed a disposition and settlement, whereby she conveyd to her nephew, Frederick James Scott (son of her sister Ismene), "all and sundry lands and heritages, debts, heritable and moveable, heirship moveables, and whole goods and gear, sums of money, and effects, and, in general, my whole means and estate, heritable and moveable, of whatever nature or denomination, or wherever situated, presently belonging or which shall belong to me at the time of my death, with the whole vouchers, instructions, and conveyances of the said debts, and the writs and evidents of my said heritable estate." Then followed, "without prejudice to the said generality," a conveyance to the said Frederick James Scott of "All and Whole my estate of Parton," setting forth those parts of that estate which Miss Glendonwyn had acquired at the judicial sale above-mentioned, with a declaration that the disponee should, as a condition of the grant, assume and use the sirname, arms, and armorial bearings of Glendonwyn of Parton, and should pay all the granter's debts, &c., and certain special legacies.

Mr Frederick James Scott survived his aunt, and assumed the sirname of Glendonwyn.

In 1859 Sir Robert Glendonwyn Gordon of Letterfourie, Miss Xaveria's nephew (son of her eldest sister), and the person next called to the succession by the deed of entail of 1825, expede a service as heir of tailzie and provision to her in the entailed estates.

In 1860 Mr Frederick James Scott died intestate, leaving an only child William R. D. Scott Glendonwyn, a minor, who, with his curator, raise the present action against Sir Robert Glendonwyn Gordon, and the substitute heirs called to the succession under the foresaid deed of entail 1825, concluding to have it declared (1) that the fettering clauses of t

entail of 1823 were not directed against Miss Xaveria Glendonwyn, the institute or conditional institute, but only against the heirs of entail or substitutes; (2) that Miss Glendonwyn was the absolute fiar of the estate conveyed by the entail; (3) that by her disposition and settlement of 1834 she had conveyed the same to the pursuer's father, Frederick James Scott; and (4) that the estate should be decerned to belong to the pursuer, who was duly served nearest and lawful heir of his father. The summons also contained conclusions for reducing the service expede by the defender, Sir Robert Gordon, and for count and reckoning.

The pursuer pleaded;—(1) Under the terms of the disposition and deed of entail, dated 5th March 1821, executed by Frederick Maxwell, Esq. of Milnhead, the said Xaveria Glendonwyn was the institute or conditional institute, and the prohibitions, clauses irritant and resolutive, contained in the said entail, were not directed against and did not affect the said Xaveria Glendonwyn. (2) On a sound construction of the said deed of entail the said Xaveria Glendonwyn was not restrained from selling, alienating, or burdening the lands therein contained, or from altering the order of succession thereto, but was entitled to dispose thereof as absolute fiar. (3) By disposition and settlement executed by the said Xaveria Glendonwyn she effectually conveyed the whole of the lands and others contained in the said deed of entail to the said Frederick James Glendonwyn, and he, on surviving the said Xaveria Glendonwyn, became absolute fiar thereof; and the right thereto, and to the whole rents and profits thereof, bygone and future, is now vested in the pursuer in virtue of the writs libelled. (4) The pursuer is entitled to make up titles to the said lands and others in his person, as absolute and unconditional fiar, *omni habili modo*, and to dispose of the lands at pleasure. (5) The pursuer is entitled to reduce and set aside the decree of special service, and all other titles to the said lands made up by the defender, in respect the defender has no right to the lands, the same having been validly conveyed by the said Xaveria Glendonwyn, and the destination thereto validly evacuated.

The defenders pleaded;—(1) The pursuer has no title to sue and maintain the present action. (2) The deceased Miss Xaveria Glendonwyn succeeded to and possessed the entailed lands and estate in question under and in virtue of the disposition and deed of entail executed by Mr Frederick Maxwell, and the prohibitions, and clauses irritant and resolutive, contained therein were well and properly directed against her and the other heirs of entail, and prevented her from disponing or conveying the said estate. (3) The said entail being a valid and effectual entail in terms of the Act 1685, the said Miss Xaveria Glendonwyn was not entitled to alter the order of succession of the heirs called to the lands and estate thereby conveyed, or to alienate or convey the said lands and estates. (4) The said deed of entail was at all events a valid and effectual entail to the effect of excluding all gratuitous alienations by the said Xaveria Glendonwyn. (5) The deed of settlement said to have been executed by Miss Xaveria Glendonwyn was not intended to convey, and did not effectually convey, the said entailed lands and estate to the disponee named therein. (6) The said deed was ineffectual to alter the order of succession contained in the deed of entail under which the said entailed lands and estate were held by Miss Glendonwyn. (7) The said Xaveria Glendonwyn having, from the date of the entailer's death down to her own death, as well prior as subsequent to the date of her succession to the said entailed lands and estate, understood and believed that the same were strictly entailed, and that she was entitled to succeed to, and after her succession that she possessed the same as heiress of entail, and that upon her death they descended to the defender as next heir of entail,

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and having throughout her life dealt with the same, and acted and transacted on that footing, she neither conveyed nor intended to convey the same by the disposition and deed of settlement executed by her and founded on by the pursuer.

A great deal of correspondence and a number of deeds were produced by the defenders, with the object of shewing that Miss Glendonwyn had invariably regarded Sir Robert Gordon as the person who was entitled to succeed her as heir of entail, and that she considered herself as heiress of entail, and as having only a life interest in the entailed estate. In particular, it appeared that in the years 1850, 1851, and 1855, she had entered into transactions for borrowing money on the security of the rents of the entailed lands, and that in the bonds which she granted in security of the loans she expressly guarded herself against incurring an irritancy by contravening the prohibitions of the entail. [The terms of these deeds will be found quoted in the opinion of the Lord President.[1]]

It also appeared that in 1856 Miss Glendonwyn became a party to a deed of translation of a debt due by the entailer, which she recognised as being a heritable burden on the estate.

The Lord Ordinary pronounced this interlocutor:—"Finds, 1st, That under a sound construction of the disposition and deed of entail dated 5th March 1821, which was executed by the deceased Frederick Maxwell, and is set forth and referred to in the first four articles of the revised condescendence, the respective prohibitions therein contained against alteration of the order of succession, and against alienation and contraction of debt, are not directed against or applicable to Xaveria Glendonwyn, who is named in the record, and who was the institute in the fee of the lands and estate disponed under the said disposition and deed of entail, and that the said prohibitions are not so framed as, in point of law, to operate as effectual prohibitions against, or as a bar to the exercise by her, of the ordinary powers of alienation and disposition competent to the proprietor of lands, or other the like heritable subjects, held under a fee-simple and unlimited title; 2d, that the defenders have failed to prove facts relevant and sufficient to establish that it was not the intention of the said Xaveria Glendonwyn to convey to and in favour of the now deceased Frederick James Scott, the father of the pursuer, the said lands and estate by and under the disposition and settlement executed by her, which is dated on the 22d February 1834, and of which No. 8 of process is an extract; and 3dly, With reference to the preceding findings, sustains the first five pleas in law set forth on the part of the pursuer, and repels the first seven pleas for the defenders; and appoints the cause to be enrolled that parties may be heard as to the application of the present interlocutor to the conclusions of the summons, and in regard to further procedure in the action, reserving meanwhile the matter of expenses."

The First Division, on 19th July 1870, pronounced the following interlocutor:—"Recall the interlocutor, sustain the 5th plea in law for the defenders, and in respect thereof assoilzie the defenders," &c.

Mr Glendonwyn appealed.[2]

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[1] *Ante*, vol. viii. 1080.

[2] *On Validity of Entail.*—Erskine v. Hay Balfour, Feb. 14, 1758, M. 4406 and 15,461; Edmonstone v. Edmonstone, Nov. 24, 1769, M. 4409, H. L. 2 Pat. App. 255.

On General Conveyance.—Thoms v. Thoms, March 30, 1868, *ante*, vol. vi. 704; Catton v. Mackenzie, July 20, 1870, *ante*, vol. viii. 1049; Leitch v. Leitch, 3 W. and S. 366; Hyslop v. Maxwell, Feb. 11, 1834, 12 S. 413; Thomson v. Lyell, Nov. 18, 1836, 15 S. 37; Weir v. Steel, Feb. 7, 1745, M. 11,359, and

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LORD COLONSAY.—My Lords, in the year 1809 William Glendonwyn sold his estate of Parton to William Scott, who was the husband of Mr Glendonwyn's youngest daughter. The affairs of William Scott having become embarrassed, the estate of Parton was in 1819 judicially exposed to sale in three lots. One of these, called the Cowgarth lot, was purchased by Frederick Maxwell, who was married to a sister of William Glendonwyn. Another, called the Parton Place lot, was purchased by Xaveria Glendonwyn, who was the second daughter of William Glendonwyn. She also acquired the third lot called the Boreland lot.

On the 5th of March 1821 Frederick Maxwell executed a deed of entail of the Cowgarth lot and other lands belonging to him, forming together the Cowgarth estate. By that deed he disponed the estate to his wife in liferent, and after her decease to Xaveria Glendonwyn and the heirs whatsoever of her body; whom failing, to the second son of Sir James Gordon of Letterfourie by his then spouse, who was the elder sister of Xaveria, and the heirs whatsoever of his body; whom failing, to the immediate younger sons of the said Sir James Gordon by his said spouse, in their order of seniority, and the respective heirs whatsoever of their bodies; whom failing, to the daughters of Sir James and his said spouse, and the heirs whatsoever of their bodies; whom failing, to Ismene Glendonwyn, spouse of William Scott formerly of Parton, and the heirs whatsoever of her body; whom failing, to certain other substitutes.

In 1823 Frederick Maxwell died, and in February 1824 the entail was recorded in the Register of Tailzies on a petition by his widow, the liferentrix, who possessed the estate till 1835, when she died, and Xaveria, the institute, entered into possession, and in March 1842 completed her feudal title by taking infeftment on the deed of entail. She continued to possess the estate on that title until her death in October 1858.

In May 1859 the respondent, who was the fourth son of the foresaid Sir James Gordon, expede a special service as nearest and lawful heir of tailzie and provision in special to the deceased Xaveria in the said estate of Cowgarth. He entered into possession, and he continues to possess that estate as being heir of entail under the deed of 1821.

Xaveria left a disposition and settlement, of date 22d February 1834, whereby she disponed to and in favour of her nephew, Frederick James Scott, and his heirs and assignees whomsoever, all and sundry lands and heritages, debts, goods, gear, sums of money, and effects, and in general her whole means and estate, of whatever nature, then belonging or which should belong to her at the time of her death, "and particularly, without prejudice to the said generality," "all and whole my estate of Parton, described in the title deeds as following, viz:"—Then follows a description of the Parton Place lot, and of the Boreland lot, but no mention is made of the Cowgarth estate. In virtue of that deed Frederick James Scott entered into possession of the lands described in his aunt's settlement and of her moveable estate, and assumed the name of Glendonwyn. He died in January 1860 intestate, leaving an only child, the appellant, who was then in pupillarity.

In December 1860 the estates of the said Frederick James Scott Glendonwyn were sequestrated, and a trustee was appointed. Funds having been realised sufficient to satisfy the creditors, the sequestrated estates, so far as not realised by the trustee for payment of the debts, were in August 1862 restored to the appellant as heir of his father. It does not appear that in these proceedings any

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Elchies' Decisions, Presumption, No. 17; Farquharson v. Farquharson, March 2, 1756, M. 2290; Hepburn v. Hepburn, Feb. 10, 1860, 22 D. 730; Collow's Trustees v. Connel, *ante*, vol. iv. 465.

On Extrinsic Evidence.—Wigram on Wills, 4th ed. p. 6; Catton v. Mackenzie, *ante*, vol. viii. 1049; Farquharson v. Farquharson, *supra;* Campbell v. Campbell, 1740, M. 14,855, 1 Pat. 343; Abbot v. Middleton, 7 H. L. Ca. 68; Warburton v. Loveland, 1 Hud. and Brooke, 648; Doe v. Jessep, 12 East. 293; Gundry v. Pinniger, 1 De Gex, Mac. and Gordon, 502; Mattison v. Hart, 14 Com. Bench, 385; Gether v. Cupper, 24 L. J. C. P. 71; Cases in M. *voce* Presumption; Jarman on Wills, 396 and 400; Dickson on Evidence, sec. 151.

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mention was made of the estate of Cowgarth, but there can be no doubt that whatever right the appellant's father had to that estate now belongs to the appellant. In May 1865 the appellant, with consent of his curators, raised the present action of declarator and reduction against the respondent and certain other persons, substitutes called to the succession by the entail of 1821. The object of the action is to have it declared that the fetters of the entail of 1821 did not apply to Xaveria, the institute, that she was therefore unlimited owner, having full power to dispose of the estate of Cowgarth, and that she did dispose of it effectually by her disposition and settlement in favour of the appellant's father. Reductive conclusions are added for the purpose of setting aside the title made up by the respondent, if that be necessary. There are also subsidiary conclusions for accounting and payment.

The grounds of defence maintained against the declaratory conclusions are in substance, 1st, That the fetters of the entail were effectually directed against Xaveria, and prevented her from disponing or conveying the estate; 2d, That the deed of settlement executed by her was not intended to convey, and did not effectually convey, the entailed lands and estate to the disponee therein named.

As regards the first of these grounds of defence I am of opinion that it cannot be sustained. Xaveria was the institute or direct disponee as distinguished from the "heirs of entail and substitutes." Ever since the case of Edmonstone v. Edmonstone, decided in the House of Lords, 15th April 1771, it has been held as settled that where the fettering clauses in a strict entail are directed against the heirs of entail merely these terms do not include the institute, as he is a disponee and not an heir of entail, and ought not by implication from other parts of the deed of entail to be construed within the fetters laid only on the heirs of entail. In the present case the fetters, that is to say, the prohibitory, irritant, and resolutive clauses, are in terms laid on the "heirs of entail and substitutes" merely; and consequently the rule established in the case of Edmonstone applies.

It is true that in other parts of the deed, such as the obligation to infeft, and the procuratory of resignation, and the precept of sasine, we find such expressions as "the said Xaveria Glendonwyn and the other heirs of tailzie above named," or, "and the other heirs and substitutes above mentioned," from which it has been argued that, according to a sound construction af the deed, Xaveria was to be regarded as one of the heirs of entail, and consequently not exempt from the fetters which are laid on the whole heirs of entail. But, in the first place, the clauses referred to are not any of the fettering clauses,—they are merely part of the machinery provided for enabling any of the parties favoured by the deed to take infeftment, and, in the second place, to hold that such loose expressions could have the effect of converting the institute, who is a direct disponee, into an heir of entail or substitute, or of extending to her by inference the fetters which, according to the terms of the fettering clauses themselves, apply only to the heirs of entail or substitute, would be to do violence to the principle of the judgment of the House of Lords in the case of Edmonstone, and of several cases subsequently decided on the same principle.

The second ground of defence raises a question of a totally different kind, and as to which we have not so much direct guidance from authority. It requires very careful consideration. It assumes that Xaveria was not under the fetters of the entail, and consequently had full power over the estate of Cowgarth, and could give it to whom she pleased. Did she, by the general words in her settlement of 1834, give to Frederick James Scott a right to that estate to the exclusion of the heir of the existing destination in the deed of entail by which she, as institute, got and held the estate? Was that destination thereby evacuated, and the estates of Cowgarth put into a different line of descent? That depends on the effect to be given to a clause of general disposition occurring in such a deed of settlement when brought into competition with an earlier deed containing a special destination of a particular estate, and that again may depend more or less on the circumstances of the case, the rule of the law of Scotland in regard to heritable property being that a destination once made is not easily presumed to be altered or innovated.

There are two classes of cases in which the question may arise. One class of

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cases is where a person having made a deed containing a special destination of a particular estate, or having chosen to take a conveyance of an estate to himself with a special destination, makes a disposition and settlement in general terms of his whole means and estate, heritable and moveable, with a different destination, but without expressly revoking or altering the first deed, or making mention of it, or of the estate with which it dealt. Of this class there are several cases reported, mostly under the head "Presumption," some of which are referred to in the papers in this case. I think that out of the whole series of cases of this class, reported during the last two centuries or more, the following inferences are deducible:—(1) That in determining what effect should be given to the words of general disposition the question has always been treated as one of presumption or presumed intention; (2) that a general disposition *mortis causa* does not derogate from a prior special destination, unless it be made clear that it was intended so to do; (3) that in dealing with such cases the Court has taken into consideration circumstances calculated to throw light on the intention or purpose of the testator, whether found within the deed or collected from external sources.

I may notice that in this class of cases there is this element, that the fact of the prior deed having been found in the repositories of the deceased without having been expressly revoked or altered may be regarded as favouring a presumption that, although the general disposition was expressed in terms which, according to their natural and ordinary meaning, would comprehend the particular property which formed the subject of the prior deed, such was not the purpose for which they were used, or the effect the testator intended should be given to them, but, on the contrary, that notwithstanding the unlimited terms of the later general disposition his intention was that the prior deed should nevertheless subsist and be taken as part of his settlement to the effect of regulating the succession to the particular property therein contained. But it does not appear that the attention of the Court was confined to that view as necessarily conclusive, or that external circumstances were excluded from consideration for the purpose of rebutting or supporting the legal presumption that the general disposition was not intended to derogate from the prior destination.

Another class of cases is that to which the present may be said to belong, viz., —where the person who made the general disposition and settlement was not the maker of the prior deed containing the special destination of the particular estate, but had unlimited power to evacuate the destination, and deal with the estate at pleasure. The cases of this class are less numerous than those of the former class, probably because parties intending to evacuate the destination of the deed under which the estate had come to them adopted the more appropriate and unquestionable mode of doing so. But in this class also, the cases that have occurred have been treated as questions of presumption or presumed intention. There has indeed of late been difference of opinion as to whether the mere existence of the previous destination unaltered does, without aid from other circumstances, raise in this class of cases a presumption that the general words were not intended to apply to the particular estate so previously destined. But there does not appear ever to have been any difference of opinion as to the competency of resorting to external circumstances, going to shew that the general disposition, notwithstanding the comprehensiveness of the language, was not meant or intended to displace the prior special destination.

In the case of Campbell v. Campbell, decided in the Court of Session in 1740, and in the House of Lords in 1743 (1 Paton, 343), two questions were raised. Both are reported in the second volume of Lord Kames's remarkable decisions, but under different heads, one under the head "Substitute and Conditional Institute," the other under the head "Presumption." The latter is that which relates to the question raised in the present case, viz., the effect to be given to a general disposition in competition with a special destination by the party from whom the property came to the maker of the general disposition. The Court of Session decided that the general disposition did not destroy the special destination, and that judgment was affirmed by the House of Lords. One ground appears to have been that the general *disposition* was made before the maker

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of it had right to the estate in question, and that he died before he could have been aware that such right had devolved upon him. It was not, however, disputed that the words of the general disposition were sufficient to comprehend the estate, and must have carried it if there had not been a special destination of it. The estate there in question consisted of moveable property, and it appears to have been suggested about half a century afterwards that the judgment may have proceeded on the ground that the right to the moveables had not vested in the maker of the general disposition, as he had not expede confirmation. But with all respect for the quarter from whence that suggestion is said to have come I cannot accept it as satisfactory. It is not borne out by the report of the case in the printed papers; on the contrary, it appears from these that the right was assumed to have vested; nor is that wonderful, seeing that the will which contained the destination was itself a general settlement, and at that time, or until 1784, it had not been decided that a right to moveables under a general disposition required confirmation any more than a special legacy. The second reason in the paper for the respondent in the case of Campbell brings out the point that was really in controversy, and was decided against the general disponee on this branch of the case.

The point again came up in the case of Farquharson (6 Paton, 724), and there also the decision was against the party who claimed under the general disposition. The words of the general disposition were, as indeed they always are, sufficiently comprehensive to embrace everything if so intended. But it was maintained that they were not intended to apply to the particular estates in question, and in support of that contention various pregnant external circumstances, including actings of the party himself with reference to the estates in question and other estates, were founded on as sufficient to satisfy the Court that the general words should not be read in the broad sense in which perhaps they might have been read if there had been no such light to guide the Court.

The point is said to have come up again in the case of Leitch (3 Wilson and Shaw, 366). But that it really did so has been questioned by high authority, and upon grounds that have not been met. The circumstances of the case were somewhat involved, and the main controversy was certainly not upon the point now under consideration, but upon the question whether any right in the fee of the estate of Kilinerdinny vested in Andrew Leitch during the incumbency of a liferentrix whom he had predeceased. The estate was held under a trust-deed for behoof of a liferentrix and certain parties *successivè*, conditional institutes, in whose favour the trustees were to denude in certain events. The trust-deed was so peculiar, and so inartistically framed, that one of the Judges declared he had never seen the like of it. On the part of the general disponees of Andrew Leitch it was contended that Andrew was the institute for whose behoof the trustees held the estate, and in whom the fee had vested, although they could not give him the beneficial enjoyment during the incumbency of the liferentrix. On the other hand it was keenly contended that no right had vested in Andrew, and consequently that his general disposition could not confer any right on his disponees. After much discussion, and much difference of opinion on the bench, it was decided that a right to the fee had vested in Andrew. That point having been settled, judgment was given in favour of his disponees, and apparently without further contention or observation in the Court below. It does, however, appear that in the House of Lords, besides the main subject of controversy already mentioned, a secondary reason of appeal stated was that "Andrew's general conveyance not referring specifically to the lands of Kilinerdinny cannot exclude the subsequent substitution in John's disposition of that estate." It also appears that the point so stated was not in that case thought to be deserving of much attention.

It has, however, been observed by Judges of high authority that the circumstances of that case are not such as would have admitted of the application of the principle on which alone such a plea could have been maintained, inasmuch as the import of the direction in the trust-deed was to create not an entail or substitution of heirs, but merely a series of conditional institutions; that the fee which was held to have vested in Andrew was an unqualified fee with no

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substitution in favour of any other person, but only a conditional institution; that the succession having come to him, he had a *jus crediti* which he could assign, or which, if he had died intestate, would have gone to his own heirs-at-law, and not to any conditional institute under the deed. This may well account for the zeal with which the question of vesting was contested, and the subsequent apparent indifference or disregard with which the secondary plea was treated, notwithstanding the previous cases in which it had been successfully maintained.

In other respects that case differed from the present. In the first place, Andrew Leitch had no feudal investiture in the estate; he had a personal right, or *jus crediti*, entitling him to require the trustees of John to denude in his favour in terms of the trust-deed. The appropriate mode of transmitting that species of right was by assignation or disposition and assignation. He could not have granted warrant for feudal investiture. Secondly, there was no suggestion of any circumstance to indicate that the words of the general disposition were not intended to be read and applied in their most comprehensive sense.

The recent case of Thoms v. Thoms in the Court of Session, referred to by the appellant, is the most favourable to this view, and it comes nearest to the present case, in this respect, that the maker of the general disposition was the institute in a deed of entail the fetters of which did not apply to him. That case was fully considered by the whole Court, and the judgment pronounced in accordance with the views of a large majority gave effect to the general disposition. That judgment appears to have proceeded on the ground that in this class of cases the comprehensive terms of the general disposition were to be held presumably as superseding or displacing the previous destination in the absence of any circumstances leading satisfactorily to the conclusion that they were not so intended. No such circumstances, either within the general disposition, or without it, were substantiated in the case of Thoms. The substitute heir of entail limited his proof to the deeds themselves, and to a letter which he tendered, but which does not appear to have been admitted, or at all conclusive if it had been admissible. But even the Judges composing the majority recognised as a general principle that each case is circumstantial, and "ruled by its own specialties," and one of them illustrated the principle by reference to the case of Farquharson, already noticed. That principle was afterwards acted upon in the present case by three of the Judges who composed the majority in the case of Thoms.

The case of Thoms is, I believe, the first case in which it has been held that a general disposition was to be presumed to be in derogation of a destination by substitution contained in the deed under which the particular estate had been acquired and possessed, unless the case of Leitch was a decision to that effect, which I do not think it was. The judgment in the case of Thoms was not appealed, and is not binding on this House, and I may, without disrespect to the learned Judges who composed the majority in that case, be permitted to doubt the soundness of the proposition that in this class of cases the general disposition is to be held presumably as superseding or displacing the previous destination. Without at present discussing that debateable proposition, it not being in my view of this case necessary that I should do so, but guarding myself against being held as assenting to it, I go on to observe that the judgment of the majority in the case of Thoms was given subject to this necessary qualification, that reference might be made to circumstances outside the deed to rebut the presumption, and that each case is circumstantial, and to be ruled by its own specialties. In the case of Thoms there were no circumstances or specialties, and judgment went in favour of the general disponee. The present case is in that respect different. There are circumstances and specialties which have been held sufficient to rebut the supposed presumption, and judgment has gone against the general disponee. In that view the two decisions are reconcileable, but upon a principle which makes it necessary to consider the circumstances to which effect has been given.

In my opinion the circumstances in this case that may be legitimately referred to are quite sufficient to rebut the *supposed presumption*, and to shew that the

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general clause in Xaveria's disposition was not meant to include the estate of Cowgarth, or to disturb the course of succession prescribed by the entail of that estate. I have no doubt that for this purpose her mode of dealing with the estate of Cowgarth may legitimately be referred to; and I think that in that alone, apart from everything else, we have enough to shew clearly that it was not her meaning or intention that the general clause should apply to that estate. In the first place, she not only did not convey it formally as she did the other two lots, but she did not even mention it by name in any *mortis causa* deed, as she might naturally have been expected to do in reference to an estate of so much importance. That is itself significant. But, secondly, after she had made her general settlement, and down to within a comparatively short period of her death, she, in various matters of importance, in formal deeds, dealt with that estate as one which, in her view, and according to her own understanding of her settlement, was not to go to her general disponee, but was to continue under the existing destination in the line of descent pointed out by the entail. That I hold to be beyond question, and there is no reason to suppose or ground for conjecture that her mind ever underwent any change on that subject. Whether she believed she had no power to take the estate out of the entail, or believed that she had such power but chose rather that it should remain within the entail, and dealt with it on that footing, is, in my opinion, of little moment, for, in either view, it is clear to me that she could not have intended that the general clause of disposition should apply to it, but must have intended the reverse. Therefore, even if it should be thought that in this class of cases the presumption is in favour of the general disponee, I think that the circumstances I have referred to are quite sufficient in this particular case to rebut the presumption.

The respondent has referred to various letters pointing in the same direction, written by Xaveria relative to the management of the estate after the date of her general settlement. I am not prepared to say that in a question of this kind no such letter can be admissible, but I think it unnecessary to go into that matter, or into an examination of the several letters to see whether any of them are admissible, as I am of opinion that the case of the respondent is made out, irrespective of the letters.

The matter of family relations has also been referred to, but I do not attach much importance to it in this case. Its features are not so distinctively marked as to impress me strongly. All that I think can be said of it is, that it harmonises with the rest of the case.

I am of opinion that the appeal should be dismissed.

Lord Chancellor.—My Lords, if the rule as to the construction of testamentary deeds is the same in Scotland as in England, viz., that the intention of the testator is to be collected solely from the words which he has used in the instrument itself, extrinsic evidence being inadmissible except for the purpose of ascertaining the subjects of which those words are properly descriptive, or the subjects to which, if the words are ambiguous or inaccurate, they may appear (after proof of the facts shewing their ambiguity or inaccuracy), to be most properly applicable, I must confess that I have very great difficulty in understanding how the operation of general words, purporting to pass everything which the settlor might be entitled to at the time of his death, can be either enlarged or limited by extrinsic evidence, tending merely to shew that the settlor did or did not know or believe that he had a disposing power over some particular property, over which he had such power, or (whether knowing or not, that he had such power), that he did or did not actually intend to pass that property by those general words.

I am bound, however, to acknowledge that evidence of this kind appears to have been received, and to have been more or less relied on, by the Court of Session, in the two cases which came to this House in Lord Hardwicke's time, Campbell v. Campbell, and Farquharson v. Farquharson; and that it was assumed, by most (if not all) of the Judges of that Court who lately decided Thoms' case, that such evidence was admissible, and might (in a case like the present) be decisive. All the authorities cited in the argument of this case are

consistent with each other, if this ground of decision be adopted. But, if this be so, the rule of law in Scotland, as to the influence of extrinsic evidence upon the construction of written instruments, differs from that of the law of England. That is a conclusion which, I confess, for my own part, I should accept with very considerable reluctance, because the rule, in this respect, of the law of England, appears to me to be a consequence flowing almost by logical necessity from another rule, common to the laws of both countries—viz., that every testamentary or *mortis causa* disposition of real estate must be made and authenticated by some instrument in writing; or, in other words, that the intention which is to receive effect must be found expressed in a written instrument. I should have thought it the sounder principle, that, subject to any limitation of their meaning afforded by the context of each particular instrument, or by any rule or presumption of law, general words in a testamentary deed ought to be applied to every subject of which, according to the true meaning of the words themselves, they are properly descriptive.

Holding these views, I should have preferred to rest my concurrence in the judgment proposed to your Lordships upon the doctrine which (if the rules of the law of Scotland for the construction of written instruments are the same as those of England), would, in my judgment, be properly deducible from the decisions of this House in Campbell v. Campbell, and Farquharson v. Farquharson, a doctrine which is not (as my noble and learned friend has shewn) really at variance with the later decision of your Lordships' House in Leitch's case, and which in Thoms' case, although not reconcileable with the opinions delivered by a large majority of the Judges of the Court of Session, was maintained by a very weighty minority. The doctrine that mere general words purporting to dispose of a man's whole property in a will or *mortis causa* deed shall (unless there be something in the instrument itself to control that presumption) be understood of property, the succession to which, after the death of the testator, is not already regulated by a special destination to a particular class of heirs in a prior instrument, either made by the settlor himself or under which he holds, and that the settlor is not, merely by the use of such general words, presumed to intend to innovate upon any such special course of succession, seems to me to be neither unreasonable nor inconvenient.

The word "revocation" or "evacuation" may not be apt to describe the effect produced by an instrument devising lands held under such a title to other persons, because (as was justly said at the bar) such an instrument would operate upon the absolute fee, legally vested in the person executing it, not by altering the special destination, but by withdrawing from it altogether the subject-matter of the settlement. If, however, substance rather than technicality is to be regarded, the analogy of revocation, properly so called, is not without a legitimate bearing on this class of cases. It is admitted that, if a special destination were contained in a prior deed (even though not strictly a *mortis causa* disposition), executed by the settlor himself, it would prevail against a subsequent disposition, by general words, of all the settlor's property, in a testamentary instrument; and it further seems to be the law of Scotland (on the ground that an intention to innovate on a special course of succession is not readily presumed), that when a reference to "heirs" is found in the dispositive words of an instrument executed by a settlor holding a particular estate, although without fetters, under a prior deed of entail (whether executed by himself or by any other person) it must, *prima facie*, be taken that the heirs intended by the later instrument are those to whom the estate would go by virtue of the destination in the earlier deed.

The doctrine mentioned by the minority of the Judges in Thoms' case seems to me to depend on the same principle; and I find it easier to suppose that this doctrine was the real foundation of the decision of your Lordships' House (under the advice of so great a Judge as Lord Hardwicke) in the two cases of Campbell and Farquharson, than to refer these decisions entirely to the weight of the extrinsic evidence which was undoubtedly received in them. But, whatever may be their true ground, I do not think it would be possible to reconcile those decisions of your Lordships' House *with a judgment* of reversal in the present

No. 4. case; and I concur in the propriety of the motion which has been made to your Lordships by my noble and and learned friend.

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LORD CHELMSFORD.—My Lords, I am of opinion that this interlocutor ought to be affirmed.

INTERLOCUTORS affirmed, and appeal dismissed, with costs.

LOCH & MACLAURIN—MACKENZIE & KERMACK, W.S.—VALPY & CHAPLIN—H. & H. TOD, W.S.

No. 5. SIR WILLIAM FORBES, Appellant (Pursuer).—*Dean of Faculty Gordon, Q.C.—J. Anderson, Q.C.*

June 17, 1873. Forbes v. Trefusis.

HON. C. J. R. TREFUSIS, Respondent (Defender).—*Lord-Adv. Young—Sol.-Gen. Jessel—Lee.*

Entail—Destination.—A deed of strict entail contained a destination to A, "and the heirs-male procreated of the marriage between A and" the entailer's daughter, "and the heirs-male of their bodies respectively; whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively; whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies respectively," &c. *Held* (*aff.* judgment of the Court of Session) that on the succession opening by the death of the eldest son of the said marriage without male issue, his only daughter, as heir whatsoever of his body, was entitled to take in preference to the next heir-male of the said marriage.

Ld. Chancellor (Selborne). Ld. Chelmsford. Ld. Colonsay.

(IN the Court of Session June 6, 1868, *ante*, vol. vi. 900.)

Sir John Stuart of Fettercairn executed in 1811 a procuratory of resignation and deed of entail whereby he bound and obliged himself, his heirs and successors whatsoever, to make due and lawful resignation of the lands and barony of Fettercairn, and others therein specified, "in favour of and for new heritable infeftment of the same to be given and granted to myself, and failing me, to the heirs-male of my body; whom failing, to Sir William Forbes, Baronet, of Pitsligo, and the heirs-male procreated of the marriage between him and the deceased Dame Williamina Stuart or Forbes, my daughter, his spouse, and the heirs-male of their bodies respectively; whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively; whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies respectively; whom failing, to John Hepburne Belsches, Esq. of Invermay, and the heirs-male of his body; whom failing, to the heirs-male of the body of the said Sir William Forbes, Bart., in any subsequent marriage; whom failing, to Sir George Abercromby, Bart., of Birkenbog, and the heirs-male of his body; whom failing, to the heirs whatsoever of the body of the said John Hepburne Belsches; whom all failing, to my own nearest heirs or assignees whatsoever, the eldest heir-female and the descendants of her body always excluding heirs-portioners, and succeeding without division throughout the whole course of succession foresaid as often as the same shall descend to females, and the daughter of the heir who shall happen to be last in possession of the lands and heritages before mentioned (whether such heir was served heir of tailie or not) succeeding always preferably to the daughter of any former heir so often as the succession through the whole course thereof shall devolve upon daughters, and which I hereby declare to be my true meaning, notwithstanding of the aforesaid general destination of heirs whatsoever."

The deed contained the usual prohibitory, irritant, and resolutive clause of a strict entail.

Sir John Stuart died in 1821 without male issue. He was survived by his son-in-law, Sir William Forbes, who died in 1828 without having completed a title to the entailed estate, and who left three sons born of the marriage between him and the entailer's daughter—viz. (1) Sir John Hepburn *Stuart Forbes*; (2) Charles Hay Forbes; (3) James David Forbes.

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On the death of Sir William, his son, Sir John H. Stuart Forbes, in accordance with the destination in his grandfather's deed of 1811, succeeded to the entailed estates, and completed a title thereto.

Sir John died 1866, leaving an only child, Lady Clinton, who, as heir of tailzie and provision to her father, completed a title to the estate, which was now challenged in an action of reduction and declarator at the instance of her cousin, the eldest son of Charles Hay Forbes, who was next brother to Lady Clinton's father.

The pursuer pleaded;—(4) By the entail of 1811 heirs-male of the bodies of heirs-male of the marriage of Sir William and Dame Williamina Forbes are entitled to succeed to the lands and estate thereby conveyed in preference to heirs-male or heirs whatsoever either of the said Sir William Forbes or of any subsequent heir of entail.

On 4th June 1867 the Lord Ordinary (Jerviswoode) pronounced an interlocutor by which he sustained, *inter alia*, the pursuer's fourth plea, and reduced the defender's title.

The defender reclaimed. The case was first heard before the First Division, and afterwards before the First Division with three Judges of the Second Division. The Court unanimously recalled the Lord Ordinary's interlocutor, and assoilzied the defender.

The pursuer appealed.

An objection was taken to the competency of the appeal under 6 Geo. IV. 120, sec. 25, which provides that "the decrees or orders of the Court of Session shall be final, and not subject to be complained of by appeal to the House of Lords, unless the petition of appeal shall be lodged with the Clerk of Parliament or the Clerk-Assistant within two years from the day of signing the last interlocutor appealed from, or before the end of fourteen days, to be accounted from and after the first day of the session or meeting of Parliament for the despatch of public business next ensuing the said two years: Provided always that when the person or persons entitled to appeal shall be out of the kingdom of Great Britain and Ireland it shall be competent for him or them to enter an appeal at any time within five years from the date of the last interlocutor, if he or they shall remain abroad so long, or within two years from the time of coming into Great Britain or Ireland, the time allowed to such person or persons for lodging his or her appeal in no case on account of mere absence exceeding the foresaid space of five years, together with the space that may elapse before the end of the fourteenth day from and after the session and meeting of Parliament next after the expiration of the said five years." The petition of appeal was presented on 25th March 1872, and on 23d April the respondent petitioned that it should not be received. This last petition was referred to the appeal committee, which met on the 24th day of April 1872, when the appellant verified the fact of his absence in New Zealand by the affidavits of Mrs Stuart Forbes, his mother, and Mrs Traill, his sister. The fact of the appellant's absence was not disputed by the respondent before the appeal committee, but he contended that his mandatary being sisted as a party became his representative, and that the case was thus brought within the first paragraph of the 25th section of the Act relative to parties in the kingdom, and the other provision relative to appeals by parties abroad was displaced. The appeal committee reported that the petition of appeal ought to be received, but that the respondent should have liberty to raise this question of competency at the hearing. The appeal was accordingly received, and the usual order made on the respondent to answer.

On the question of the competency of the appeal the respondent in his case argued;—The mandatary *is a party, and* a necessary party, to the

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suit, and also to this appeal. The parties who answer to the description of the "person or persons entitled to appeal" are Sir William Forbes and his mandatary; and to bring them within the proviso applicable to persons out of the kingdom they must both have been in that situation. Sir William Forbes and his mandatary, although two persons, form but one party to the suit, and represent but one interest. That interest is not only one but indivisible, and was fully represented in this country by the mandatary. And as he who represented that interest before the Court has been present throughout, it seems impossible to hold in this case that the "persons entitled to appeal" can claim the privilege of absence from the kingdom.

Further, even assuming that Sir William Forbes had a separate right of appeal, it seems fatal to his claim for an extended period that, while personally absent, he was constructively present. To entitle a party to the privileges of absence he must have been, not merely personally, but as a party to the cause, "out of the kingdom." This cannot be said of Sir William Forbes. If he founds on his bodily absence, then he is not by himself a person entitled to appeal. He cannot take a step in Court without his mandatary. If, on the other hand, he refers to the spirit and meaning of the Act, and pleads his right as the party substantially interested in the suit, it is fair to inquire whether, in his character of pursuer of the action, he has been absent from the kingdom. So far as the spirit and meaning of the statute are the test he seems to have been throughout present by his mandatary. To allow this would practically enable any party to obtain latitude of five years for appeal to the House of Lords, simply by going out of the country and suing by a mandatary.

The appellant in the appeal case argued;—(1) As to his competency of the appeal—A mandatary is appointed merely to secure the opposite party's costs.[1] (2) As to the merits of the appeal—The clear meaning of the destination is to call next after Sir William Forbes the heirs-male of his body by his marriage with the entailer's daughter; and on their entire failure, but only in that event, the heirs-female or heirs whatsoever of the bodies of these heirs-male. Had the entailer intended that each of the sons of Sir William Forbes should be instituted as the root of an independent stirps, and that the limitation, should have the same effect as if each son had been called by his name with limitation to the heirs-male and female of his body, apt and familiar words might easily, and would undoubtedly, have been used to express it. But, for the sake of argument, let it be assumed that the effect of the clause was as the Court have found. Be it that the introductory limitation was equivalent to a limitation to "the first and other sons," how do their Lordships get rid of the words of inheritance which follow, viz., "the heirs-male of their bodies respectively?" The Court altogether ignore the word "male." They read the substitution as if it were "the first and other sons of the marriage, and the heirs-general of their bodies;" because a limitation to heirs-male and female of the body is precisely the same as a limitation to heirs of the body, or heirs whatsoever of the body. If the first son died, whether in his father's lifetime or not, leaving a daughter, and survived by the other sons, the daughter would, on the reasoning of the Court below, take, to the exclusion of the

[1] Gordon v. Gordon, Dec. 11, 1823, 2 S. 572; Darling's Practice, vol. i., p. 101; Shand's Practice, vol. i., p. 154–162; Buik v. Patullo and Ramsay, March 3, 1855, 17 D. 568; Smith v. Norval, May 14, 1828, 6 S. 852; Sandilands v. Sandilands, May 31, 1848, 10 D. 1091; Caledonian Railway Co. v. Turner, Dec. 21, 1849, 12 D. 406; Cairns v. Anstruther, March 16, 1841, 2 Robinson, 29.

sons; and so would the heirs, whether male or female, of her body; in other words, instead of the descent to heirs-male of the marriage, so stringently provided for in the entail of 1811, the primary descent on the death of an eldest son leaving only a daughter would be to heirs-female of the body, because there can be no heirs-male if one female intervenes. Is not this plainly repugnant to the destination in the entail of 1811, by which the "heirs-male of the marriage" are called as a class, and "the heirs whatsoever" are likewise called as a class, on the failure or extinction of heirs-male? Much reliance was placed by the respondent on the particle "respectively" with which the limitation ends—"to the heirs-male of their bodies respectively." This particle, however, expressed nothing more than the sentence would without it. It expressed the manner in which the succession is regulated in all cases of class succession. Had the word been absent, the class of heirs-male of the body would not have succeeded jointly, but in the legal order of primogeniture and descent. Had it been the intention of the entailer to institute the sons *seriatim* as the root of a stirps, embracing heirs-female as well as heirs-male of their bodies, in their order, he would have adopted a well-known form or style familiar to conveyancers,—a style which has frequently been used to carry such intention as this into effect. That style or form will be found in many entail cases. [1]

It is not necessary to refer to the respondent's argument.

LORD CHANCELLOR.—My Lords, in this case your Lordships have the benefit of a very careful and well-considered judgment, not only of the Judges of the First Division, but also of the consulted Judges who were called in to assist them, and the result of whose united deliberations was to produce unanimity, the Judges in the First Division having been originally divided in their opinions. I need not say, my Lords, that it would be only on very clear and strong grounds that your Lordships would be disposed to decide against that weight of authority, and against so well-considered a judgment of the Court below. Further, I may observe that the learned Lord Ordinary, who came to a different conclusion, founded it, not wholly, but certainly in a considerable degree, on a view of the construction of a part of this deed which is no longer insisted upon at the bar, and therefore it may be doubted whether, if the Lord Ordinary had had the same benefit of further consideration which the Judges of the First Division had, his Lordship might not have concurred in their opinion.

When we come to examine the deed the first thing which I think is clear—in fact it was hardly resisted by the Dean of Faculty in his reply—is this, that although "the heirs-male procreated of the marriage," and in a later place, "the heirs-female procreated of the marriage," between Sir William Forbes, Baronet, and Dame Williamina Stuart, the settlor's daughter, are words which might have extended to all the male line descending from that marriage, and all the female line also descending from that marriage, yet it appears from the context of this particular deed that that is not truly their meaning, because, having spoken of "the heirs-male procreated of the marriage" between Sir William Forbes and the settlor's daughter, the deed goes on with the words "and the heirs-male of their bodies respectively,"—plainly, therefore, speaking of the first heirs-male procreated as the authors of a stirps or line from whom other heirs-male were to

[1] Anstruther v. Anstruther, 2 Bell's App. Cases, 242; Howden v. Rocheid, Aug. 10, 1849, *ante*, vol. vii. H. L. p. 110, 1 L. R. (Sc. App.) 550; Lockhart v. Macdonald (Largie case), 1 Bell's App. 202, 2 D. 384; Sir G. Mackenzie, vol. ii, p. 484; Dallas, p. 623; Carleton Entail, Register of Tailzies, vol. xxxi., p. 116; Gordon v. Gordon, Mor. 15,386; Creditors of Carleton v. Gordon, 5 Brown's Sup. 252; Lockhart v. Gilmour, M. 15,404; Farquhar v. Farquhar, 1 D. 121; E. of Kintore v. L. Inverury, 4 Macq. 520; Edward v. Shiell and Small, Feb. 12, 1848, 10 D. 685.

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descend and to take by inheritance. That by itself, I think, unless there were other difficulties in the context which do not occur here, would be a sufficient reason for taking "heirs-male" to signify sons, and to be a word descriptive of the persons who are to be the heads of several stirpes, and the heirs-female in like manner to be daughters. And I would observe, my Lords, that although the words "procreated of the marriage" between two persons named, are words that would not necessarily exclude the ulterior descent of a remoter issue from them, yet in their strict and accurate signification they are certainly more appropriate to issue of the first generation than to any afterwards who are truly and literally procreated of other persons, though their immediate parents may be traced back to the persons named.

Having arrived at that construction of those words, one material step has been made towards the rest of the construction, because we have thereby ascertained that this testator intended several of the stirpes to take one after another in the order of primogeniture, and not a single stirps to take according to the ordinary rules of simple descent.

I cannot help observing that that construction is further illustrated by a comparison of this portion of the deed with those parts which follow it, because when the testator intended a simple destination to the heirs-male of the body of a particular person he knew how to express it, for he goes on to say, "whom failing, to John Hepburne Belsches, Esquire, of Invermay, and the heirs-male of his body, whom failing, to the heirs-male of the body of the said Sir William Forbes, Baronet, in any subsequent marriage, whom failing, to Sir George Abercromby" "and the heirs-male of his body, whom failing, to the heirs whatsoever of the body of the said John Hepburne Belsches,"—in every case expressing himself in the manner in which, if the argument for the appellant were sound, he might have been expected to express himself in this first part of the deed. For in truth the argument of the appellant is that all this amounts in the result to neither more nor less than what would have been the effect of the deed if the testator had simply said, "failing the heirs-male of his own body, to Sir William Forbes, Baronet, of Pitsligo, and the heirs-male of his body by his marriage with my daughter, whom failing to the heirs-female of the said Sir William Forbes by the same marriage." For that, of course, it would have been quite unnecessary to have used the very special language which this testator has used, dividing the stirpes instead of uniting them in one, using the word "respectively," and contrasting the language of this part of the deed in the manner in which he has contrasted it with the parts which follow.

Now, it is certainly a sound principle that when you find words used you should suppose them to be used for a purpose rather than without a purpose, and I think, therefore, that if we can place a reasonable construction upon the words which occur here, and which are rendered superfluous by the appellant's argument, we ought to do so. The appellant's argument turned very much upon what was said to be the proper or technical force of the words "whom failing," which, it was said, were words intended, after the exhaustion of one limitation or a series of limitations, to introduce another. To that proposition I see no reason whatever for taking the slighest exception, but it is in truth a mistake to suppose that it is a proposition in any way inconsistent with the judgment of the Court below. The same effect, neither more nor less, is given by the argument on both sides to these words "whom failing." Both agree that on the failure of the one line they are meant to be introductory of another. The question is not as to the effect of the word "failing," but as to the effect of the word "whom." What is the antecedent to which the word "whom" is relative? The Largie case has no tendency whatever to throw the least light upon that which is the only question in this case, because it is admitted by the respondent in this case that the destination "to the heirs whatsoever of the bodies of such heirs-male respectively" is not to take effect until the failure of the heirs-male of the bodies previously mentioned. The question is, what is the true antecedent of the relative word "whom." Now, I cannot help thinking, my Lords, that the Court below had sound reason for answering that question as they have answered it, in this way, that the "heirs-male of their bodies respectively" is the antecedent, not "the heirs-male

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procreated of the marriage between " the settlor's daughter and Sir William Forbes and their descendants, but those persons " respectively."

Having arrived at that, I cannot but think that the effect of the word " respectively," introducing the gift over, which commences with the words " whom failing," and recurring at the end of that gift over to the " heirs whatsoever of the bodies of such heirs-male respectively "—such heirs-male being there clearly such sons—is to import the force of that word " respectively " into the entire sentence, and that it is not really distinguishable in sense from what it would have been if, as it was put to the counsel in the course of the argument, it had been " whom respectively failing " or " whom failing respectively," the effect of it being that the heirs of the bodies of each stirps are to succeed in this manner—the heirs-male of that stirps first, the heirs-female of that stirps afterwards, but both the heirs-male and the heirs-female of that stirps succeeding next, respectively, to the parent towards whom they stand in the relation of heir, and are meant to stand in the relation of successor. My Lords, that word " respectively " is, in its natural and proper sense, and with the force which it constantly has in these legal instruments, a word at once of distribution and connection. It distributes when a series of persons are intended to take, or to take in a certain order or manner. And it is a word of connection because it brings together by a reference the heir to the ancestor, the issue or the child to the parent. So understood here it seems to be only a short term for expressing a series of limitations, in each of which, as I understand it, and as the Court below has understood it, the whole issue of each stirps is to be exhausted before you go into the subsequent limitations in this deed, the male issue, however, being always preferred to the female.

Now, I do not know that we really need more to support this construction than the reasons which I have offered to your Lordships, and which in truth are more fully and more ably expressed in the judgments in the Court below, particularly the judgments of Lord Curriehill and Lord Benholme. But I cannot help saying that although I think it was quite right of the learned counsel for the respondent not to lay their main stress upon subordinate clauses in the deed, which after all assist rather by way of illustration than by direct construction, yet I cannot but think myself that the subsequent clause, as to the rule which is to apply upon the succession of daughters, is very much more consistent with the construction placed upon this instrument by the Court below than with that contended for by the appellant. Your Lordships will observe that the effect of the appellant's construction is to reduce this to the simple elements which I mentioned at the outset, the single stirps of Sir William Forbes, or rather the testator's daughter as the wife of Sir William Forbes, there being a preference of the male issue descending from that stirps over the female, but, subject to that preference, a simple gift first to the male issue of that stirps and then to the female. On the other hand, the construction which the Court below has adopted, and which I think is hardly now contested as far as the division of the stirps is concerned (I mean as far as the construction of the words " heirs-male procreated " and " heirs-female procreated " are concerned), make several stirpes each to take successively, the one after the other.

Now, with which of these two schemes of the will is this declaratory clause more consistent? Your Lordships will see that the declaratory clause contemplates the rule to be followed for female succession, the succession of daughters always, " so often as the succession through the whole course thereof shall devolve upon daughters "—that rule being that the daughters shall take with reference to the latest taker, I mean with reference to the last state of possession by the heir from whom that daughter takes—that, for instance, if there should be a daughter of the last taker in male line, that daughter should succeed before the daughter of any former taker in the male line. I think that that rule, fairly understood, will also give a clue to the mode of succession if that daughter's line were exhausted; or if the last taker in the male line died without any issue at all, then you are still to look to the last previous possessor, and the female taker is to take in order of possession reversed—that is, that the heir representative of the family in the preferred male line transmits to his own daughter as his successor, and if that line fails you then go back to the next *preceding* male heir in the preferred

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male line, and his daughter will take in preference to any former ones. That is a mode of succession at least more consistent with the division of the whole into stirpes and the succession of the females of each stirps after the failure of the males of that stirps, than the notion that all the males of a single stirps are to be completely exhausted and then all the females are to come in.

However, my Lords, I agree entirely with what was said, that after all, from these subsidiary clauses illustration rather than proof is to be derived. All that I venture to say is, that taken in the manner in which they have been taken by the Court below, the result is something consistent with the ordinary scheme of a family settlement in strict entail, where you have a division like this into a certain number of stirpes, and being so, I think that the opposite view is very much less consistent with the ordinary scheme of will. Therefore I think the antecedent probability concurs with the conclusion at which I arrived from the words themselves, and particularly from the governing word "respectively" as found in the earlier part of the instrument. On the whole, I advise and move your Lordships to affirm these interlocutors, and to dismiss this appeal, with costs.

LORD CHELMSFORD.—My Lords, I must confess that I have felt considerable doubt in the course of the argument as to the proper construction of this deed of entail of 1811, nor can I say that that doubt has been entirely removed; but considering that we have here the unanimous judgment of seven learned Judges in the Court of Session, which judgment is concurred in by the opinion of my two noble and learned friends, I feel that my doubt is unfounded, or at all events that it ought to yield to such high authority. I therefore agree that these interlocutors should be affirmed.

LORD COLONSAY.—My Lords, I concur entirely in the opinion which has been expressed by my noble and learned friend on the woolsack. The case is a very simple one, and cannot be illustrated by more statement than has been given by him, and by two at least of the learned Judges in the Court below. It appears to me that the clause of the deed of entail makes each of the sons of the marriage a stirps, and that it says, with regard to those sons respectively—that is, as to each stirps—that the descent shall be to the heir-male of his body, whom failing, to the heirs whatsoever of the body of such sons. That seems to me to decide the whole case. I think that is the natural reading of the words. I think it is consistent with the ordinary course of descent in such cases, and, on the whole, reconciles the subsequent clause better than if we took the opposite construction. I have nothing more to add.

The *Dean of Faculty*, for the appellant, craved the costs occasioned by the objection to the competency of the appeal.[1]

LORD CHELMSFORD.—I think, my Lords, that the appellant ought to have the costs of the opposition to his appeal on the point of competency. Your Lordships may recollect that the Lord Advocate, being pressed by my noble and learned friend on the woolsack, said that he did not mean to insist upon the objection. This is a stronger case, as it appears to me, than that cited by the Dean of Faculty.

Lord Advocate.—That would be merely the attendance of the agent. The appeal was presented after a lapse of close upon five years, and it was presented by a party who is in precisely the same position now as he was throughout in the Court of Session. A petition against the competency of the appeal was presented, and an agent appeared before the appeal committee, to whom it was remitted, and the appeal committee reserved the question for the consideration of this House.

LORD CHANCELLOR.—I think, my Lords, it would be much better to use words which do not anticipate the function of the taxation of costs, but which express the principle upon which the House proceeds; and, with that view, I propose to

[1] Kerr v. Keith, June 10, 1842, 1 Macq. 425.

ur Lordships these words—"The costs occasioned by the presentation of a No. 5.
tition against the competency of the appeal."

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INTERLOCUTOR appealed from affirmed, and appeal dismissed, with costs, but the appellant found entitled to the costs occasioned by the presentation of a petition against the competency of the appeal.

W. ROBERTSON, Westminster—ADAM & SANG, W.S.—LOCH & MACLAURIN, Westminster—MACKENZIE & KERMACK, W.S.

WATSON AND COMPANY, Appellants (Pursuers).—*Butt, Q.C.— White.* No. 6.
ROBERT SHANKLAND, Respondent (Defender).—*Lord-Adv. Young— Benjamin, Q.C.*

May 16, 1873.
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Ship—Advance against freight—Charter-party—Insurance.—A charter-party ntained this clause—"Sufficient cash for ship's ordinary disbursements to be lvanced to the master against freight, subject to interest, insurance, and 2½ per cent mmission." The charterer made advances to the master, but did not insure the eight, and the vessel was lost on the voyage. In an action raised by the charterer ainst the owners *held* (affirming judgment of the Court of Session) that the charrer, having stipulated that he should be entitled to insure freight at the owners' exense to an amount corresponding to the amount of his advances, must be held have made such insurance a part of his security, and not having effected any ch insurance must be held to have relinquished, in the event of the ship being st, any claim against the owners for repayment.

Question (*per* Lord Chancellor) whether in ordinary cases advances against eight are recoverable in the event of a loss of the ship and cargo.

(IN the Court of Session November 27, 1871, *ante*, vol. x. 142.)

Ld. Chancellor (Selborne). Ld. Chelmsford. Ld. Colonsay. Ld. Cairns.

On 20th August 1863 a charter-party was entered into between James M'Kirdy, master and part owner of the ship "Janet Cowan," and Ralli Brothers of Bombay, where the vessel then was, in terms whereof the ship was to proceed to Calcutta, there to be loaded by the charterers or their agents with a cargo for the United Kingdom, "the freight to be paid on unloading and right delivery of the cargo."

The charter-party contained the following clause :—"Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent commission; and the master to endorse the amount so advanced upon his bills of lading."

On 2d October 1863 Ralli Brothers transferred their rights and interest in this charter-party to Messrs Grant, Smith, and Company, by whom it was endorsed to Messrs Watson and Company on 13th October.

The vessel, in terms of the charter-party, proceeded to Calcutta, where she was loaded with a cargo for the United Kingdom by Watson and Company, who between the 7th November and 17th December 1863, while the ship was preparing for the voyage, made various cash advances to or on the order of the master, for the ship's ordinary disbursements, to account whereof M'Kirdy, the master, granted a bill to Watson and Company for £500, drawn upon Mr Robert Shankland, merchant in Greenock, the managing owner of the vessel. This bill was presented for acceptance on the 17th December 1863, but Mr Shankland refused to accept it, on the ground that the master had no power to grant it, and that, under the charter-party, Watson and Company should have effected an insurance upon the freight for the amount of their advances. No such insurance, however, was made by Watson and Company, although they had time to do so after receiving intimation of Shankland's refusal to accept the bill.

The ship sailed from Calcutta on the 9th of November 1863, and was with her cargo totally lost on the 7th of April 1864.

In these circumstances Watson and Company raised this action in the Sheriff-court of Renfrew *against Shankland, M'Kirdy*, and the other

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registered owners of the ship, for recovery of £596, 0s. 3d., the alleged amount of their advances against freight for the ship's disbursements while preparing for the voyage, with interest, and 2½ per cent commission on the total amount of the freight, which they claimed as having acted in the capacity of shipping agents for the vessel.

This action was not founded on the bill for £500 granted by the master, which, not being stamped, was invalid under the Act 17 and 18 Vict. cap. 83, section 5, but the bill was referred to as evidence of the nature of the transaction.

The pursuers pleaded;—(1) The defenders are liable for the obligations of the defender M'Kirdy incurred in his character of master and part owner of their ship. (2) The defender Robert Shankland, as managing owner or ship's-husband, having authorised the defender M'Kirdy to pass drafts on him for the ship's debts, was bound to accept the bill, and is liable therefor, and for the loss caused by his non-acceptance. (3) The whole defenders are liable for the acts of the master and part owner, and of the managing owner or ship's-husband. (4) The defender M'Kirdy is liable individually for the sum in the bill granted by him, and dishonoured.

The defenders pleaded;—(1) The advances by the pursuers for the ship's disbursements at Calcutta being a payment, and not a loan, cannot be recovered back from the defenders. (2) The pursuers, as the charterers of the vessel, or the transferees or indorsees of the charter-party, were not entitled to take, and the master of the vessel was not entitled to grant, a bill of exchange for repayment of a sum of money that the pursuers themselves under the charter-party were at the time indebted to the master and owners of the vessel. (3) The master of a vessel has no power in a foreign port to bind his owners in a bill debt, even for the ordinary disbursements of the vessel; and more especially he has no power to bind his owners in such a debt to the charterers of the vessel, when such parties are themselves bound to provide, by means of a payment on account of freight, the master of the vessel with the funds necessary to pay such disbursements.

The Sheriff-substitute (Tennent) pronounced an interlocutor, which, after various findings in regard to the facts set forth in the foregoing narrative,—"In point of law finds that the money thus paid by the pursuers was not a loan made by them to or for behoof of the defenders, or of the master of the 'Janet Cowan,' but that it is to be held as having been made in terms of the clause of the charter-party in regard to cash for ship's disbursements, to which the pursuers were parties: Finds that by the terms of said clause the pursuers were bound to furnish sufficient cash for ship's ordinary disbursements as an advance against the freight, which it was expected would be earned at the conclusion of the voyage; and that the defenders are not bound to repay to the pursuers the sum thus advanced to them in terms of the charter-party: Finds that the pursuers are entitled to receive interest, the premium of insurance, and a commission of 2½ per centum upon the advances made by them; and of consent of parties decerns for the same, amounting to the sum of : Finds that it has not been proved that the pursuers were agents for the ship at Calcutta, and therefore finds that they are not entitled to the commission charged by them in the account appended to the summons: With the exception of the sum of above mentioned, assoilzies the defenders from the conclusions of the summons: Finds the defenders entitled to expenses," &c.

On appeal against this decision, the Sheriff (Fraser) allowed the pursuers to add the following plea in law to the record:—"(6) The sum sued for having in any view been made as an advance against freight,

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l no freight having been earned, the defenders are obliged to repay same, and commission thereon, to the pursuers, with interest as illed."

Thereafter the Sheriff, by interlocutor dated 13th February 1871, re- led the judgment of the Sheriff-substitute: "Finds that the money paid the pursuers to the captain was not a loan made by them to or for oof of the defenders, or of the master of the 'Janet Cowan' as repre- ting the defenders, but was an advance as against freight for ship's inary disbursements, subject to interest, insurance, and 2½ per cent mission: Finds in law that the defenders are bound to repay to the suers the sum of £441, 4s. thus advanced to the captain, with interest reon at the rate of 5 per cent from the last date of the advance, to- her with commission of 2½ per cent upon the advances: Finds that as pursuers did not effect insurance upon the advances so made by them y are not entitled to recover from the defenders any sum under this d: Finds that the pursuers were not agents for the ship at Calcutta, that they were not entitled to charge commission as such: Decerns inst the defenders for the said sum of £441, 4s., together with interest reon at the rate of 5 per cent from the 17th day of December 1863 payment; and also for the sum of £11, 0s. 6d. sterling, being com- sion of 2½ per cent upon the said advances, together with interest on l sum of £11, 0s. 6d. at 5 per cent from the said 17th day of Decem- 1863 and till payment: Finds no expenses due to either party, and erna."

The defenders appealed, and, after hearing counsel, the Court, on 14th y 1871, appointed the cause to be re-argued in the presence of three ges of the Second Division.

he Court (by a majority of the seven Judges, *diss.* Lord Justice-Clerk and d Kinloch) pronounced this interlocutor:—"Recall the interlocutors of Sheriff and the Sheriff-substitute, dated respectively the 13th February 71 and 19th December 1870:"—(Then followed a number of findings in nt of fact to the effect contained in the narrative of the case)—"Find t by this action the pursuers, as charterers, claim repayment of their ances to the master at Calcutta, besides interest at 5 per cent thereon payment, and 2½ per cent commission; but find that they do not im the amount of premiums that would have been required to insure much of the freight as corresponds to the amount of their advances: d in law that cash advanced against freight to the master of a ship by charterers for ordinary ship's disbursements at the port of loading is in ordinary circumstances equivalent to a payment of freight, but is e held as an advance in consideration of the subsequent performance the contract by the owners and shipmaster by the right delivery of cargo at the port of discharge; and that if there is a failure of the sideration by the voyage not being accomplished and the cargo rightly ivered at the port of discharge the charterers are entitled, in respect of h failure of consideration, to recover the amount of the said advance n the owners; but find that in the present case the charterers, having ulated that they should be entitled to insure freight at the owners' ense to an amount corresponding to the amount of their advances, st be held to have limited their security for repayment of the advances he right of set-off in settling with the owners if the freight should be ed, and to the amount of the said insurance if ship and cargo should lost, and to have relinquished or discharged the personal obligation of owners for repayment in the latter event: Therefore find that the suers have failed to establish their claim of repetition against the nders; but, in respect of the *agreement and consent* of parties, decern

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against the defenders for payment to the pursuers of £21, 17s. sterling, being the amount of the premium of insurance and commission stipulated by the charter-party to be paid to the charterers in respect of the advance made to the master at Calcutta as aforesaid, with interest thereon at the rate of 5 per cent per annum from and after the 7th day of July 1864 till payment: *Quoad ultra* assoilzie the defenders, and decern: Find the defenders entitled to expenses both in this Court and the inferior Court; allow accounts thereof," &c.

The pursuers appealed.[1]

LORD CHANCELLOR.—My Lords, without saying that the authorities which have been cited at the bar contain nothing useful for the assistance of your Lordships in the determination of this, or any similar case, it does not appear to me that it is a case which is necessarily governed by any of those authorities.

The facts are shortly these:—A bill of exchange was granted by the master of a ship at Calcutta for the purpose of covering certain advances made at that port in respect of the disbursements of the ship by the charterers or their agents. It is clearly admitted with great candour at the bar that the parties did not themselves look upon this transaction as a transaction upon the footing of the charter-party. It may very well be, according to the argument of Mr Butt, that if, when the transaction is examined, it is found in fact to fulfil all the conditions of a transaction according to the charter-party, the appellants would not suffer by reason of their having given to it a different form, in consequence of their having, in the first instance, taken a different view of its nature and effect. At the same time no one can be very much surprised if, they having intended to operate in a particular manner and not under the charter-party, it should turn out that the transaction when compared with the conditions of the charter-party does not accurately fulfil those condition.

The charter is contained in these words—"Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent commission." In my view it is not necessary to decide any of the questions that arise upon the contract made in that form except this, what is the effect of the words "subject to interest, insurance, and 2½ per cent commission" with reference to the fact that no insurance was made? It may very well be, certainly as far as I am concerned I will deal with the case upon the hypothesis that it may be that, according to the true construction of this contract, it was to be a loan upon the security of the freight, and not a prepayment of freight. It is not necessary that your Lordships should decide that question, and I should not advise your Lordships to pass your decision in such a form as to affect the determination of such a question in any future contract upon which it may arise. But, assuming that to be the true construction of the contract, and that this was to be a loan upon the security of the freight, and not a prepayment of the freight, or a part payment of the freight, or a payment on account of the freight within the principle of the authorities which have been referred to, still the question is, whether, according to the true and sound construction of this contract, it was not understood and agreed between the two parties that the insurance which it was for their common interest, for the interest of both of them, to have made in the most proper and convenient manner, should be made by the charterers.

My Lords, I cannot but think that, apart from any evidence as to usage and practice, it is a sound view of this mercantile contract to hold that it provides for insurance, and does not leave the subject of insurance uncertain and indeterminate. Insurance is mentioned, as your Lordships will observe, in

[1] *Appellants' Authorities.*—Saunders v. Drew, 3 B. and A., 445; Arnould's Ins. 50; Wilson v. Martin, 11 H. and G. 684; Parsons' Marine Ins. 190.

Respondents' Authorities.—Thomson v. Gillespie, 5 E. and B. 209; Nicks v. Shield, 7 E. and B. 633; Byrne v. Schiller, L. R. 6 Ex. 319; Jackson v. Isaacsen, 3 H. and N. 405; "The Salacia," 32 L. J. Adm. 43; Droeje v. Simpson, L. R. 2 Privy Council, 505; Trayes v. Worms, 34 L. J. 274 (C. P).

direct connection with two other things which were not uncertain, and which were not indeterminate, namely, interest and commission. Interest was to be charged at all events; commission was to be charged at all events. It appears to me that the sound and reasonable view, looking to the nature of the contract, is that there is nothing to lead us to suppose that insurance was not to be as much a fixed term of the contract as interest and commission; and that not the less because all these terms are primarily in favour of and for the protection of the person advancing the money. The owner subjects himself to the burden, but both have an interest in diminishing that burden; at least the man upon whom the burden would fall has an interest in diminishing it as far as it can be diminished for his own security. And therefore, as either one or the other ought for that purpose to make an insurance, it was reasonable that they should make a contract between themselves as to how the insurance was to be made.

One of your Lordships put to Mr Butt, in the course of his reply, this observation, in which Mr Butt expressed his concurrence:—"These are all things as to which the charterer was to be the creditor of the other party." But if he was to be the creditor of the other party for all these things then that was a part of the contract. He was to advance the money, he was to charge interest, he was to charge commission, and he was to charge insurance, and how could he charge insurance unless insurance was made?

My Lords, it appears to me that the good sense of the matter concurs with that view, because he would not be satisfied unless the insurance was under his own control, he would not have the security for which it was reasonable that he should stipulate, and it would be only by him, when the advances were made, that the precise amount for which the insurance was to be effected would be known. I take it therefore that as between these parties it is a contract in substance to this effect: I, the borrower, give you, the lender, a right to charge me with the premium of insurance; which is very much the same thing in principle as if he had put the money into his hands for the purpose of effecting that insurance. I by no means think it necessary to say what the result might have been if, for any reasonable cause, he had determined not to avail himself of the right to insure and to charge the premiums of insurance, and he had given notice of that to the other party in reasonable time. He did not in fact do so, although according to the evidence there was abundance of time for it to have been done. Still less do I desire to say anything which would affect the question which might have arisen if, having effected an insurance, that insurance had, through some cause not imputable to his fault, become unavailable. I proceed, my Lords, upon the assumption that it may be the construction of this contract that in either of these events he, acting reasonably and according to good faith and right understanding, would be held entitled to recover in the event of the loss of the ship. But in point of fact no insurance was made, and the question is whether, under this contract, the shipowner had not a right to rely upon that insurance being made, in the actual circumstances of the case, by the person who here stipulated for and received the right to charge the premiums of insurance against him, the shipowner. I think, my Lords, that he had. It is manifest that the charterers neglected to do so, and to give notice that it was not done. What must be the consequence of a loss of the ship, the charterers knowing that the insurance was not made? Upon one or the other of these two parties that loss must fall. If the insurance had been made and the money paid by the shipowner, then the benefit of the insurance would have accrued to the shipowner. It is very much like an ordinary case, put in the course of the argument, of the right of a man who gives several securities, when he pays off the mortgage, to have all the securities delivered up into his own hands unless a reason which is a sound and good one, and consistent with the duty of the mortgagee, and which is not imputable to his own fault, can be given for the failure of any one of them. My Lords, this seems to have been really the view which prevailed on the whole in the minds of the learned Judges in the Court below. I think the soundest course for your Lordships to take would be to found your judgment entirely upon that view.

I perceive that in the interlocutor under appeal there are certain findings

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which your Lordships will probably think go beyond that which, taking the view of the case which I have submitted to your Lordships, if your Lordships should concur in that view, it is necessary to put upon the face of this interlocutor. There is a finding as to the general law upon the subject. Now, it appears to me, my Lords, that it is not expedient that that finding should be made in the interlocutor,—first, because it does not appear to me to be clear that upon this occasion we ought to decide any question of general law; and secondly, because if we did, it would be necessary to consider how far that law ought to be the English or the Scotch law; and finally, if it ought to be the English, whether it would be a safe thing to lay down the rule in the terms which are here stated, which certainly do not appear to agree altogether with the rule lately stated in England in the case of Byrne v. Schiller, reported amongst our cases. I should, therefore, propose to your Lordships to vary the interlocutor by omitting the words beginning "Find in law" and ending with the words "the amount of the said advance from the owners; but".

Then, my Lords, further, the Inner-House proceed to place a construction upon the contract going, I think, beyond the view which I have submitted to your Lordships, and involving this, that by the form and terms of this contract the charterers "must be held to have limited their security for repayment of the advances to the rights of set-off in settling with the owners if the freight should be earned, and to the amount of the said insurance if ship and cargo should be lost, and to have relinquished or discharged the personal obligation of the owners for repayment in the latter event." I cannot think that we are called upon to place upon the face of the interlocutor any such interpretation of the contract. One of your Lordships has suggested words to be substituted for the words which I have read, and which would make the finding run thus, "Find that in the present case the charterers, having stipulated that they should be entitled to insure freight at the owners' expense to an amount corresponding to the amount of their advances, must be held to have made such insurance a part of their security, and, not having effected any such insurance, must be held to have relinquished, in the event of the ship being lost, any claim against the owners for repayment." I would submit to your Lordships that these words should be adopted, and that the interlocutor should be varied in the manner which has been explained.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend with regard to the short ground upon which he has rested his decision in this case. By the contract between the parties the insurance upon the advances was to be effected by the charterer. There was no obligation upon him to insure except in the sense of its being for his own protection that he should be insured; but as he chose not to insure he took the risk upon himself, and therefore he must bear the loss.

LORD COLONSAY.—My Lords, I concur in the result which has been arrived at, and I think the grounds which have been stated are quite sufficient for the determining of this case.

LORD CAIRNS.—My Lords, I also concur.

"It is ordered and adjudged . . . that the said interlocutor of the Lords of Session in Scotland, of the First Division, of the 2d (signed 5th) of December 1871, complained of in the said appeal, be varied by omitting therefrom the following words, namely, 'Find in law that cash advanced against freight to the master of a ship by the charterers for ordinary ship's disbursements at the port of loading is not in ordinary circumstances equivalent to a payment of freight, but is to be held as an advance in consideration of the subsequent performance of the contract by the owners and shipmaster by the right delivery of the cargo at the port of discharge, and that if there is a failure of the consideration by the voyage not being accomplished, and the cargo rightly delivered at

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the port of discharge, the charterers are entitled in respect of such failure of consideration, to recover the amount of the said advance from the owners; but,'— and also by omitting therefrom the following words, namely, 'Limited their security for repayment of the advances to the right of set-off in settling with the owners if the freight should be earned, and to the amount of the said insurance if ship and cargo should be lost, and to have relinquished or discharged the personal obligation of the owners for repayment in the latter event;' and by substituting in lieu thereof the following words, namely, 'Made such insurance a part of their security, and, not having effected any such insurance, must be held to have relinquished, in the event of the ship being lost, any claim against the owners for repayment:' And it is further ordered and adjudged that, subject to these variations, the said interlocutor of the 2d (signed 5th) of December 1871, so varied, and also the said interlocutor of the Lords of Session in Scotland, of the First Division, of the 31st of January 1872, also complained of in the said appeal, be and the same are hereby affirmed, and that the said petition and appeal be and the same is hereby dismissed this House: And it is further ordered that the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments: And it is further ordered that the cause be and is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with these variations and this judgment."

HILLYER, FENWICK, & STIBBARD, London—W. MASON, S.S.C.—SIMSON, WAKEFORD, & SIMSON, Westminster—W. ARCHIBALD, S.S.C.

No. 7.
July 8, 1873.
Edinburgh Tramways Co. v. Black, &c.

THE EDINBURGH TRAMWAYS COMPANY, Appellants (Defenders).—*Lord-Adv. Young—Clerk, Q.C.—Mansfield.*
A. & C. BLACK and OTHERS, Respondents (Pursuers).—*Lloyd, Q.C.—M'Laren—Pember.*

Private Act—Edinburgh Tramways Act, 1871, 34 *and* 35 *Vict. c. lxxxix.—General Tramways Act*, 1870, 33 *and* 34 *Vict. c.* 78, *sec.* 9—*Provisional Order.*—The Edinburgh Tramways Company were authorised by their special Act and relative plans to lay a double line of tramways in a certain street which at its widest part was not broad enough to afford a clear space of 9 feet 6 inches between the footpath on each side and the nearest rail. By an agreement incorporated with the special Act the whole provisions of the General Tramways Act, 1870, were made to apply as fully as if the special Act had been a provisional order obtained under the general Act. The general Act authorised the Board of Trade to grant provisional orders, which should only become effectual when confirmed by an Act of Parliament, and provided (sec. 9)—"No tramway shall be authorised by any provisional order to be so laid that for a distance of 30 feet or upwards a less space than 9 feet and 6 inches shall intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway, if one-third of the owners, or one-third of the occupiers of the houses, shops, or warehouses abutting upon the part of the road where such less space shall intervene as aforesaid shall, in the prescribed manner, and at the prescribed time, express their dissent from any tramway being so laid."

One-third of the occupiers of houses in the said street having applied for interdict against the formation of any line of tramway within 9 feet 6 inches of the footpath, as specified in sec. 9, *held* (*rev.* judgment of the First Division) that the objection was incompetent, on the ground that the special Act was to be regarded as a provisional order confirmed by Parliament, and that sec. 9

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applied merely to the granting of orders by the Board of Trade, and not to their construction when granted and confirmed by Parliament.

Statute—Plans—Sections.—When an Act of Parliament authorises works to be constructed in accordance with deposited plans and sections these are incorporated with the Act.

Ld. Chelmsford. Ld. Colonsay. Ld. Cairns. Ld. Hatherley.

(SEE narrative in Court of Session report at p. 418 of the present volume).

The Edinburgh Tramways Company appealed.

LORD CHELMSFORD.—My Lords, the question in this case is whether the Edinburgh Street Tramways Company can be restrained by interdict from constructing a tramway on the portion of North Bridge Street extending from the south end of the North Bridge to the High Street of Edinburgh, at a distance of less than 9 feet 6 inches from the nearest rail to the outside of the footpath.

The question depends upon the effect of an article in an agreement contained in the schedule to the Edinburgh Street Tramways Act, which, by the 44th section of the Act, is made part of the Act. By the 5th section of the Act the Company are to "make, form, lay down, and maintain the tramways hereinafter described, in the lines and according to the levels shewn on the deposited plans and sections, and in all respects in accordance with those plans and sections."

We had occasion a short time ago to consider the question as to the effect of plans and sections deposited and referred to in this manner, and we found that, in the case of the North British Railway Company v. Tod, which is reported in 12 Clark and Finelly, it was laid down, that where there is such a reference as this to the plans and sections in an Act of Parliament they are incorporated into the Act. The provision here is most express, that the tramways are to be constructed in all respects in accordance with the deposited plans and sections. Now, according to the description of the plans and sections the company are to make a double line of tramway, in which the space between the outer line of rails and the footway on each side of North Bridge Street must be less than 9 feet 6 inches. By the agreement which was entered into, and which is made a part of the Act, the company bind and oblige themselves "to construct and work the tramways described in the said bill and shewn on the Parliamentary plans." Therefore the company, under the Act, and the agreement, which is made a part of it, are bound to make the tramways in accordance with the plans and sections.

But it is said that by the agreement one-third of the owners of houses abutting upon North Bridge Street have a right to object to the tramway being brought within 9 feet 6 inches of the footway. The first clause of the agreement says—"The parties hereto of the first part, as the local authority foresaid, shall have the whole rights, powers, and privileges which the Tramways Act, 1870, or any other general Act relating to tramways now in force, or which may hereafter pass during this or any future session of Parliament, confer, or may hereafter confer, upon the local authority of any district, and the whole provisions of the said Acts shall apply to the Act of Parliament which the said second party is now promoting, or to any Act of Parliament which they or the company may hereafter obtain, as fully in every respect as if the same were a provisional order obtained under the Tramways Act, 1870." The ninth section of the General Tramways Act provides that "every tramway in a town which is hereafter authorised by provisional order shall be constructed and maintained as nearly as may be in the middle of the road, and no tramway shall be authorised by any provisional order to be so laid that for a distance of 30 feet or upwards a less space than 9 feet and 6 inches shall intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway, if one-third of the owners or one-third of the occupiers of the houses, shops, or warehouses abutting upon the part of the road where such less space shall intervene as aforesaid shall, in the prescribed manner and at the prescribed time, express their dissent from any tramway being so laid."

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The first clause of the agreement provides that the General Act shall apply "as fully in every respect as if the same (that is, the private Act) were a provisional order." A great deal of controversy has taken place as to the exact meaning of those words, but I apprehend that the ordinary sense and understanding of the language would be that it must refer to a provisional order obtained—that is, completed and confirmed—by Act of Parliament. Now, supposing, instead of being an Act of Parliament, this had been such a provisional order, it would have been one, of course, as I have already said, confirmed by Act of Parliament. How could there be a veto by the owners under those circumstances? Taking the case of a provisional order, they could only have interposed while it was in progress—that is to say, after notice had been given of the intention to apply for a provisional order. They might then have given notice of their objection. But, under those circumstances, supposing there was no dissent at all, a provisional order, of course, might be made which allowed a tramway to be constructed with an intervening space between the footway and the outer rail of less than 9 feet 6 inches. Such a provisional order, of course, would be utterly incapable of being resisted afterwards; and how, under these words, putting the Act of Parliament upon the same footing as a provisional order, could the owners possibly, when the Act of Parliament was passed, have any veto whatever? And how can it possibly be understood that this reference to the first part of the General Tramways Act with regard to provisional orders can have any application to a case of this description? The local authority having for the protection of the public bound the company to make their tramways according to the plans which the Act of Parliament authorised, can it be believed that, by a general reference to rights, which these persons would have to prove, as well as that the provisional orders were being made to their prejudice, they intended to prevent the Act of Parliament being carried out? The argument upon which the respondents insist is, according to their construction of it, utterly inconsistent. One part compels the company to do the works which are authorised by the Act, the other, according to the argument of the respondents, allows the owners to say that what the Act sanctions and the agreement compels shall not be done. Even putting it upon the lowest possible ground, the part of the Act as to the execution of the works is clear and distinct, and the obligation to execute the tramways as prescribed by the Act is express. The qualification is hard to be understood, and it is capable of a construction which renders it wholly inoperative.

My Lords, I should not have entertained the slightest doubt upon this case if it had not been for the respect which I feel for the judgment of the three learned Judges who have expressed a contrary opinion; but it appears to me that the owners have no right whatever to the interdict which has been granted to them, and therefore I submit to your Lordships that the interlocutor ought to be reversed.

LORD COLONSAY.—My Lords, with every respect for the opinions of the majority of the learned Judges in the Court below I cannot come to any different conclusion from that which has been arrived at by my noble and learned friend. It appears to me that the only contention that could be maintained with plausibility here is that which is founded on the notion that the 9th section of the General Act was somehow imported into this statute, and formed a condition which overrode the other provisions of the Act. But I think that is a strained construction of the agreement, and that it is founded on not only straining the construction of the agreement but also straining the objects and purposes of the 9th section itself. I therefore cannot adopt the conclusion which has been come to in the Court below.

It appears to me that the respondents in this case have been rather negligent of their own interests in this matter with regard to what would be the result of this tramway passing through their street. Either they had not measured the street and ascertained what was to be the effect of the construction of the tramway according to the plans, or they relied upon some protection from the local authority which would supply the want of their being themselves parties to an

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agreement which would have protected their interests. However, looking to the agreement as it stands, and considering what the purposes of that 9th section of the General Act are, I cannot concur with the views taken in the Court below. I can arrive at no other conclusion than that which has been suggested by my noble and learned friend.

As to the form of judgment to be pronounced here, in the first place, I apprehend that the interlocutor of the Court below must be reversed. Then, I presume, there will be a remit to the Court to recall the interdict, and repel the reasons of suspension.

Lord Cairns.—My Lords, the learned Judges in the Court below who granted the interdict in this case appear to have been very much influenced in their views by a consideration of the great danger which would arise to the public unless the fullest care was taken as to the mode in which license was granted for making tramways of this description.

In those considerations I entirely concur; but it appears to me that the time has passed in this case for giving weight to them, and that all that the Court below had to do, and all that this House have now to do, is to ascertain what is the extent and limit of the Parliamentary authority which has been granted to the appellants in this case.

Now, if the agreements between the appellants and the different local bodies are put aside for a moment it is perfectly clear that under the Act of Parliament the company were making, when they were interfered with by the interdict, or had made, a tramway along North Bridge Street in exactly the way that was authorised by the Act of Parliament, and that, in point of fact, the Act of Parliament would not have authorised them to make it in any other way than the way in which they had made it. If there were nothing more in this case there would be nothing more for argument.

But the authority given by the Act of Parliament is attempted to be controlled by the 1st section of the agreements which were entered into by the local bodies. Now, I own that it is not very easy to give a clear and distinct interpretation to that first section of those agreements. I doubt very much whether the parties had themselves in their own minds any very clear and intelligent apprehension of what that first section meant; but if it is not possible to give a very clear and distinct meaning to the section, certainly that section cannot be made available for the purpose of curtailing and restraining the clear and distinct power entrusted by the Act of Parliament to the appellants.

As it appears to me, the utmost that the first section of the agreement does is this,—it provides that the provisions of the General Act should apply to the Act of Parliament which was then being solicited by the company, or to any other private Act of Parliament which the appellants might afterwards have obtained, as fully in every respect as if the same, that is, as if the private Act, were a provisional order obtained under the Tramways Act, 1870.

Now, what advantage that would give to the parties, or was supposed to be likely to give to the parties, I am not quite sure. But I see clearly that the words they have used hypothetically are these, "as if the Act of Parliament were a provisional order obtained under the Tramways Act, 1870." But if the provisional order were obtained under the Tramways Act of 1870, the time for objection had passed, the time for exercising a veto was gone, the provisional order was in existence, and whether that were an order which had passed through its stages properly or improperly is quite immaterial.

The Act of Parliament coming over the order and upon the top of the order, did away with all consideration of the foundation of the provisional order, and took the place of the provisional order as an Act of the Legislature. It appears to me that it is only with that Act of the Legislature that we have now to do, and that there is no power in any Court to restrain the appellants so long as they follow the provisions of the Act of the Legislature, which it is not pretended they are not doing. Therefore, my Lords, I agree that in this case the interdict should be recalled.

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LORD HATHERLEY.—My Lords, I also concur in the opinion at which your Lordships have arrived, that the interdict should be recalled, and that relief should be given to the appellants, and I will very shortly state my reasons for coming to that conclusion. If your Lordships look at the General Act of 1870 you find that it is divided into three parts, the first part relating to the mode of proceeding to obtain a provisional order, the second and third parts being of a more permanent character, the one relating to the construction of the tramway, and the other to certain provisions usually introduced into other Acts giving power for making tramways of this description. The second and third parts are introduced into this private Act which we are considering. The first part, being in its nature temporary, is not so introduced, but it happens that in that first part there is the 9th section, upon which so much discussion has arisen, by which section a power is given to one-third of the frontagers, or persons living in front of the line of tramway about to be constructed, to put an absolute veto upon the making of any provisional order empowering the construction of such a tramway unless a certain distance be kept between the extreme edge of the tramway and the kerb at the outside of the footpath.

Now, my Lords, there is no possibility of arguing this case with success as the respondents have argued it, as if that Act had expressly said no provisional order can be made at all which will bring the edge of the tramway within that distance of the footpath, irrespective of there being consent on the part of the frontagers or not, for the introduction of the question of the consent of the frontagers makes it clear that such an order is not in itself an invalid order.

It is an order which has the full force of an Act of Parliament, unless that dissent has been interposed before the order is made. Therefore, it is not upon the face of the order a bad order. The order is perfectly good, although it gives a more limited space,—it may be much more limited space,—between the tramway and the footpath, because when the order is once made and there has been no opposition on the part of the frontagers it will be assumed that it is a proper order. The order is full and complete.

That being so, we come to the second Act and the agreement recited in it. I think it is of considerable importance, for the purpose of coming to a just conclusion as to the intention of that Act of Parliament, to observe that the Act pointedly introduces the second and third parts of the General Act, and does not introduce the first part. The only way in which the first part can be said to be introduced at all is, that the Act confirms by its 44th section an agreement made between the parties, that is to say, between the local authority and the promoters of the tramway, and that agreement *inter se* provides that as between the parties it shall be as if the first part of the General Act had been introduced also. Still it does not introduce the first part at all, except by saying, as between you, the parties to the agreement, it shall be as if it were expressly enacted. The very fact of the private Act saying that the second and third parts shall be considered to be incorporated in this Act is an exclusion, as it appears to me, of the first part.

Upon the whole, my Lords, the agreement comes to this, as it appears to me, that the local bodies stipulate that as between themselves and the promoters, not only as to this Act, but as to all future Acts as well as to this, whenever you, the promoters of this tramway, are minded to have any tramway whatsoever in Edinburgh, you shall not have any advantage over us by proceeding by special Act instead of proceeding by way of provisional order, but it shall always be dealt with as between you and us as if the powers you obtained were powers obtained by virtue of a provisional order, and therefore they shall be subject to all such rights and advantages as we might claim by virtue of that arrangement. Now, it is said it is very difficult to point out what the particular advantages would be of that arrangement. I quite agree that it is extremely difficult to point out what the particular advantages would be, but I am quite clear of one thing, and that is, that the local authorities had not the slightest idea that they had a right to object only at the proper time, that is to say, before the order was made, in consequence of the proper distance between the tramway and the footpath not being observed. In the present state of things the local authority

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might say to the company,—"This shall be treated as if a provisional order had been made, and we insist on your carrying out the article in our agreement, that you will execute the tramway in the manner you have undertaken to do, that is to say, according to your plans," which is a matter perfectly inconsistent with the contention of the respondents.

My Lords, I certainly feel that degree of diffidence which we ought always to feel in these cases, considering the great weight of authority in the Court below. I feel the weight of that authority, but I cannot bring my mind to any other conclusion than that which I have stated. It must no doubt be owing to some defect on my own part that I cannot see the force of the reasoning leading to the contrary conclusion.

INTERLOCUTOR appealed from reversed, "except in so far as the interlocutor of the Lord Ordinary of 13th April 1872 '*quoad ultra* refuses the interdict craved.'"

ASHURST, MORRIS, & Co., Westminster—LINDSAY, PATERSON, & HALL, W.S.—SIMSON, WAKEFORD, & SIMSON, Westminster—MILLAR, ALLARDICE, & ROBSON, W.S.

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MRS CAMPBELL PATERSON, Appellant (Defender).—*Dean of Faculty Gordon—Pearson, Q.C.—G. Webster.*

REV. JOHN MACLEOD (Minister of the Parish of Morvern), Respondent (Pursuer).—*Lord-Adv. Young—Donald Crawford.*

Teinds—Valuation—Prescription.—Held (*aff.* judgment of the Teind-Court) that a decree of valuation of teinds was not a title under which a proprietor could by prescriptive possession acquire a right to teinds of lands not originally included in the valuation.

Teinds—Valuation—Presumption.—Circumstances in which *held* that terms of a report of sub-commissioners of teinds in 1629, decree of approbation thereof in 1785 and 1786, and relative scheme of division, and the proceedings in a process of augmentation in 1800, raised the presumption that the whole lands in a parish had been valued in 1629, but that this presumption had been overcome by proof that certain lands were not included in the valuation.

Ld. Colonsay.
Ld. Cairns.
Ld. Hatherley.

(IN the Court of Session March 9, 1869, *ante*, vol. vii. 614.)

This process of augmentation, modification, and locality was raised in 1863 by the Rev. Dr Macleod, minister of the parish of Morvern, against the heritors. The heritors opposed the augmentation, on the ground that the teinds of the parish had been valued, and were exhausted. The heritors founded on two decrees of the Teind-Court,—(1), a decree, dated 26th January 1785, pronounced in a process of approbation and valuation at the instance of the Duke of Argyll, which ratified a valuation made by the sub-commissioners of the presbytery of Argyll in 1629; (2) a decree, dated 12th July 1786, pronounced in a process of approbation and valuation at the instance of Allan Maclean of Drimnin and others, ratifying a decree of the sub-commissioners of the presbytery of Argyll in June 1629.

On 22d November 1865 the Teind-Court pronounced a decree of modification fixing an increased stipend, and remitted to the Lord Ordinary to prepare a locality; "but declaring that this modification and the settlement of any locality thereof shall depend upon its being shewn to the Lord Ordinary that there exists a fund for the purpose." The Lord Ordinary appointed the minister to lodge a condescendence of teinds of the parish, and the heritors to lodge answers thereto.

The minister averred that the decrees founded on did not include all the lands in the parish, and specified certain lands in the parish which he said

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were not included in the valuation. The minister also stated certain objections to the validity of the decree of 1786.

Separate answers were lodged for various heritors.

Mrs Campbell Paterson and others pleaded;—(3) The validity of these decrees is not only fortified by the positive, but every ground on which the valuations could have been objected to, though any such had existed, has been cut off by the negative prescription.

Similar answers were stated by the other heritors.

The Lord Ordinary (Barcaple) pronounced this interlocutor:—"Finds that the objections stated by the minister to the decree of approbation and division in 1786 are excluded by the negative prescription: Finds that the teinds of the lands belonging to the several respondents which are condescended upon by the minister as being unvalued must be held to have been included in the valuation by the sub-commissioners in 1629, approved of by the Teind-Court in 1785 and 1786; and appoints the cause to be enrolled, that parties may be heard upon the effect of this judgment, and on the question of expenses."

The minister reclaimed.

The Second Division pronounced this interlocutor:—"Edinburgh, 8th January 1869.—The Lords having considered this case, in respect of its importance, direct that it shall be argued before themselves, with the assistance of three Judges of the First Division, on the question whether the plea of the positive prescription raised by the defenders is applicable to the case, and ought to be sustained or repelled."

On 9th March 1869 the Second Division and consulted Judges, by a majority of six to one (Lord Benholme dissenting), pronounced this interlocutor:—"Having heard counsel upon the plea of the positive prescription raised by the defenders, in conformity with the opinion of the majority of the seven Judges, repel the said plea." (*Ante*, vol. vii. p. 614.)

Subsequently, on 19th March 1869, the Second Division recalled the Lord Ordinary's interlocutor, "in so far as regards the lands of Knock and Gualochaolis, acquired from Allan Maclean of Knock: Find that the said lands are unvalued."

Mrs Campbell Paterson appealed.

LORD COLONSAY.—My Lords, the question to be decided under this appeal is, whether the teind of certain lands now belonging to the appellant, and described in her titles as "all and whole the sixteen shilling and eightpenny land of old extent of Knock, the sixteen shilling land of old extent of Cullichelish, acquired from Allan Maclean of Knock, are to be held as having been included in the valuation made by the sub-commissioners in 1629, and approbations of their report in 1785 and 1786. That question has arisen in a process of augmentation, modification, and locality raised by the minister of the parish of Morvern against the heritors of that parish, of whom the appellant is one.

It is not disputed that the teinds of all lands comprehended in the report and approbations thereof have been exhausted long ago. But it was maintained by the minister that certain subjects which appear in the titles of the heritors are not mentioned in the report of the sub-commissioners, or comprehended in their valuation. On the other hand, the heritors maintained that the subjects referred to, whatever may be the names by which they have at any time been known, were valued along with the whole lands belonging to their predecessors under the names given in the report of the sub-commissioners.

The subjects condescended on by the minister as being unvalued were twelve in number, and belonged to four heritors. The Lord Ordinary decided that all these subjects must be held to have been included in the valuation of the sub-commissioners in 1629 approved of by the Teind-Court in 1785 and 1786. He

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also found that certain objections stated by the minister to the decreet of approbation in 1786 were excluded by the negative prescription.

Against that judgment the minister presented a reclaiming note to the Second Division of the Court. There the heritors made a stand on a plea of positive prescription, which had been stated by them on the record, but had not been specifically dealt with by the Lord Ordinary. The Second Division directed that the question whether the plea of positive prescription was applicable to the case should be argued before themselves and three of the Judges of the First Division. The question having been argued before seven Judges, the plea was repelled by a majority of six Judges to one.

That point having been disposed of, the Second Division, after some further procedure, recalled the interlocutor of the Lord Ordinary as to the lands now in question, but concurred with the Lord Ordinary's finding that all the other lands condescended on by the minister as being unvalued must be held to have been included in the valuation of 1629, and the approbations thereof in 1785 and 1786.

When an heritor pleads that the teinds of his lands are valued it is incumbent on him to shew that they have been valued by competent authority. A valuation by sub-commissioners, when duly approved of by the Court of Teinds, is sufficient. But in many cases it happens that there is difficulty in identifying some of the lands of the heritor with any of those named in the valuation on which he founds. The reasons are obvious. Take, for example, the present case. More than 200 years had elapsed from 1629 till the present question arose. In the interval all the properties have changed hands, most of them have been sub-divided, and separated, and formed into new groups, with new designations. Old names, not altogether abandoned, have undergone change of sound in pronunciation and change of orthography in transcription, so as to be not easily recognised. Some names may have passed away entirely, and some subjects that were treated as nameless pertinents may have come into prominence under separate names; and so it happens that of twelve subjects which the minister condescended on as being unvalued ten were, after much research and discussion, and having regard to the circumstances of the case, held to have been included in the valuation, either separately or *in cumulo* with others.

The question, therefore, comes to be, whether the appellant has been able to shew with reasonable certainty that the lands described in her titles in the terms I have quoted were included in the valuation of 1629, although "Knock" is not therein named, and notwithstanding the evidence relied on by the minister as excluding any evidence that they were valued.

The position taken by the appellant in the record is that the lands in question, and which are described in her titles in the terms I have already quoted, belonged in 1629 to Murdoch Makileane of Lochbowie, and were comprehended in his lands there valued, and which are thus described in the valuation—"The lands of Ardneis, Archabeig, Cowlecheylis, Auchaforsay, Achingawen, Unybeig, Darriness, Corwan, and Clwnlead, with the pertinents." The appellant maintains that the lands in question are there comprehended under "Cowlecheylis" and pertinents.

The minister, on the other hand, alleges that in 1629 the lands in question belonged to Angus Maclean, parson of Morvern, not to Murdoch Makileane of Lochbowie, and were not valued. This is denied by the appellant. The minister further alleges that in 1629 "Knock and Gualachaolis were, as now, incorporated with each other." The appellant admits that Knock and Gualachaolis have always been incorporated with each other. But this agreement in words is not an agreement in meaning. The minister means that Knock, which belonged to the parson of Morvern, had incorporated with it a Gualachaolis, though not named. The appellant means that the Cowlecheylis or Gualachaolis which belonged to Lochbowie had incorporated with it a Knock, though not named. I therefore do not think that anything can be rested on this verbal concurrence.

But the minister founds upon a series of title-deeds as shewing that in 1620 the lands of Knock did belong to the parson of Morvern, and as to tracing them down to 1706, when they were conveyed by Allan Maclean of Knock to Allan

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Cameron of Glendessary, without ever having belonged to Lochbowie, or any person deriving from him. He also founds upon another series of title-deeds, as tracing Lochbowie's lands down through a totally different course of transmission till 1698, when they were acquired by the said Allan Cameron of Glendessary from Lochbowie,—thus shewing, as he contends, that Knock, which belonged to the parson of Morvern, could not have been comprehended in the valuation of Lochbowie's lands, as alleged by the appellant. I shall as briefly as possible trace these two chains of transmission, in order to see how far they bear out the contention of the minister. In doing so I shall take them separately, and in each case follow the chronological order of the transmission.—(His Lordship here adverted to the titles.)

If, then, the title-deeds as printed by the parties are to be relied on, there was a sixteen shilling or sixteen shilling and eightpenny land of Knock, which was the property of the parson of Morvern in 1620, and of his son in 1640, and was subsequently transmitted to Glendessary, as I have described; while the Cowlkeylis that belonged to Lochbowie, and was valued in 1629, was a twopenny land, and formed an integral part of his twelve merk land before 1620, and so continued until the twelve merk land,—without having undergone any disintegration, and without any trace of a Knock having been connected with it,—came likewise into the hands of Glendessary. And all the titles from Glendessary downwards bear that Knock had been acquired from Allan Maclean of Knock, and that the twopenny land of Cowlkeylis had been acquired from Lochbowie. It seems next to impossible to reconcile with these facts the allegation of the appellant, that the Knock described in her own title as having been acquired from Allan Maclean of Knock was in 1629 in reality comprehended in the twopenny land of Cowlkeylis, which belonged to Lochbowie. The titles, when carefully examined, are clearly adverse to that allegation, and if the decision of the case is to depend upon the evidence afforded by the titles, or on any inference that can be drawn from them, I think it must be adverse to the appellant.

But the appellant maintained a very powerful argument, founded on the terms of the report of the sub-commissioners in 1629, and on the interpretation said to have been given to that report in the approbations thereof in 1785 and 1786, and also on the manner in which the teinds of the parish have been dealt with from that time till the present, and the presumptions thence arising. I now proceed to consider the elements of the case, and the inferences to be drawn from them.

In the report of 1629 the sub-commissioners set forth that they had been directed to try and inform themselves by all lawful means of the worth "of all lands of each paroche in the said presbetrie," and that they had "faithfullie, trulie, and diligentlie proidit in tryeing and cleiring the sds. valuations of the parochynes underwryten." The reasonable inference from that statement would be that they had valued *all* the lands in each parish, subject, however, to be rebutted by evidence that certain lands had been omitted. Further, in regard to what was then the parish of Kilcomkeill, in which the lands in question were situated, it appears that the Bishop of Lesmoir, patron of the kirk of Kilcomkeill and chief titular of all the teinds thereof, appeared by his procurator, and they "appoint nothing against the premises." Then, again, it appears that the person from whom the sub-commissioners derived their information as to the value of the lands belonging to Lochbowie and of the lands belonging to the parson of Morvern was the parson of Morvern himself, who certainly must have known everything regarding Knock. Yet, while he gives up and values the teinds of his own lands of Ulling, contained in his charter of 1620, he makes no mention whatever of Knock, which was contained in the same charter, and which, as we have seen, was also contained along with Ulling in his son's sasine in 1640. The reason of this silence as to Knock is not apparent. One suggestion might be that the parson had parted with it between 1620 and 1629, but that would not be consistent with the subsequent titles. Besides, if he had parted with it, some other person must have acquired it; but no person appears to have given it up for valuation, and the question is, was it or was it not valued? The minister suggests that, *as the parson* was himself both proprietor

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in occupation of the land and possessor of the teinds, he may have omitted to put, or thought it unnecessary to put, a value on the teinds. This suggestion is plausible rather than altogether satisfactory. If, however, Knock was in fact omitted, it is not incumbent on the minister to find out the cause of the omission. On the face of the report there is no trace of its having been valued *eo nomine;* and in the record the only suggestion by the appellant is, that it was comprehended in Lochbowie's twopenny land of Cowlkeylis, a suggestion which, for reasons I have already stated, cannot be accepted.

Then as to the two processes of approbation in 1785 and 1786:

The first was a simple process of approbation brought by the Duke of Argyll with reference entirely to lands belonging to himself in various parishes, including some lands in what was in 1629 the parish of Kilcomkeill. These were the lands which had been valued in 1629 as belonging to Lachlane Macleane of Morvern, and have nothing to do with the subject-matter of the present case.

The process of approbation of 1786 was brought by the then heritors of lands in the old parish of Kilcomkeill other than the Duke of Argyll. One of these heritors was Campbell of Ardslignish, a predecessor of the appellant. The persons called as defenders were the Officers of State, the Duke of Argyll, the minister of Morvern, and the moderator of the synod of Argyll. None of these entered appearance except the Duke of Argyll, and his interests were not affected by anything done. The process was one for approbation, valuation, and division. The summons contained a conclusion for approbation of the report of the sub-commissioners, a conclusion for division of the *cumulo* valuation of the teinds of such of the lands belonging to the different pursuers as had been valued *in cumulo*, and that such division should be made in terms of a mutual agreement between the pursuers, or conform to a division to be proportioned on a proof of the present rental of the lands, and to be approved of by the Court, or by any other proper rule, and also a conclusion of a precautionary character, to the effect that if the Lords should refuse to approve of the report of the sub-commissioners concerning the valuation of the stock and teind of "the lands thereinbefore enumerated, or any part thereof," a new valuation should be led of the teinds of "the several lands before enumerated, or such parts thereof." The lands there referred to were the same as were enumerated in the report of 1629, except such as belonged to the Duke of Argyll, and had been included in the approbation of 1785. The summons made no mention of Knock, or of a sixteen shilling or sixteen shilling and eightpenny land of Gualichelish. The only lands mentioned in the summons as belonging to Ardslignish were Achnaha, and the portions he had acquired of Lochbowie's twelve merk lands, viz., Arnies, Achabeg, and Cowlkeylis.

Let us now see what course was followed in that process. In the first place, nothing was done under the conclusion for valuation. That conclusion may therefore be disregarded. There remained the conclusion for approbation of the report of 1629 and the conclusion for dividing or apportioning such of the valuations of teind as had been made *in cumulo*. The conclusion for approbation was necessarily limited to the contents of the report, and no decree of approbation to be pronounced in that process could legally go, or could be intended by the Court to go, beyond the conclusions of the summons, or to give the character of valued teind to the teinds of lands that had not been reported as valued by the sub-commissioners under some name or description; and if the process had been, as in the case of the Duke of Argyll, a mere process of approbation, the expression "Cowlkeylis, now called Knock," which has caused so much difficulty in this case, would in all probability never have been called into existence. But there was a conclusion for division of teind, and the parties appear to have agreed that the division of teinds valued *in cumulo* should be made in proportion to the valued rent of the lands belonging to the several heritors. Accordingly a certificate of the valued rent of the parish of Morvern, so far as regarded the lands of the parties to the cause, was obtained. From the valuation-roll of the county it appears that the roll was made up in 1751, at which time Glendessary was proprietor both of the lands that had belonged to Lochbowie and of those acquired from Allan Maclean of Knock. The certificate produced in 1786 for

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he purpose of dividing the *cumulo* was made after Glendessary's estate had been old and partitioned, and at the time when Ardslignish was proprietor of the arts of that estate which fell to him. In both of these documents it will be een that "Knock and Gualichelish" are coupled together, and opposite to them placed one sum of valued rent, £5, 11s. 1d. Probably they were possessed s one tenement when the roll was made up. There is no other name at all imilar mentioned either in the roll or in the certificate. We have already seen hat Knock was acquired by Glendessary from Allan Maclean of Knock, but whether Gualichelish thus coupled with it represents the twopenny land of Cowlkeylis acquired by him from Lochbowie, or the sixteen shilling and eightenny land of Gualichelish mentioned somewhat mysteriously in the instruments f sasine in 1707, or both, does not appear. The appellant, of course, assumes hat it was the first, but whether it was so or not it was plainly something different from Knock. There are two things, Knock and Gualichelish, that go to make up the £5, 11s. 1d. of valued rent.

When the teinds that had been valued *in cumulo* came to be apportioned according to the valued rents of the lands, the clerk who made the scheme of division appears to have assumed that the report of the sub-commissioners comprehended all the lands in the parish; and in dividing and apportioning the teinds of Lochbowie's twelve merk lands, which had been valued *in cumulo* at 1 boll meal, 1 boll 2 firlots 1 peck bear, and £40 Scots, he apportioned to Arnies and Achabeg, which then belonged to Ardslignish, a proportion corresponding to their valued rent, which was £4, 3s. 4d., and he apportioned to what he describes as "Cowlkeylis, now called Knock," a proportion of teind corresponding to the sum of £5, 11s. 1d., which in the roll and certificate of valued rent stood opposite to Knock and "Gualichelish." This is the first appearance of the expression "now called." There is no warrant for it in the summons, or in the titles, or in the report, or in any document that has been referred to. The clerk who prepared the scheme no doubt saw from the report that one of the parcels comprehended in Lochbowie's lands was called "Cowlkeylis," and it was his duty to apportion to that parcel part of the *cumulo* teinds of Lochbowie's lands. He also saw that in the certificate of valued rent of the parish the only name at all similar to Cowlkeylis was coupled with Knock, and one sum of valued rent put opposite to them. Then, apparently assuming that all the lands in the parish would be embraced in the report, and not finding Knock mentioned *eo nomine*, but finding it in conjunction with the only name at all similar to one which he did find mentioned, he may have assumed that Gualichelish had come to be called Knock. It is apparent that in his own mind Cowlkeylis, not Knock, was the thing he was dealing with, as indeed it was the only thing he required or was entitled to deal with; but he adds, "now called Knock," so as to identify it with the valued rent of £5, 11s. 1d. By thus apportioning to Cowlkeylis a share of the *cumulo* teind corresponding to a sum of valued rent, which comprehended Knock as well as Cowlkeylis, it follows that more has been put on Cowlkeylis than its proper proportion, and consequently that less than the proper share has been put on all the other parcels of land comprehended in the *cumulo* valuation, and that the owners of these other parcels obtained an unjust advantage. It is scarcely supposable that Lochbowie's Cowlkeylis, which was only a twopenny or one merk land, could by itself have a valued rent of £5, 11s. 1d., seeing that his sixpenny or three merk lands of Arnies and Achabeg have in the same roll only a valued rent of £4, 3s. 4d.

If the clerk fell into this mistake in the way suggested, or in any way, none of the parties present had any interest to correct him, but the reverse. Ardslignish would be benefited by having his unvalued teinds of Knock treated as valued. The other heritors would be benefited by having part of the *cumulo* teind diverted to Knock, thereby lightening the burden on them. But the division and apportionment of that *cumulo* was not a matter in which the minister was interested. He would get the whole amount, whatever might be the apportionment among the several owners of what had been Lochbowie's twelve merk lands. The scheme of division, being unopposed, was of course approved of, and decree was of *course given in conformity* with it. Whether

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that decree opposes a technical bar to the contention of the minister I shall consider presently. In the meantime it is a judgment of the Court, to the effect that the parsonage and vicarage teinds "of the lands of Achnaha, Arnies, and Achabeg, and Cowlkeylis, now called Knock, with the pertinents belonging to John Campbell of Ardslignish," are of the worth and avail there specified, and are to continue so in all time coming.

The next thing that occurred was that, in the year 1800, the minister of Morvern raised a process of augmentation, modification, and locality. In that process the report of 1629, and the approbations thereof in 1785 and 1786, and the foresaid scheme of division, were founded on, and were recognised and treated as shewing that the whole teinds of the parish had been valued in 1629. No objection was stated to the regularity or sufficiency of any of these documents, although questions were raised which gave an interest to examine them. In that process of augmentation arrangements were made and judgments pronounced on the assumption that the whole teinds of the parish had been valued in 1629; and so matters rested until the present process, raised in 1863, disturbed the prevailing belief. The terms of the report in 1629, and of the decree of approbation in 1786, and the proceedings in the process of augmentation in 1800, raise a presumption that in 1629 the teinds of the whole lands in the parish were valued, though Knock was not specially named; and very clear evidence to the contrary will be required to rebut that presumption. But I am of opinion that, if it be competent to go into the inquiry, the presumption would be rebutted by the titles referred to by the minister, and an examination of the proceedings in the process of approbation. I think that the allegation of the appellant, that Knock had always been incorporated with Lochbowie's twopenny land of Cowlkeylis, if meant to apply to the Knock in question, is disproved by the titles, which shew that it never belonged to Lochbowie, but belonged to a different family. And if the allegation means only that there always was a Knock incorporated with Lochbowie's Cowlkeylis, it is of no value, because the Knock alleged to be unvalued is the Knock acquired from Allan Maclean of Knock.

I think that the other suggestion in the case for the appellant, that in the interval betwixt 1620 and 1640 Lochbowie may have possessed Knock by some right of liferent or other temporary right, cannot avail the appellant, because in that view it could not have formed any part of the nine parcels composing the twelve merk lands that were valued, and it is not mentioned as having been valued, and is not in any way referred to in the report of the sub-commissioners.

There still remains to be considered the question, whether the decree of approbation in 1786 excludes the contention of the minister. That involves points which I shall deal with separately.

First, What is the true reading and legal construction of the decree of approbation? I think it is merely an approval of the report of 1629, and of the valuation there made of the lands there mentioned, and cannot be held to extend to any different lands. If it had extended to different lands it would have been *ultra vires*. But it did not do so. The summons or libel had reference only to lands enumerated in the report. The conclusions of the summons were limited in like manner, and the decree of approbation refers throughout to "the pursuer's lands libelled," and no other lands. It is true that in that part of the decree which has reference to the conclusion for dividing such of the teinds as had been valued *in cumulo*, we find that in the approving of the scheme of division the words of the scheme are adopted, viz., "teinds of the land of Achnaha, Arnies, and Achabeg, and Cowlkeylis, now called Knock." These words, with the exception of "now called Knock," are quite in accordance with the report and the summons. The addition of these words can import nothing more than that what was called Cowlkeylis at the date of the valuation is now (in 1786) called Knock, —has now got a name which it had not formerly. There is no finding that the Knock known by that name at and before the date of the valuation was valued. Neither is there any finding that it was then or is now Cowlkeylis. In short, whether Cowlkeylis was or was not now called Knock, that *alias* conferred on

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rwlkeylis cannot be made to mean legally that the Knock acquired from Allan aclean of Knock was part of Lochbowie's twelve merk land, and that the Court s so decreed when it would have been *ultra vires* to have done so. I there- re think that the terms of the decree do not exclude the contention of the inister.

Second, Is it then excluded by prescription? As regards the positive pre- iption, I concur with the majority of the Judges in the Court below. I think at the plea is inapplicable. There is neither the kind of title nor the kind of session which the statute requires.

Then, as regards the negative prescription, I think that it cannot be founded to the effect of excluding the contention of the minister. If I am right in view I take of the true legal construction of the decree in 1786, it is not in- sistent with the contention of the minister as to Knock, and there is no room the plea of negative prescription. But further, it is to be observed that the l question here being one of identity, the plea of prescription can have no ce unless the identity, or, in other words, the matter in issue, is assumed in vour of the appellant and against the pursuer.

On the grounds I have stated I think that the Court of Session came to a ht conclusion in holding that the appellant's lands acquired from Allan aclean of Knock were not included in the valuation by the sub-commission in 29, and are unvalued. I therefore think that the interlocutors appealed from ould be affirmed, and the appeal dismissed, with costs.

Lord Cairns.—My Lords, it appeared to me throughout the argument of this se that the real question to be decided was not so much, perhaps not at all, e question of positive or negative prescription, upon which so much learning nd care appear to have been bestowed in the Court below, as what we should ther term a question of fact, viz.,—aye or no,—were the lands included in the itles of the appellant valued in the valuation of the teinds of the parish by the ub-commissioners in the year 1629, and more particularly were those lands hich in the titles of the appellant are now described as "Knock," or as "now alled Knock," so included?

Now, my Lords, if we were to deal with this case upon considerations of pre- umption only I own it appears to me that the way in which the valuation of the sub-commissioners was treated in the years 1785 and 1786 in the two pro- esses of approbation to which my noble and learned friend has referred would go very far to shew that the whole of the teinds of the parish had been included in the valuation of the sub-commissioners in 1629. Indeed, I might add that the valuation of 1629, *ex facie*, would rather raise in the mind of any one perusing it the idea that the sub-commissioners conceived that they were valuing the whole of the teinds of the parish. And further than that, when we come to the process of augmentation, which was concluded in the year 1804 and was raised by the father of the present respondent, who was then minister of the parish, nd who appears to have by his procurator represented that the teinds of this arish were all valued by the sub-commissioners of the presbytery of Argyll in he years 1629 and 1630,—I say, when we come to that process of augmentation, certainly would appear to me, and it did appear to me in the argument, that at presumption was very much advanced and very much strengthened, and at if the case were to rest there, and if we had nothing more to guide us, the ference to be drawn from these circumstances to which I have referred would so strong that it must be accepted as leading to the conclusion that the whole the teinds of the parish had been included in that valuation.

But, my Lords, in this case we are not left to presumption. The case having en argued in the course of last session, speaking for myself, I may say that uch of the delay that has occurred in deciding it has arisen from the circum- ance that I have felt, as I think every person would feel, a strong desire to ve the fullest weight that was allowable to those considerations of presump- on, and I felt some unwillingness to have the inference which had been raised my own mind by those circumstances of presumption that had been so strongly rged dislodged by a different view, without the clearest proof that that presump-

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tion could not be entertained. But I am obliged to confess that when I com to look at the titles which have been so fully explained by my noble and learne friend (whose explanation I do not mean to repeat), I am driven altogether o of the conclusions which I might have derived from the presumptive eviden to which I have referred; and after a great deal of time and trouble has bee expended in looking at these titles, I have evidence before me which appears me to be perfectly clear, and which I cannot disregard, that the lands include in the titles of the appellant, and which are there described as "Knock," or, "now called Knock," are not the same lands as those described by the old nam of "Knock" found in the earlier titles, and are not included under that o name. How the change has come about has been accounted for by my nob and learned friend; but whether the suggestion he has made is a correct one not, we have this fact as clear as if the matter had only occurred a few month ago—we have the devolution of the title of the different lands in the paris clearly marked in a succession of charters and deeds, and it appears to me fro that to be perfectly clear that the titles under which the present appellant clain to shew that her land was included are not the titles under which this land mu be included, and that there is in the valuation of 1629, and in the lands therei described, no name or denomination of territory under which we can range th land which is the subject of the present appeal.

My Lords, I own I have some regret at the conclusion at which I have t arrive, more especially as I find that the late minister of the parish himself wa clearly under a different impression. But that of course could not prejudice th case we have now to decide on; and I must say that I agree entirely in the con clusion at which my noble and learned friend has arrived, and in the motio with which he has concluded his statement, namely, that this appeal be dis missed.

Lord Hatherley.—My Lords, I confess that I approached the consideratio of this case with the same degree of doubt and difficulty as that which has bee expressed by my noble and learned friend who last addressed the House, wit regard to a claim made for teinds in a case where, at least as long since as 178 there appears to have been an assumption on the part of many of those wh were interested in the consideration of the matter that the teinds in questio had been valued by a process of valuation which took place as long as near 250 years ago, especially as we find that that assumption was not only acquiesce in, but actually put forward by the minister himself in the year 1804, now som seventy years ago. Having regard to the principles which have prevailed in a systems of jurisprudence, and especially having regard to some not otherwis than recent cases in your Lordships' House with reference to the amount of pr sumption which ought to be justly entertained when claims are put forward co trary to that which has been the current view of parties (especially parties i terested) for a long period of years, I was anxious to look into the case (and do not think it was a misplaced or an improper anxiety), to see if there was an thing which would justify your Lordships' House in coming to the conclusio that the general agreement, apparently, of thought and opinion during so long course of time as that to which I have referred was founded in right and i title.

But as it happens in this case (and we owe the demonstration of it in a gre degree to the extreme attention which has been devoted to the case by my nob and learned friend who first addressed the House), there really is not the thinne interstice in which there can be interposed a presumed arrangement or a pr sumed agreement which would justify the claim set up by the appellant to tre this particular parcel of land as having been valued in the valuation of 162 for we have, with a degree of distinctness and completeness which could scarce be expected in a title derived from so remote an antiquity, a clear deduction title, which has been made much more clear, I admit, to my own mind, by t statement of the noble and learned Lord who first expounded the deduction titles. We have a clear and continuous stream of documents of title, whi evince the course in which the land now in question, namely, the land of Knoc

came down from the parson of the parish in 1629, and we have another exactly similar stream of clear and continuous titles with reference to the land belonging to Maclean of Lochbowie, which comprehended another parcel which the appellant in this present case wished to represent as including the land of Knock. It is impossible, as was demonstrated by the deductions of title traced by my noble and learned friend, so to include Knock in the lands which came from Maclean of Lochbowie. Having these two clear and distinct streams of title, beginning from a period considerably antecedent to the valuation—beginning from 1620 (nine years before the valuation) in the one case, and from a period still more remote in the other case, we find these two streams at last in confluence in the title of Cameron of Glendessary, and we find nothing from that time forward which can leave room for a presumption of an arrangement to be interposed at any time, by which your Lordships can now say that the land of Knock was comprised in the valuation of the Lochbowie land under another title, namely, Cowlkeylis. It appears to me to be clearly made out that the Knock in question is the Knock which belonged to the parson at the time when the valuation was made, and it appears to be equally clear that it is not named or included in that valuation.

Under these circumstances, and being anxious to say these few words, in order to shew that I am not unmindful of the duty which is incumbent upon every Court to presume all that can be presumed in favour of what have been believed for a long course of time to be the respective rights and titles of the parties, I think it is impossible in this case to make a presumption which will exclude the positive and clear matters of fact which have been placed before our minds, and therefore I find myself compelled to join with my noble and learned friends in the conclusion at which they have arrived.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

CONNELL & HOPE, Westminster—A. WEBSTER, S.S.C.—WILLOUGHBY & FOX, Clifford's Inn—J. MARTIN, W.S.

CASES

DECIDED IN

THE COURT OF SESSION, &c.

1872–73.

WINTER SESSION.

JOHN HOME, Appellant.—*Muirhead.*
ROBERT PRIMROSE PATERSON, Respondent.—*Shand—Balfour.*

No. 1.

Oct. 21, 1872.
Home v. Paterson.

Franchise—Parish Schoolmaster—24 *and* 25 *Vict. c.* 107, *Parochial and Burgh Schools (Scotland) Act*, 1861, *sec.* 18.—By sec. 18 of the above Act it is provided that in any arrangement for the retirement of a schoolmaster the schoolmaster's house, &c. shall be made over "to the person actually discharging the duties of schoolmaster."

Held that the proviso did not apply to the case of a schoolmaster who had on account of bad health been allowed to employ an assistant for a period of years to discharge his duties, but had not retired.

Registration Appeal Court. B.

JOHN HOME, W.S., Merchiston House, objected to Robert Primrose Paterson being continued on the roll as a voter for the county of Midlothian. Robert Primrose Paterson stood enrolled as a voter as "Robert Primrose Paterson, schoolmaster, proprietor in virtue of his office, houses, and pertinents, Duddingston." It was objected that he was not schoolmaster of the parish of Duddingston, in the actual discharge of the duties of schoolmaster, and had not been so for ten years past.

The facts as stated in the special case by the Sheriff were:—"That the voter was duly appointed schoolmaster of the parish of Duddingston in the year 1850; that in 1862 there was an arrangement between the voter and the heritors of the parish, by which the voter, as schoolmaster, was permitted to appoint an assistant, or a person to act for him as schoolmaster, and the salary was to be received by this person; that the terms of this arrangement and the cause of it, and whether it was in writing or verbal, have not been stated to the Sheriff; that the arrangement was for a period of years, and ended in April or May 1872; that the person so appointed discharged the duties of schoolmaster since 1862 till April or May 1872, and he continued to discharge these duties after the conclusion of the said arrangement and till recently, when he was dismissed by the voter; that the voter has now appointed another person to act as schoolmaster for three months, whom he is to pay for his services; that the voter has not personally *discharged the* duties of schoolmaster since

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1862; that he has without interruption occupied the schoolmaster's and garden. He considers himself to be, and always to have bee schoolmaster of the parish, and that he could at any time act as sc master if he was not prevented by his medical adviser on account c state of his health."

By the Parochial and Burgh Schools Act, 24 and 25 Vict. c. 10 18, it is enacted that "nothing in this Act shall be held to interfere any arrangement which shall have been concluded between the he and the schoolmaster of any parish for the retirement of such sc master, except as regards the house and garden and premises att thereto, which shall in every case be made over at the term of Whits next after the passing of this Act to the person actually dischargin duties of schoolmaster."

The decision of the Sheriff was,—That it had not been proved th has ceased to be schoolmaster, and that his name should be continu the roll.

Home appealed, and argued;—That as the voter had ceased to disc the duties of schoolmaster, his title to occupy the house had also cea

The respondent answered[1];—There was here no final retirement Paton's case, and the schoolmaster might at any time resume the c of his office.

LORD BENHOLME.—I am satisfied that no case has been made out for fering with the Sheriff's judgment. There is a clear distinction betwee case and Paton's case, where the schoolmaster resigned his office, and no merely the active duties of the office. There was no actual resignation h the voter retained the status of schoolmaster. The distinction betwee schoolmaster and an assistant appointed by the schoolmaster to dischar duties is very obvious.

LORD ARDMILLAN.—I retain the opinion expressed in Paton's case, th authoritative separation of the voter from the active duties of his office pr a very serious obstacle to the enjoyment of the franchise in respect of occupancy of the house. In the present case the voter has had his name roll for many years as occupant of the schoolmaster's house, and that occupancy he still retains. The objector is bound to make out that the who is actually occupying the school-house is so separated from the discha the duties of his office as to be no longer entitled to the position of schooln It is, on the one hand, not sufficient that he continues to occupy the But, on the other hand, it is not sufficient for the objector to prove that been compelled by the state of his health to cease from giving instructio sonally, and to appoint a temporary substitute. The person now actin appointed, and the person formerly acting was dismissed, by this voter from all that appears in the case the voter, who has never been dismis suspended, might still be discharging the duties of the office if he were i health, and will resume them on recovery. I therefore think that the v not in the same position as in the case of Paton, where the heritors had re the schoolmaster from the sphere of his official duties, so that he could n and could not resume them.

LORD ORMIDALE.—The case of Paton cannot be held to rule the presen that case the schoolmaster had resigned, or was held to have resigned his while in the present the schoolmaster not only retains the house but all th to discharge the duties of schoolmaster which he ever had. It is true t does not discharge the active duties of the office, but his title is not t destroyed. It can be easily understood that any legitimate cause might

[1] Paton v. Morison, Oct. 23, 1871, *ante*, vol. x. p. 1.

to prevent a schoolmaster for a time personally discharging the duties of his office. I do not therefore think that the objector has made out a case for having him struck off the roll. No. 1. Oct. 21, 1872. Home v. Paterson.

THE COURT affirmed the Sheriff's judgment.

JOHN HOME, W.S.—T. F. WEIR, S.S.C.—Agents.

WALTER SANDILANDS, Appellant.—*Shand—Balfour.*
JOHN HOME, Respondent.—*Muirhead.*

No. 2. Oct. 21, 1872. Sandilands v. Home.

Franchise—Valuation-Roll—Proof of Value—Valuation Act, 1856, 17 *and* 18 *Vict. c.* 91, *sec.* 34.—Certain subjects were entered on the valuation-roll of 1871-72 as of the annual value of £12, and on the valuation-roll of 1872-73 as of the annual value of £16. The assessor stated that the value for 1871-72 was truly £14, and that it should have been so stated in the valuation-roll. *Held* that the statement of the assessor that the valuation-roll was wrong could not be admitted to contradict the valuation-roll.

WALTER SANDILANDS claimed to be enrolled on the register of voters for the county of Midlothian as "tenant, Moffat Park Cottage, Inveresk." Registration Appeal Court. B.

John Home, W.S., objected that the value of the subjects on which Walter Sandilands claim to be enrolled had not been, during the twelve calendar months immediately preceding the 31st July 1872, of the annual value of £14, as appearing on the valuation-roll of the county.

The facts as stated by the Sheriff were—"That the annual value of the subjects, as appearing on the valuation-roll for 1872-1873, is £16; that the annual value, as appearing on the valuation-roll for 1871-1872, is £12; and that the claimant returned the said sum of £12 as the value for the valuation-roll of 1871-1872. The assessor stated that the value for 1871-1872 was truly £14, and that it should have been so stated in the valuation-roll of that year."

The Sheriff rejected the claim, and Sandilands appealed.[1]

LORD BENHOLME.—I cannot doubt but that the assessor's opinion is here brought directly to impeach the valuation-roll of the previous year, because what he says comes shortly to this, that subjects the value of which he put down at £12 ought truly to have then been valued at £14. Now, I do not think that we can allow him to do that, and so get behind the valuation-roll. It might have been a different case if a rise in the value towards the latter period of the year had been proved to the Sheriff, but that was not attempted. We cannot allow the authority of the valuation-roll to be impeached in this way.

LORD ARDMILLAN.—In my opinion this case can be disposed of without interfering with previous decisions, or deciding the general principle.

We cannot separate the two sections of the statute as to owners and tenants. The recognition of the effect and authority of the valuation-roll must be the same in both. I am still of opinion that the valuation-roll in existence at the date of the claim is in a different position from that of the previous year; and this is best illustrated by taking the case of a claimant as owner who must have been in possession for six months. If the current valuation-roll states the value of his property at £10, while the roll of last year makes it £4 or £5, and if, in the interval, he has built his house, or an addition to his house, or has so increased it and improved it as to augment its value,—is he to be excluded from the franchise?

[1] **Brown v. Blackwood**, Oct. 20, 1869, *ante*, vol. viii. p. 8; Dove v. Reid, Dec. 19, 1868, *ante*, vol. vii. p. 287; M'Gaw v. Maitland, Dec. 19, 1868, *ante*, vol. vii. p. 327; *Alexander v. Thomson, Dec. 19, 1868, ante*, vol. vii. p. 325.

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Oct. 21, 1872. Sandilands v. Home.

As I read the statute, the current valuation-roll cannot be impugned or challenged. Nor is a challenge of the old valuation-roll to be lightly received or favourably viewed. That I consider to be the general view of the statute. But the case here differs from that supposed in its special circumstances. This claimant, when giving up his value to the assessor for taxation, stated it to be £12, and now, when he wishes to obtain the franchise, he says that the true value at that time was £14, and he is probably correct, because we see that his property is stated at £16 of value in the present year. But we cannot allow such a proceeding. We cannot permit him to challenge a value taken on his own statement. I think we should affirm the decision of the Sheriff in the circumstances of this case; but we must be understood not to differ from the principle decided in the quoted case of M'Gaw when circumstances occur to require the application of that principle.

LORD ORMIDALE.—I am of the same opinion.

I am glad we have not here to decide any general principle as regards the valuation-roll, for though the 34th section of the Valuation Act (17 and 18 Vict. c. 91) would be of great importance in assisting that principle, it has not been brought under our notice. That section is in these terms:—"In all questions and proceedings under any Act of Parliament relating to the franchise or to the representation of the people in Parliament, it shall be sufficient to refer to an entry in the valuation-roll in force for the time, or last in force under this Act in any county or burgh, and such entry shall be received and taken in all such questions and proceedings as conclusive proof that the gross yearly rent or value of the lands or heritages specified therein is at the date of such reference, and has been from the commencement of the year to which such valuation-roll applies, of the amount therein set forth. . . ."

That section could not cover the case of new houses erected after the making up of the roll. For example, suppose that several new and valuable houses were erected during the latter part of a year, they could not be in the valuation-roll of that year. But without remarking further upon the principle, there is here no proper or reliable evidence to shew that the value of the subjects in question was not correctly stated in the valuation-roll. If the assessor entered these subjects in the valuation-roll at too low a valuation he must be held to have done so in violation or neglect of his duty; and therefore, when we find that the claimant himself had stated the value at £12, being the sum entered in the valuation-roll, I think the attempted correction by the assessor is quite inadmissible.

THE COURT affirmed the Sheriff's judgment.

T. F. WEIR, S.S.C.—JOHN HOME, W.S.—Agents.

No. 3.

Oct. 21, 1872. Rutherford v. Dunn.

WILLIAM RUTHERFORD, Appellant.—*Darling.*
THOMAS JOHN DUNN, Respondent.—*J. A. Young.*

Franchise—Tenancy—Precarious Possession.—A person occupied a house, garden, and lands belonging to his brother under a verbal agreement that he should pay the taxes and feu-duties, and keep them in repair, with power to sublet. *Held* that the occupant had right to the franchise as tenant of the subjects.

Registration Appeal Court. B.

THE following case was stated by the Sheriff of Roxburgh (Pattison):—"William Rutherford, shoemaker in Yetholm, claimed to be entered in the register of voters for the election of a member of Parliament for the county of Roxburgh as 'tenant of house, garden, byre, and lands at Yetholm, in the parish of Yetholm.' The claim was objected to by Thomas John Dunn, a registered voter.

"*It was established* as matter of fact that the claimant had personally

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occupied the subjects specified in his claim for several years, and is now in the personal occupancy thereof. That his elder brother, who succeeded to them as heir of their father at the father's death, about eight or nine years ago, agreed with the claimant to allow him to possess the subjects, upon condition that he kept them in repair, with liberty to sublet if he thought fit, and make the most of the subjects for his own benefit. No writing passed between the parties then, or at any subsequent period. No term for which possession was to endure was mentioned, nor was any rent specified. The claimant has since personally occupied the subjects. He had never sublet the same or any part thereof, and has from time to time expended sums of money in keeping up the subjects, has paid the feu-duty of the subjects, and taxes payable by the brother as proprietor in respect thereof, and has also paid poor-rates. He has never paid any rent to the brother directly or indirectly, or has had any settlement of accounts with him in reference to his expenditure on the house and otherwise, or his possession of the house.

"In these circumstances, the claimant maintained in point of law that he had been and was in possession of the subjects as tenant, and was therefore entitled to be registered and to vote, in terms of the 6th section of 'The Representation of the People (Scotland) Act, 1868.'

"The Sheriff rejected the claim, holding that the claimant's possession was not in law that of a tenant, but a precarious possession, terminable at any time at the will of the brother, and therefore not such as the said statute (section 6) requires."

William Rutherford appealed, and argued;—Actual personal occupancy was proved. There being no written contract, the law presumed that the bargain was for a year, and was renewed from year to year by tacit relocation. The power to sublet implied power to maintain occupancy for a year.[1]

LORD ARDMILLAN.—Permission to sublet must be assumed to have been part of the bargain, according to the distinct statement to that effect made by the Sheriff in the special case, and we must hold that it is so. If permission to sublet be a condition between the proprietor and the tenant, the proprietor making such a condition could not eject a subtenant; and the man who can thus sublet must be tenant, because no man can sublet unless he himself be tenant of the subjects. Besides, the claimant has occupied on the footing of tenancy. He has paid the annual burdens and taxes which were due by his brother as proprietor, such payments by him being a consideration in lieu of rent; and if, while so doing, he also had power to sublet, there can be no doubt that his tenure is of such a nature as to entitle him to the franchise.

LORD ORMIDALE.—I am of the same opinion.

The case may be tested in this way: Suppose a question had arisen in the Sheriff-court between this claimant and the party from whom he derives his right, and that the latter had, after the claimant had the possession, as is here set forth, and had paid annual burdens and taxes as stated, tried to eject him summarily, the claimant could, I think, have successfully answered that, according to the true construction of the agreement, he held at least a yearly tenure of this property as tenant. As tried by that test, the construction here contended for by the claimant must, I think, be held to be the true construction.

I therefore agree with your Lordship that the Sheriff has fallen into error in the present case, and that the judgment appealed against must be reversed, and the appellant's name should be added to the roll.

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[1] **Stewart** v. Grant, Dec. 19, 1868, *ante*, vol. vii. p. 311; Hilston v. Scott, Nov. 24, 1870, *ante*, vol. ix. p. 14.

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LORD BENHOLME.—I agree with your Lordships.

The Sheriff here has gone upon the ground that this claimant had only a precarious possession, entitling the landlord to turn him out on a week's notice. But surely this view is quite inconsistent with the fact that the claimant got a power to sublet. This power to grant a sublease seems to me necessarily to imply that he was tenant for a year at least, and unless he got notice before Whitsunday he must be considered to have held upon tacit relocation from year to year. We must alter this finding, and remit to the Sheriff to add the claimant to the roll.

THE COURT reversed the Sheriff's judgment.

JAMES STORMONTH DARLING, W.S.—JOHN STEWART, W.S.—Agents.

No. 4.

Oct. 15, 1872. Lord Advocate v. Marchioness of Lansdowne.

THE LORD ADVOCATE, First Party.—*Sol.-Gen. Clark—Rutherfurd.*
THE MARCHIONESS of LANSDOWNE, Second Party.—*Shand—Marshall.*

Succession—Inventory-Duty—23 and 24 Vict. c. 80—Discharge—Confusion—Entail.—The proprietrix of an estate under a deed of entail granted a bond of annualrent for improvement outlay under the Montgomery Act in favour of herself, her "heirs, executors, successors, and assignees," on which bond infeftment was taken. It was afterwards discovered that the entail was defective, and that she held the property in fee-simple. She thereupon executed a new deed of strict entail, expressly under burden of the above mentioned bond of annualrent, but with the provision that, in the event of her making no separate conveyance of it, it should accrue to the institute or heir of entail succeeding to the estates. She died without making any such separate conveyance.

Held that the bond of annualrent did not fall to be included in the inventory of the deceased's estate, under the statute 23 and 24 Vict. c. 80, as it was not *in bonis* of the deceased, there never having existed a proper relation of debit and credit between the entailed estate and her.

2D DIVISION. Ld. Ormidale. R.

THIS special case was brought under the Act 19 and 20 Vict. c. 56, with reference to the succession to the late Margaret Mercer Elphinstone of Aldie, Baroness Keith and Nairne and Countess de Flahault.

The Baroness Keith was the only daughter and child of the marriage between the Honourable George Keith Elphinstone and Jane Mercer. She was served heir of tailzie and provision in special to her maternal grandfather, William Mercer of Aldie, who died December 1790 in the lands of Meikleour, Kinnaird, Aldie, &c., in the county of Perth. The service was dated 16th March, and the retour was recorded 4th April 1793. The Baroness Keith, as heiress of entail in possession of the lands and estates of Aldie and Meikleour, &c., as authorised by the Court of Session, granted bond of annualrent, dated the 1st and 3d March 1851. She thereby bound and obliged herself "and the heirs of entail in their order successively succeeding to me in the foresaid entailed lands and estates of Aldie and Meikleour, &c., to make payment to myself, the said Margaret Mercer Elphinstone, Baroness Keith and Nairne, Countess de Flahault, and my heirs, executors, and assignees," of an annualrent of £485 15s. 6d., or such other annualrent or interest during her life as should correspond to the sum of £9715, 10s. 9d., being three-fourths of the sums expended by her on improvements on the said estates. Further, by the said bond the Baroness Keith bound and obliged herself "and the heirs of entail in their order successively succeeding to me in the foresaid entailed lands and estates of Aldie and Meikleour, &c., to make payment to myself, the said Margaret Mercer Elphinstone, Baroness Keith and Nairne, Countess de Flahault, and my heirs, executors, successors, and assignees, of an annualrent of £7, 2s. sterling for every £100 of the foresaid sum

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f £9715, 10s. 9d., for each and every year of the full period of twenty-ve years after the day of my death, and no longer." The bond gave real xcurity over the estates of Aldie, Meikleour, &c., for both annualrents. n instrument of sasine in favour of the Baroness Keith followed on ie said bond, and was recorded in the General Register of Sasines at dinburgh the 22d July 1851.

After the execution of this bond of annualrent it was discovered that ie deeds of entail under which the Baroness Keith held the said nds of Aldie, Meikleour, &c., were defective, and that she really held as e-simple proprietrix. She accordingly, on 21st November 1866, exe-ıted a deed of strict entail comprehending the said lands and estates Aldie, Meikleour, &c., by which she conveyed the said lands to her dest daughter, the Marchioness of Lansdowne, and the other heirs of en-il therein mentioned, but reserving her own liferent of the said lands ıd estates thereby disponed, and full power and liberty to herself, at any me of her life, to alter or revoke the deed of entail in whole or in part. he disposition in the deed of entail was granted expressly under burden f the bond of annualrent already referred to, and it further contained the ollowing clause:—"And I hereby declare that in case I shall not, during my lifetime, nor by any *mortis causa* deed or settlement, specially dispone or convey the whole or any part or portion of the foresaid two annualrents, then the whole, or such part or portion thereof as may not have been so disponed and conveyed by me, shall accrue to the institute or heir of entail succeeding under this present deed of entail, and the lands and others above disponed shall be free and relieved from the same in all time coming." No special disposition or conveyance of the said annualrents was ever made by the Baroness Keith. She died in 1867, and was survived by two daughters, the said Marchioness of Lansdowne and the Honourable Georgina Elphinstone de Flahault. Her personal and other property not included under the foresaid deed of entail was, in terms of a trust-disposition and settlement dated 13th December 1824, equally divided between her two daughters. The elder, the Marchioness of Lansdowne, succeeded to the entailed estate of Aldie, Meikleour, &c.

In the succession-duty account delivered to the legacy and succession-duty department of the Inland Revenue on behalf of the Marchioness of Lansdowne the rental of the heritable property was stated without deduction of the annual amount of the bond of annualrent in favour of the Baroness Keith for the improvement debt of £9715, 10s. 9d. The value or amount of the bond of annualrent was not added to the inventory of the personal estate of the Baroness Keith.

In these circumstances the Lord Advocate for the Crown maintained that the disposition and deed of entail of 1866 being revocable was testamentary, and was one of the instruments forming the will of the Baroness Keith; that the bond of annualrent for the improvement debt of £9715, 10s. 9d. was a real burden on the estates of Meikleour, &c., and was money secured on heritage belonging to the Baroness Keith at the time of her death, and formed part of her succession; that the said entail of 1866 being unrevoked, and no other testamentary deed disposing of the said bond of annualrent having been made by the Baroness Keith, the said bond of annualrent was carried by the destination in the said entail to the Marchioness of Lansdowne; that the said sum of £9715, 10s. 9d. secured by the said bond of annualrent was liable to inventory-duty, and such duty was payable by the Marchioness of Lansdowne.

On the other hand, the Marchioness of Lansdowne maintained that the Baroness Keith, by the disposition and deed of entail of 1866, "freed

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and relieved" the entailed estates of the bond of annualrent, and th the deed of entail did not carry the bond of annualrent to her, and th the same never belonged to her, and she never had power to assign t same, or to keep the same up as a debt against the estates: Further th the estates, freed of the bond, having been conveyed to her as institu under the deed of entail, and she having paid the whole Governme duties exigible from the lands, without deducting from their value t bond of annualrent, the claim for inventory-duty on the capital of t bond of annualrent, which was not bequeathed to her either in lifere or fee, and which from the date of the deed of entail (if not also pr viously, *confusione*) had ceased to exist, was unfounded. *Separatin* Although it were held that the Baroness Keith had not discharged t bond of annualrent during her life by a formal deed, she had, under t disposition and deed of entail executed by her, effectually indicated h intention that the bond of annualrent was not to burden the estates an series of heirs called to the succession. Such intention *destinatione* regu lated the character of the succession and mode of payment of the duti to Government, and in the present case was equivalent to a formal di charge of the bond executed by the Baroness Keith in her lifetime.

The question submitted for the decision of the Court was whether t Marchioness of Lansdowne was liable to pay inventory-duty on the su in the bond of annualrent, under the statute 23 and 24 Vict. c. 80, a part of the succession of the Baroness Keith, deceased.

The Lord Ordinary (Ormidale) pronounced the following interlocutor:— "Finds, in answer to the question submitted for the decision of the Cou in the special case, that the Marchioness of Lansdowne is liable to pa inventory-duty on the sum in the bond of annualrent, under the statut 23d and 24th Victoria, cap. 80, as part of the succession of the Barones Keith, deceased." *

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* "NOTE.—By the statute referred to it is enacted that the money secured o heritage shall be liable in inventory-duty as if it had been personal or moveabl estate.

"That the bond of annualrent in question was in itself of the nature and i the form of an heritable security is indisputable. But the defender contend that, as the entailed landed estate over which the bond bears to be heritabl secured turned out not to be entailed at all, but held in fee-simple by the Bar ness Keith, and as she was then also the creditor in the bond—or in other word as the Baroness was thus at one and the same time in right of the bond and u fettered proprietrix of the lands over which the sum in the bond was heritabl secured, the latter became extinguished *confusione*. It appears to the Lor Ordinary that this contention of the defender is not well founded.

"As a general principle of law it is no doubt true that when the same perso comes to be both debtor and creditor in an obligation it is to be held as e tinguished *confusione*. But it is equally clear, on the authorities which will b afterwards referred to, that this principle is subject to modification and exce tion according to the circumstances in which it arises.

. . . . . .

"No alteration or revocation having been made by the Baroness the result i that the bond of annualrent in question has upon her death devolved upon he eldest daughter, the defender, as institute under the entail of 1866 of the lande estates; and in this way it may be said that the bond then came to be e tinguished *confusione* in the person of the defender. But the duty now claime is on the inventory, not of the defender's estate, but of that of the deceased Bar ness Keith. In these circumstances, the Lord Ordinary thinks that, in the pe son of the Baroness, the bond had not been extinguished *confusione* or otherwis but, on the contrary, must be held to have subsisted down to her death, as

The Marchioness of Lansdowne reclaimed.
At advising,—

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LORD JUSTICE-CLERK.—The question submitted for the decision of the Court is, whether the Marchioness of Lansdowne is liable to pay inventory-duty on

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separate and independent heritable right, and that equally whether the landed estates are to be considered as entailed or unentailed when the bond was executed. It may be that while, and so long as the Baroness lived, and was herself in right both of the entailed lands and the bond of annualrent, the latter was dormant, but not extinguished; for she might, in the Lord Ordinary's opinion, have destined and left it, not to the defender, but to her younger daughter, or any one else she pleased. It is true that she left it to the defender as institute in the entail of 1866, but this of itself shews that it had been down to her death a separate part of her estate, and so dealt with. Accordingly, if she had not by her deed of 1866 specially disposed of the bond in the way she did, the succession to it and to the entailed lands would have been different, the bond going to her two daughters equally, and the entailed lands devolving, in the first instance, wholly upon her elder daughter.

"The views entertained by the Lord Ordinary, in regard to this case, as now explained, are supported, he thinks, by the authorities—Stair i. 8, 19; Ersk. iii. 5, 27; and Bell's Principles, sec. 580. According to these authorities, it is clear that *confusio* does not always, when the two rights come to be vested in the same person, effect an extinction of either right. Thus, in the words of Mr Erskine—'Sometimes it produces only a temporary suspension of it, while the debtor and creditor continue one and the same person, or while the same person is entitled to the succession of the two several rights from the different destinations of which the *confusio* flows. But when the succession of these rights happens again to divide in two, the obligation or right which lay for a while sunk or dormant *confusione* revives and recovers its first force—(Stair, December 21, 1680; Cuninghame (Dict., p. 3038), January 4th, 1726; Cumin (Dict., p. 3042), cited (folio) Dict. i. p. 196; Stair, i. 18, 9). Hence the conveyance of a debt affecting an entailed estate in favour of the heir of entail and his heirs whomsoever does not import a perpetual extinction of the debt. The debt is indeed dormant during the life of the disponee; but if the heir-at-law and the heir of entail happen at any time after to be different persons the ground of the extinction, or rather of the suspension, ceaseth, and consequently the debt will revive in the person of the heir-at-law against the heir of entail, for it is considered as a separate estate in the absolute power of the heir who purchased it, and affectable by his creditors—Fac. Coll., ii. 63, art. 2 (Gordon, Dec. 1, 1757, Dict., p. 11,164). Nay, though the deed assigning the debt to the heir of entail should also contain a discharge of it in his favour, as having made the payment, the discharge hath not the effect of extinguishing it *confusione*, seeing that part of the deed which assigns it is a sufficient indication of the heir's intention that it should still continue to subsist in his person—Fac. Coll. ii., 101 (Kerr v. Turnbull, February 15, 1758, Dict., p. 15,551).' Mr Bell states the same doctrine thus:—'Where the creditor has an interest to keep up the debt, it is held to be suspended, not extinguished. So the debt may be assigned, and money borrowed on it; or it may be kept up for the benefit of children, as by an heir of entail; or in contemplation of a divergence of the lines of succession, it may be made available to a particular heir,'—and both the learned authors refer for illustrations of the doctrine they state to numerous decided cases.

"It was argued, however, for the defender, that the doctrine and decided cases referred to can have no application except where one of the rights relates to an entailed estate, the destination of which is beyond the power of the proprietor to alter. It no doubt appears to be true that in most of the decided cases the question has arisen where one of the rights related to an entailed estate; but the doctrine, as stated by the commentators, is not limited to such cases, and the decisions do not in every instance relate to entailed estates. For example, in the case of Lady Halgreen v. Burnett, 30th July 1702, vol. iv. of

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the sum in the bond of annualrent, under the statute 23 and 24 Vict. c. 80, as part of the succession of the Baroness Keith, deceased. The clause under which the claim is made is in these terms :—"All money secured on heritable property in Scotland, and all money secured by Scottish bonds and other instruments excluding executors, and all money secured by Scottish bonds or other instruments the rights to which shall be taken excluding executors, constituting the succession or part of the succession of any person who shall have died after the 3d day of April in the year 1860, shall be liable to inventory-duty under the said recited Act." The 2d clause of the Act is that the said duty, with interest thereon at the rate of five per cent from the expiry of six months after the death of such deceased person, shall be a debt to Her Majesty, and shall be payable by any and every person who shall take any money secured as aforesaid, constituting the succession or part of the succession of any person deceased, and that whether he shall take the same as having a beneficial interest therein, or as trustee, or in any other capacity, and whether he shall have an absolute right or only a liferent or life interest or other limited right or interest therein, and whether he shall take the same by *mortis causa* conveyance or by special destination or by inheritance."

The question is, whether the money which is said to have been secured, viz., the sum of £9715 contained in this bond of annualrent, is within the first clause,—in the first place, whether it secured a sum of money on heritable property, and in the second place, whether it constituted part of the succession of the Baroness Keith. The state in which the right and interest of Lady Keith stood at the date of her death was simply this, that she was the uncontrolled proprietrix of the whole of that estate on which it is alleged that this burden had been laid and this money secured. These bonds were executed for the purpose of making a burden on an entailed estate in respect of certain moneys expended on improvements, on the footing and supposition that the estate was limited by fetters, when in point of fact these fetters were entirely null. The way in which Lady Keith dealt with these bonds is this : she executed a new entail upon the footing that the former entail was defective in the solemnities required by the law. The new entail is substantially the same as the previously existing one, and keeps alive the feudal investiture which had been taken under the bond at the time when it was thought that that was necessary to make it a burden upon the fee of the estate, but with this provision that unless she shall leave the bond and the money secured by it to any one else, it is on her death to cease and determine absolutely, leaving the institute or heir of entail in full possession of the unburdened estate. Now, whatever effect might have been given to any conveyance or deed in favour of a third party under which Lady Keith might have tried to create a new burden, or to impose on the heir in possession the burden of these bonds, I have come to be very clearly of opinion that upon the facts as they actually occurred, and under these instruments, there was no rela-

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Brown's Supplement, p. 533, where it was held that one having first acquired an infeftment of annualrent and then the right of property, he was entitled to use both as separate rights, the property was not entailed.

"The defender, besides maintaining that the authorities and cases which have been now referred to, were favourable rather than adverse to her, cited and seemed to rely on the case of Burnett v. Burnett, 30th April 1766 (Paton's Appeals, vol. ii., p. 122). The principles of decision, however, in that case appear to be inapplicable to the circumstances of the present. The destination of both the rights there, although expressed in different terms, were held to result in the same thing ; and it was on this ground, and having regard to what clearly appeared to be the intention of the party, that no separate estate was to be kept up, it was decided that *confusio* had taken effect.

"For the reasons which have now been explained, the Lord Ordinary has, although not without difficulty, come to the conclusion that the question in the special case ought to be answered favourably for the Crown, and he has accordingly so answered it."

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ion of debit or credit at all between Lady Keith and the estate of which she was the absolute proprietor, and that as there was no such relation there was no right in which she was a creditor secured upon this heritable property, and consequently that there was no money so secured which did or could form any part of her succession. Whether a person holding in fee-simple could create such a relation is a matter involving some subtlety, into which I think we need not enter, but the substance of the thing is beyond all doubt, viz., that the bond of annualrent in substance effected nothing. It effected nothing during Lady Keith's life, for she had the whole uncontrolled property of the estate, and it effected nothing after her death, for the moment Lady Keith died the whole thing came to an end. No one had any beneficial interest in it. No doubt if it had been a separate debt heritably secured over this estate, and there had been such declaration in a settlement by a party entitled to make the declaration that it should cease and determine in favour of the heir, that might have been the case put to us a *legatum liberationis*, but that is not at all the nature of this case. The fact is that these bonds were executed under a misapprehension in point of law and also in point of fact, and when Lady Keith died she was in possession of this estate on which the succession-duty is payable, but the money secured by the bonds was no part of her succession. Therefore, as the question is put in the form of a special case for the opinion of the Court, I am for finding in favour of Lady Lansdowne, in the question put to us, that she is not liable to pay inventory-duty on the sum in the bond of annualrent.

Lord Cowan.—I concur with your Lordship in thinking that there were several points brought into the argument in this case which we do not require to solve in giving the judgment which must be pronounced. As regards the question of creating, in the terms here employed, a burden upon an estate which the party has in absolute property, I do not wish to express any opinion whatever. I am very far from thinking that it may not be within the power of a party so to deal with the succession to his estate as to enable him to give over a burden so created on the estate to a third party, and to leave it as a burden upon the heir to whom he gives the estate itself. We do not require to consider that question. Had there been an assignation of the bond of annualrent in favour of a third party the state of the rights of parties under the Revenue Acts would just have been this—that the value of the estate taken in absolute property would have suffered a deduction, to the extent of the burden so created upon the succession, in the question as to the succession-duty; and then the party who got the benefit of the assigned bond of annualrent would have been liable in the succession-duty for the sum that he took under the assigned bond of annualrent. But with that we have no concern whatever in this argument. That was not the state in which this lady left her estate to be taken by her heirs and representatives. On the contrary, it is impossible for me to read the clause in the deed of entail to which our attention was so frequently called without being convinced that the estate was left absolutely unaffected by any burden whatever in favour of her daughter, seeing it is there said that, unless there should be an assignation of the bond of annualrent (which there never was), the lands would be entirely free and relieved from the bond in all time coming. The Baroness Keith had power to make such a declaration. That is undisputed. And therefore the estate was really left unburdened and free of the bond of annualrent, to be taken by her eldest daughter as absolute and uncontrolled fiar. Now, in that condition of matters, how can it be said that there was here money, secured over the estate in terms of the statute, which fell to be included in the inventory given up of the lady's succession. That is the first point; and as to it I think Mr Shand's argument was good; but in the second place, under the same clause of the statute it required to be a part of the succession of the lady; and upon the same footing I hold that there was no succession to the bond of annualrent, and never could be, because it terminated the moment the lady died without having assigned that annualrent. Therefore, upon the whole matter, from an early part of this argument, I came to be quite satisfied that we had to deal here really in principle and in substance with

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nothing else than this,—a reserved power to burden the estate which was given by the deed, if the granter thought fit thereafter to burden the succession so given to the party who is disponee; and undoubtedly a reserved power to burden, if not exercised, ceases to have any existence at the death of the party who has the power. Upon the same ground it seems to me that, in principle, we must deal with the question that is now before us, and that we have no ground for holding that there was here an estate created, which required to be destroyed by confusion. Upon that point I do not enter into the argument of the Lord Ordinary at all. I cannot understand that view of the case, because there was no proper debtor and creditor to give rise to the doctrine of confusion so as to extinguish this bond of annualrent. That would have raised an entirely different question if it had existed here, but I go simply upon the grounds I have stated in holding that, in the state in which this lady left her succession, there was nothing to be given up in the inventory of her estate under the statute as being liable for inventory-duty.

Lord Benholme.—The bond of annualrent about which we have heard so much in this case was executed with reference to the Montgomery Act; and the object of the Montgomery Act is to enable a proprietor who holds an estate under fetters, when laying out money in a particular way, to secure to the proprietor's representatives, who may be supposed not to be his or her heirs of entail, the amount, or a certain portion of the amount, of moneys so laid out by executing a bond of this kind. It is held that if that expenditure gives benefits to a special class of disponees who are protected by the fetters of a good entail this is the statutory method of affecting their interests, by making them liable to pay the annuity under the bond. Now, in this case, there is no room for that view, and no room for the application of the law by which the doctrine of confusion is excluded, because there are no parties here entitled, under the protection of the fetters, to be considered as heirs of entail in the sense of the Montgomery Act. I look upon this bond as having been executed under a mere false impression of the Act, and to be no better than if the granter had been the fee-simple proprietor, without any entail at all, or any destination at all upon her estate. The mere circumstance that her estate is destined to heirs-male, for instance, does not make it a fettered estate; and it is against fetters, and with reference to fetters and the necessity of overcoming these fetters, that the whole operation of the Montgomery Act is directed. Now, having said so much on that point, I must say that I quite agree with your Lordship that this bond had no effect at all, either in favour of or against Lady Keith. It had no effect in her favour in conveying to her a right which she herself was debtor in. It was conveying to her an estate which she held simply, and she might have altered the destination at her pleasure. There was no use of fettering such a bond, which had no effect, and consequently I look upon it that it was no benefit to her on the one hand, and no burden upon her on the other, either upon her or upon her estate. The Act of Parliament, I think, clearly requires that the money secured in the way contemplated by the statute was a part of the succession of the lady, with reference to whom inventory-duty is to be paid. Inventory-duty suggests that it is an inventory of something that belonged to the deceased, and that is taken up by her representatives,—it may be her trustees, or it may be her general representatives; but it is something that belonged to her, and that is the estate which forms part of her goods. Now, can it be said that this estate was of that kind? I think it neither belonged to her, nor was debtor to her in any way; and consequently I think it is perfectly plain that inventory-duty cannot be charged upon a thing she never had any interest in at all, and which could only come into operation as a debt, or as money secured upon her death, and in consequence of some peculiar provision that she contemplated. I think it is impossible to say that that formed part of her succession. On these grounds, I think there has been an entire mistake here, and that the question contained in the case should be answered as your Lordship suggests.

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Oct. 15, 1872.
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LORD NEAVES.—I am of the same opinion. This case has been complicated r introducing into it questions as to confusion which forms an important part of ir law, and in so far as regards the general principles applicable to that matter am inclined to hold with the Lord Ordinary that there is a strong equity in pplying those principles to all cases where there is a substantial interest to do . But the principle is, that in certain events where rights have merged into e they should be capable of being kept separate. Where there is a substanal interest in the party I would extend that principle as far as possible, not nly in cases of entail, but in other cases. There are various rights that ought be kept separate, although they come into the person of the same individual,— , for instance, in a ranking and sale; when a creditor gets a decree of sale he ot only gets that decree but he gets a virtual or expressed assignation to all e adjudications, and all the heritable securities that exist over that estate in vour of his debtor's creditors, so that he may resort to them at any time to efend himself equitably against the claims of other parties. The same thing ccurs in other cases. It is competent to preserve these rights separate, so as to e capable of separate assertion, and he may ascribe his title to any of them to btain what is reasonable and equitable in his defence of it. These are cases by hich debts that would otherwise run into one are prevented from being extinuished by *confusio;* but a thing cannot and need not be extinguished before t exists. Now, I know no case in which a party becomes his own debtor in a ond of this kind, heritable or moveable, or whatever it may be, even although he adds at the end of it, "I bind myself and my heirs-male to pay to myself and my heirs-female £1000," which virtually imports this: "I bind myself after I am dead to pay to myself that sum." That is a thing I never heard of. A man may, by conveyance or by other means, say, "I bind my heirs-male to pay to my heirs-general after my death" so and so; but that is another affair. That is not a regular bond, but it may become binding upon both parties, if it is made in connection with grounds or conditions that will compel the parties in justice to fulfil the wish so expressed. That is a different thing; but for any one to bind himself or herself after death to pay to himself or herself a certain sum of money, and to say that that obligation is *in bonis* of him or her, seems to be a great absurdity. In point of fact it is nonsense. Now, that is the general aspect of this matter according to the view that is taken of it, that of debtor and creditor; but when we come to the other question, it resolves itself into this—Is this a part of the succession which in any right sense was vested in Lady Keith, and after her death was to descend to her representatives of some kind? It cannot be a part of her succession, unless it is first *in bonis* of her, and I cannot see that it was ever *in bonis* of Lady Keith. She could have done nothing in any way to enforce it. It is a mere fiction, so far as that is concerned; and if not *in bonis* of her, it cannot become a part of her succession on which duty is to be paid. It may be a revelation or expression of will, valid or invalid, by which after her death certain rights in her property are to take effect, but the rights are not to take effect in her lifetime, and they are mere rights of property affecting an estate, and have no reference to money which is to come into her possession. Upon these grounds I think it plain that there is nothing here *in bonis* of Lady Lansdowne which can be the subject of a claim such as is here made.

THE following interlocutor was pronounced:—"Recall the interlocutor complained of, and find that the Marchioness of Lansdowne is not liable to pay inventory-duty on the sum in the bond of annualrent dated 1st and 3d March 1851, under the statute 23 and 24 Vict. c. 80, as part of the succession of the Baroness Keith, deceased, and decern: Find the reclaimer entitled to expenses, and remit," &c.

ANGUS FLETCHER, Solicitor of Inland Revenue—LOCKHART THOMSON, S.S.C.—Agents.

No. 5.

Oct. 16, 1872.
City of Edinburgh v. Montgomery.

THE CITY OF EDINBURGH, Objectors.—*Watson—M'Laren.*
WILLIAM MONTGOMERY, Common Agent in the Locality of St Cuthberts, Respondent.—*Adam—Gloag.*

Teinds—Locality—Res Judicata.—Held that a judgment in a question between two heritors given effect to by a final locality was *res judicata* in a subsequent locality in a question between the common agent and one of these heritors.

Teinds—Locality—Old Stipend.—Opinion (per Lord Cowan) that when an augmentation of stipend is granted, the allocation of the old stipend remains fixed and falls to be taken as the first step in the new locality.

Teinds—Locality.—In a process of locality a heritor whose teinds were not valued for stipend was localled upon an admitted rental of £409. In a subsequent locality he alleged that the rental was now less, and that the teinds were exhausted. The Court *held* that the heritor was entitled to a proof of his averment that the rental was diminished.

2D DIVISION. Lord Gifford. Teind Clerk.

IN the locality of the stipend of the parish of St Cuthberts, modified in 1821, approved of as final by interlocutor dated 4th February 1864, the Lord Provost and Magistrates of Edinburgh were localled on as follows:—

	BARLEY. B. F. P. L.	
"For lands of Lochbank and others, . .	18 1 2 0	
	MEAL.	
For lands of Bruntsfield Links and the Meadows,	70 0 2 2½"	

A new augmentation having been granted in 1862 the common agent proposed in the interim locality to local on the Magistrates for the above amounts as old stipend, and for 3 0 1 1 meal, and 3 0 1 1 barley, as augmentation for the lands of Bruntsfield Links and the Meadows, treating the teinds of "Lochbank and others" as exhausted.

In so localling on Bruntsfield Links and the Meadows the common agent assumed the rental to be £409 in terms of a judicial admission made by the Magistrates in the previous process of locality.

The Magistrates of Edinburgh now objected that as appeared from various documents produced, of the 18 1 2 0 of old stipend localled on "Lochbank and others," 8 bolls only were applicable to the lands of Lochbank, and that the remaining 10 1 2 0 was truly applicable to the lands of Bruntsfield Links and the Meadows, and that that amount added to the amount of 70 0 2 2½, localled on these lands exhausted these teinds. The Magistrates, therefore, objected (objection 8) to the interim locality, and craved that the scheme of locality in the present process be rectified as follows:—

	BARLEY. B. F. P. L.	
"Lochbank, per locality of 1805, . . .	8 0 0 0	
Bruntsfield Links and Meadows, per do., . .	10 1 2 0	
	MEAL.	
Do. do. per locality of 1821-64, .	70 0 2 2¼"	

The respondent, the common agent, stated,—"In the process of locality of the stipend modified in 1821 the city appeared and objected to Bruntsfield Links and the Meadows and the lands of Lochbank being localled on for stipend, on the ground that they were not teindable subjects, and never were so. A record was made up between the objectors and Mr Learmonth of Dean, a heritor in the parish. On 12th May 1858 *the Lord Ordinary* pronounced an interlocutor in which he, *inter alia*,

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that the lands of Bruntsfield Links and the Meadows, belonging
ity of Edinburgh, are teindable; that the rental thereof has been
ly admitted to be £409 per annum, and that one-fifth part of such
d rental falls to be taken as teind: Finds that the old stipend
in 1805 appears to have been, and ought now to be, held as being
out of the teinds of certain lands known as the lands of Loch-
nd others belonging to the city of Edinburgh;' and with these
he remitted the process to the clerk to frame a correct scheme of
in accordance therewith. This interlocutor, in so far as regards
ıdings, was adhered to by the Inner-House, First Division, on 1st
59 (21 D. 890). A scheme of locality was accordingly framed by
k in accordance with these findings, which was thereafter, on 4th
y 1864, approved of as final, and is the basis on which the *interim*
in the present process was framed."

s pleaded for the city of Edinburgh, objectors;—1. The proceed-
ich took place in the former process of locality did not constitute
ata as regards the question now at issue—(1) because the present
ı was not raised, far less discussed and determined, in the last
of locality; and (2) because the respondent in the present pro-
s did not represent, officially or otherwise, either of the parties to
ner proceedings. 2. The documents set forth in the objections
hed that the stipend in question was payable for the lands of
rs and Bruntsfield Links, as well as for the lands of Lochbank, and
the proportions set forth in the objections.

ıs pleaded for the common agent, respondent;—1. The objections
o be repelled, in respect that it was not the fact that any part of
stipend of 18 b. 1 f. 2 p. was payable or paid for Bruntsfield
nd the Meadows. 2. It was *res judicata* that the lands of Bruntsnks and the Meadows paid no part of the said old stipend.

Lord Ordinary, on 11th June 1872, pronounced an interlocutor
ıg the objections for the city of Edinburgh.*

OTE.—The Lord Ordinary has carefully looked into the old localities, documents relative thereto, so far as the same are accessible, and he has be of opinion that the city's objections are ill founded, and that no part 8 b. 1 f. 2 p. 0 l. of old stipend is really applicable to the teinds of the s and Bruntsfield Links. But he is further of opinion that even were rise the question is excluded by the judgments in this locality, or in nediately preceding, first by the Lord Ordinary on 12th May 1858, and by the Inner-House on 1st June 1859.

h the pleas of the common agent in the present record seem therefore nded, and the Lord Ordinary on both grounds has repelled the objec- the city.

The first plea in order, though last stated, is that of *res judicata*.

s quite fixed that a question, whether of law or fact, decided *in foro con-* and *causa cognita* in one locality is binding on all concerned in subsecalities of the same parish—See Blantyre v. Earl of Wemyss, 22d May 5 S. 1009, and the recent case of Graham Bonar v. The Lord Advocate, 1870, 9 M. 58. Even admissions by a common agent in one locality en held binding on the heritors in future localities, at least where they the interests of parties who had both right and interest at the time to them—Earl of Hopetoun v. Ramsay, H. L., 22d May 1846, 5 Bell's , 69; Duke of Buccleuch v. Common Agent, Inveresk, 10th Nov. 1868, . Now, in the locality of St Cuthberts it was finally decided both by l Ordinary and the Court 'that the lands of Bruntsfield Links and the s, belonging to the city of Edinburgh, are teindable; that the rental has been judicially *admitted to be £409* per annum, and that one-fifth

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The objectors reclaimed, and at the debate in the Inner-House they proposed to amend their record, to the effect of adding a statement that, since the final locality of 1864, the rental of Bruntsfield Links and the Meadows, confessed to in 1858 as £409, had considerably fallen, and that, even assuming that they formed no part of the subjects localled on as "Lochbank and others," their teind was now more than exhausted by the 70 b. 0 f. 2 p. 2¼ l. meal laid upon them in that locality, and craving to be allowed to lead proof of the present rental of the lands.[1]

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of such admitted rental falls to be taken as teind: Finds that the old stipend localled in 1805, appears to have been and ought now to be held as being payable out of the teinds of certain lands known as the lands of Lochbank and others belonging to the city of Edinburgh.' This was in substance a finding that no part of the old stipend localled in 1805, which was just the 18 b. 1 f. 2 p. 0 l., was applicable to Bruntsfield Links and the Meadows, for these last were found teindable for the first time in 1858, and directed to be localled upon to the extent of a fifth of £409. In 1858 the city strenuously contended that the Meadows and Bruntsfield Links were not teindable, and had never paid teind at all. The expression 'and others' is fully accounted for, for it is undeniable that in 1805 the city had many lands subject to teinds which do not appear by their specific names. It seems to the Lord Ordinary to be too late now to maintain that the Meadows and Bruntsfield Links had all along, at least from 1805, paid teind along with Lochbank.

"(2) But in point of fact the 18 b. 1 f. 2 p. 0 l. of barley laid upon 'Lochbank and others' is traced and accounted for without any part thereof being localled on the Meadows and Bruntsfield Links.

"So far back as 1708 there was laid on the lands of Lochbank 5 bolls of bere and 3 bolls of bere. These lands then belonged to Hepburn and Anderson's heirs, but that they were parts of the lands of Lochbank, afterwards the city's, is clear from the disposition to the city in 1716, No. 457 of process, and from other evidence. This accounts for the eight bolls barley which is laid upon the lands of Lochbank in 1805. Barley seems to have been taken as interchangeable with or equivalent to bere, as appears from comparing various entries in the old localities. Again, in the same locality of 1708, there is laid on the lands of Newhaven (and Newhaven is evidently a large district comprehending Trinity and Warriston), 'formerly pertaining to the heirs of Mr James Pillans,' 3 b. 1 f. 2 p. bere. In the rental of 1803 there appear lands belonging to the city of Edinburgh, localled upon for 3 b. 1 f. 2 p. barley, and, assuming barley and bere to be interchangeable, there are no other lands excepting those formerly of James Pillans' heirs to which this precise allocation is applicable. Then, in the locality of 1805 there appear lands belonging to the city of Edinburgh.

	B.	F.	P.	L.	
"Old stipend, ...	3	1	2	0	
"Barley—augmentation then first laid on, .	7	0	0	0	barley.
"In all,	10	1	2	0	do.
"Add Lochbank,	8	0	0	0	do.
"Making the whole old stipend, . .	18	1	2	0	do.

"But this is just the old allocation now in dispute, and it seems quite plain that no part of it is laid upon the Meadows or Bruntsfield Links. There are other items of evidence pointing to the same result, but it is unnecessary to go into further detail."

[1] Learmonth v. The City of Edinburgh, 3d Dec. 1857, 20 D. 190, and 1st June 1859, 21 D. 890; Bonar v. Lord Advocate, 3d Nov. 1870, *ante*, vol. ix. p. 58; Erskine v. Common Agent of Crail, 15th Nov. 1864, *ante*, vol. iii. p. 49; Duke of Buccleuch v. Common Agent of Inveresk, 10th Nov. 1868, *ante*, vol. vii. p. 95.

At advising,— No. 5.

LORD JUSTICE-CLERK.—On the first question which was argued before us, namely, as to what subjects were included under the words "Lochbank and others" in the old locality, I think we must adhere to the interlocutor of the Lord Ordinary, so far at least as to repel the eighth objection stated for the city of Edinburgh. The reason first given by the Lord Ordinary sufficiently determines the point so as to render it unnecessary for me to enter upon the evidence. Oct. 16, 1872. City of Edinburgh v. Montgomery.

There remains, however, a point which was raised for the first time before us, and was not dealt with by the Lord Ordinary.

There being no valuation of the lands, a fifth of the actual rental was taken as the teind in the last locality. The objectors say that the rental has since diminished, and that the sum localled upon them in the last locality now exhausts their teind. The question is, whether they are entitled to an inquiry into the state of their actual rental with a view of shewing that their teind is thus exhausted. This is a matter on which the decision in the former locality does not preclude inquiry. I think therefore that before further answer we should allow the objectors an opportunity of leading evidence as to the amount of their present actual rental.

LORD COWAN.—On the general question I concur in what your Lordship has said. I do not see that we can do otherwise than repel these objections, as the Lord Ordinary has done. We cannot go back on the principle upon which the stipend was calculated and stated in former localities. The old stipend is held to be thereby finally adjudicated in any new process of augmentation and locality subsequently brought. There is no declarator or reduction, or any new process before us which can interfere with what has been fixed by the decree of locality last pronounced by this Court. Unless a reduction or some such process be brought neither the Teind-Clerk nor the Court can do otherwise than accept the old locality as it stands as the first step towards making up a new locality for allocation of the augmented stipend.

It is a totally different question when it comes to be decided what part, if any, of the present augmentation shall be localled upon these particular lands of Bruntsfield Links and the Meadows. On that question I agree that we can do nothing until we have a valuation of the teinds of the lands, proceeding on the existing rental. The objectors are entitled to lead a valuation if so advised.

LORDS BENHOLME and NEAVES concurred.

The case was adjourned to allow the Magistrates to consider whether they would move for a proof as to the present rent of their lands or bring a process of valuation of the teinds.

The Magistrates having intimated that they did not intend to move for a proof, but intended to bring a valuation,

THE COURT pronounced the following interlocutor:—"Refuse the reclaiming note, and adhere to the interlocutor of the Lord Ordinary: Repel the objection No. 8: Allow additional expenses to the common agent since the date of the Lord Ordinary's interlocutor, and reserve to the reclaimers to lead a valuation of their teinds, and allow the amendment of the record referred to in the interlocutor of 3d July last to be withdrawn."

MILLAR, ALLARDICE, & ROBSON, W.S.—WILLIAM MONTGOMERY, W.S.—Agents.

Mrs ANNE LOWE and her HUSBAND, Petitioners.—*Brand.* No. 6.

Factor—A. S. 13th February 1730—*Penalty.—Held* that under the Act of Sederunt a factor who has failed to lodge accounts annually is liable to a minimum penalty of half a year's salary *for each year in* which he has so failed. Oct. 19, 1872. Lowe.

No. 6.
Oct. 19, 1872.
Lowe.
1st Division.
Ld. Mackenzie.
M.

James Yates Simpson, writer, Largs, was on 2d June 1855 appointed judicial factor on the estate of the late Mr Robert Lowe, teacher of dancing.

The present petition was presented by Mrs Anne Lowe and her husband, who were beneficiaries under the settlement, for removal of the judicial factor, and for a new appointment. The prayer of the petition then proceeded:—"And thereafter to ordain the said James Yates Simpson to lodge a full and complete continuation of his accounts, as judicial factor foresaid, since 14th January 1868; and to remit to the Junior Lord Ordinary to ascertain the state thereof, and the balance due thereon by the said respondent; and to decern and ordain him, and his said cautioner, to make payment to the judicial factor to be appointed under this petition of such balance when ascertained."

Mr Simpson was removed from his office as judicial factor by the Court, and Mr Robert Cameron Cowan, C.A., appointed in his place on 19th May 1871, the petition, *quoad ultra*, being remitted to the Lord Ordinary to inquire and report.

On 19th July 1871 Lord Mackenzie ordained the late factor to lodge his accounts, and remitted to Mr A. W. Robertson, C.A., Edinburgh, to examine and audit the same and to report.

The accounts from January 1868 till October 1871 were lodged in November 1871.

On 1st March 1872 Mr Robertson issued a report fixing the balance due, and, *inter alia*, instructing that Mr Simpson failed to lodge with the clerk of the process, as required by the Act of Sederunt under which he held his appointment, accounts of charge and discharge of his intromissions for the two years ending the 14th day of January 1870, and has consequently made himself "liable to such mulct as the Lords of Session shall modify, not being under a half year's salary."

By the Act of Sederunt of 13th February 1730, concerning factors appointed by the Lords, it is enacted (section 2), "That every factor shall, within six months after extracting his factory, make a distinct and special rental of the estate committed to his management, and lodge the same in the hands of the clerk to the Act appointing and authorising him to be factor on the said estate, where it shall lie, and be made furthcoming, and the inspection and perusal thereof to be allowed unto all persons having interest, without fee or reward, to the end the same may be examined, and the said factor charged thereby, or otherwise, as shall be found just;" and (section 4) that "such factor shall, once every year give in a scheme of his accounts, charge and discharge, to the clerk afore-said, that all concerned may have access to see and examine, and provide themselves with proper means of checking the same, wherein if the said factor fail he shall be liable to such a mulct as the Lords shall modify, not being under an half year's salary."

The commission charged by the factor in his accounts for the *two* years amounted to £22, 19s. 11d., one-half whereof is £11, 9s. 10d.

The Lord Ordinary reported to Inner-House.

The petitioners moved the Court to impose a penalty in terms of the Act of Sederunt, and contended that the late factor should be mulcted in a penalty amounting, at least, to half a year's salary of each of the two years for which he had failed to lodge accounts.[1]

No appearance was made for Mr Simpson.

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[1] Lamb v. Ritchie, Dec. 14, 1838, 16 S. 219; Nairne, March 4, 1863, *ante*, vol. i. p. 515; Condie v. Macdonald, Nov. 20, 1834, 13 S. 61; Cranston v. *Scott, Dec. 1, 1826*, 5 S. 62 (N. E.).

At advising— No. 6.

LORD PRESIDENT.—My Lords, this argument having been *ex parte* we were naturally anxious to be quite sure whether the point were settled by decision. Oct. 19, 1872. Lowe.

It is now clear that it has been decided in several cases that the *minimum* fine is one half of each year's salary during which the accounts are not lodged.

It is unnecessary to go into the previous cases, but in that of Nairne on 4th March 1863, reported in 1 Macph. 515, I myself delivered the judgment of the Court, and though, from the report in Macpherson, there might be a doubt as to whether the factor was mulcted for one year only or for each year, it must be for each year, because the Lord Ordinary says so very distinctly in his note, and if I had differed from him I should have remarked upon it. My recollection is fortified by the report in the Scottish Jurist,[1] from which it appears that I distinctly stated that the fine was to be for each year. And upon reference to the session papers I find that the Jurist report must be correct, because from these it appears that there was a balance due to the factor of £32, 3s. 6d., and yet the sum we decerned against him for, as appears from the interlocutor printed in Macpherson's report, was £195, 2s., which, though of course partly interest, must be mainly the mulct. I am satisfied, therefore, that the case of Nairne is a direct authority on this point; and following as it does on a series of previous decisions, there can be no doubt as to the construction of the section of the Act of Sederunt.

It is plain that Simpson must suffer loss of one-half of his commission for each of the three years from 1868.

LORD DEAS.—I agree with your Lordship that this point is quite settled by previous decisions.

It is perhaps a pity that the Act of Sederunt should have been so construed, because it might have been better to deal with each particular case by itself. The Act has, however, now been frequently under consideration, and its construction is fixed.

LORD ARDMILLAN concurred.

LORD KINLOCH was absent.

THE COURT pronounced this interlocutor:—"Find that the said James Yates Simpson failed to lodge his account for each of the two years ending 14th January 1870, in terms of the Act of Sederunt of 13th February 1730; therefore mulct the said James Yates Simpson in the sum of £11, 9s. 10d., being one-half of his commission for the said two years, in terms of the said Act of Sederunt: Find that the balance due by the said James Yates Simpson on his intromissions, in terms of the accountant's report, No. 114 of process, is £3, 1s., which, with the said mulct of £11, 9s. 10d., makes the sum due by him to the trust-estate mentioned in the proceedings amount to £14, 10s. 10d., and decern against the said James Yates Simpson for payment to Robert Cameron Cowan, the present judicial factor on the said trust-estate, of the said sum of £14, 10s. 10d. sterling: Find the said James Yates Simpson and his cautioner liable in the expenses of the petition, in so far as not already found due; allow an account thereof," &c.

M'CAUL & ARMSTRONG, S.S.C.—Agents.

[1] 35 S. J. 312.

No. 7.

Oct. 19, 1872.
Greig v. Greig.

GREIG AND OTHERS (Mr and Mrs Greig's Marriage-Contract Trustees), First Parties.—*Millar—Watson.*
GREIG AND OTHERS (Mr Greig's Testamentary Trustees), Second Parties.—*Lord-Adv. Young—Asher.*

Tutors and Curators—Statute 1696, *c.* 8—*Deathbed.*—A father appointed his testamentary trustees to be tutors and curators to his children, declaring that if the nomination should fall, a prior nomination of tutors and curators should take effect. The second nomination having fallen as regarded the appointment of curators, not having been executed in *liege poustie, held* that the nomination of tutors subsisted, the nomination of tutors and curators being separate.

2D DIVISION. R.

GEORGE GREIG of Eccles, in his marriage-contract, appointed his marriage-contract trustees to be tutors and curators to the children of the marriage. Afterwards, in his trust-disposition and deed of settlement, of date 22d May 1869, he revoked this nomination, and appointed the trustees under the trust-disposition to be tutors and curators, "declaring that if from any cause the nomination of tutors and curators contained in this deed shall not take effect or be set aside, then I expressly declare that the nomination of tutors and curators as contained in my said contract of marriage shall stand, and be of full force and effect."

Mr Greig died on 19th June 1869, leaving a son, James Lewis Greig, and two other children, all in pupillarity. The trust-deed was reduced on behalf of the son as heir-at-law on the ground of deathbed. The question then arose, whether, the nomination of curators in the trust-deed being invalid, as not being executed in *liege poustie*, in terms of the Act 1696, c. 8, and the deed having been reduced *quoad* the heir-at-law, the nomination of tutors therein made fell also, and whether in consequence the prior nomination of tutors revived *quoad* the whole children of the marriage, or at least *quoad* the heir-at-law, James Lewis Greig.

A special case was presented by the marriage-contract trustees of the first part and the testamentary trustees of the second part.

Argued for the first parties, the marriage-contract trustees;—The nomination is a joint nomination of tutors and curators, which must stand or fall *in toto*. The father's intention was that the guardianship of his children should be continuous and undivided. But if the second parties are preferred to the office of tutors, there will be one set of guardians for the children in their pupillarity, and another set in their minority, and when the eldest child reaches minority there will be one set for him and another for the younger children.

Argued for the second parties, the trustees under the trust-disposition;—The nomination of tutors and curators is joint *ex figura verborum* merely. This is shewn by the provisions of the Act 1696, c. 8, which allows parties to accept the office of tutors and decline that of curators. Even if the children who have attained minority should have different guardians from those who are in pupillarity this is no grave objection, being a matter of everyday occurrence.

LORD JUSTICE-CLERK.—There is no difficulty in this case up to a certain point, for it is clear that the nomination of curators in Mr Greig's trust-disposition and settlement is not a good one. But the question arises, whether the nomination of tutors must fall along with it. When Mr Greig made the nomination of tutors and curators he knew it to be doubtful whether it would be good to the full extent; but I cannot doubt that he meant it should stand good to the extent to which he could make it good. I am therefore of opinion that the testamentary trustees are entitled to the office of tutors both to James Lewis Greig *and the younger children* of the marriage.

No. 7.
Oct. 19, 1872
Greig v. Greig

LORD COWAN.—I am clearly of opinion that this is a separable nomination. As I read the Act 1696, c. 8, which gave power to fathers *in liege poustie* to nominate curators to their children, that statute contemplated that there might be separate nominations of tutors and curators. In this relation that clause is exceedingly important, which says that where the same parties are appointed to the two offices, *i.e.* by the same deed—for that must be inferred—it shall be in their power to accept the tutory and decline the curatory. Apart from that, I cannot think that we are to refuse effect to Mr Greig's nomination of tutors because his nomination of curators cannot take effect, not having been made *in liege poustie*. In the trust-disposition and deed of settlement he declares that if this nomination of tutors and curators shall fall, the nominations of the tutors and curators in the marriage-contract shall stand. The right construction of this clause is that the testamentary trustees shall be tutors, and if their nomination as curators shall fall then there may be a failure of curators altogether, or else the first parties shall take the office of curators if they please. But what shall happen at the expiration of the tutory is not a matter on which we are now called upon to give an opinion.

LORD BENHOLME.—If I thought that the effect of the two deeds taken together was that the office of tutor goes to the testamentary trustees and the office of curators falls altogether, that would be inconsistent with the father's wishes, for he wished the management to be harmonious. He desired the guardians to be persons of his appointment, and the same persons to fill both offices. Now, I am not prepared to say that when the tutory expires the parties nominated in the first deed will be entitled to the office of curators. It is this which creates a doubt in my mind. At the same time I do not dissent from the judgment proposed, viz., that the testamentary trustees are entitled to the office of tutors.

LORD NEAVES.—I have considerable difficulty in this case. The question is not as to the power of the father to make separate nominations, but as to his meaning. He meant the same parties to be tutors and curators. In both deeds the parties named as tutors and curators are the same. If Mr Greig's meaning was that if there was a partial failure of the nomination in the second deed there should be a partial adoption of the first that could so easily have been said that the absence of such a statement seems to me very important. I have great difficulty, but at the same time I agree with your Lordships that the nomination of tutors and curators is separable. It is plain that the nomination of tutors and curators is not a concurrent or simultaneous appointment. It is a present nomination of the one, and a prospective nomination of the other.

As to the nomination of curators, I doubt whether that nomination in the first deed revives. The statute has said that a tutor accepting may decline to be a curator, but I never heard of one who declined the office of tutor and afterwards accepted that of curator.

On the whole, I concur with your Lordships. I think that the nomination of tutors and the nomination of curators not only are separable, but are separate.

THE following interlocutor was pronounced:—"The Lords having heard counsel on the special case are of opinion and find that the first parties are not entitled to the office of tutors of James Lewis Greig, and that the second parties are entitled to that office: Further, that the first parties are not entitled to the office of tutors of the younger children, and that the second parties are entitled to that office; and authorise the expenses incurred in connection with this special case to be paid out of the heritable estate, and remit to the Auditor," &c.

JOHN WALKER, W.S.—MORTON, NEILSON, & SMART, W.S.—Agents.

No. 8.

Nov. 1, 1872.
Traquair v. Martin.

ROBERT TAYLOR TRAQUAIR and his CURATORS, First Parties.—*Macdonald—Balfour.*
AGNES MARTIN, Second Party.—*Millar—Hall.*

Testament—Mutual Settlement—Revocation.—By mutual settlement each of two sisters conveyed her estates, heritable and moveable, to the other in liferent in case she should survive, and to a nephew in fee, reserving "full power to us at any time during our joint lives to alter, innovate, or revoke these presents in whole or in part as we may see proper." *Held* that the mutual deed was simply testamentary, and could be altered by the surviving sister in so far as regarded her own estate.

Testament—Legatum rei Alienæ—Surrogatum.—A person who was proprietrix of one *pro indiviso* half of a house, and had the liferent of the other half, in the belief that the whole belonged to her, disponed it *mortis causa* to a beneficiary.

Held that the beneficiary was not entitled to a *surrogatum* out of the deceased's general estate for the *pro indiviso* half which was not carried by the conveyance.

1ST DIVISION. B.

MRS JANET TAYLOR or STEWART, a widow, and her sister Miss Joan Taylor, who resided together in Edinburgh, were entitled to equal shares of certain heritable subjects in Edinburgh derived from their father.

In 1854 Mrs Stewart with her own funds purchased the house 20 Dublin Street, Edinburgh, in which she and her sister resided, and took the disposition (after a narrative of the payment of the price by her, and a discharge thereof), to and in favour of herself and her sister "in conjunct fee and liferent, and their heirs and assignees whomsoever." They were both infeft for their respective rights.

On 4th March 1852 Mrs Stewart and Miss Taylor executed a mutual disposition and settlement, which set forth that the sisters, "from our affection for each other, and other good causes, have agreed to grant these presents." In this deed each sister assigned and disponed to the other the whole heritable and moveable estate that should belong to her at her death, "in case she shall survive me, in liferent, for her liferent use allenarly, and Robert Taylor Traquair, my nephew, ... and his heirs, executors, and assignees, under the conditions and provisions aftermentioned, in fee;" . . . . . "and for rendering this deed the more effectual, and facilitating its execution, we do hereby severally nominate the survivor of us to be the sole executor of such one of us as shall predecease, hereby debarring all others from that office;" . . . "reserving always to us, and each of us, our respective liferents of the estates and effects above conveyed, with full power to us, at any time during our joint lives, to alter, innovate, or revoke these presents in whole or in part as we may see proper; but declaring always that the same, in so far as not altered, innovated, or revoked as aforesaid shall be effectual though found lying by either of us at the time of her predecease, or in the custody of any other person for our behoof, with the delivery whereof we hereby dispense for ever."

Miss Joan Taylor died on 13th February 1859.

On 29th August 1863 Mrs Stewart, by holograph writing, bequeathed to Agnes Martin, for her long and valued services to her as her servant and friend, the furniture of certain rooms in the Dublin Street house, and a number of specified articles.

On 30th July 1867 Mrs Stewart executed a disposition and assignation of her household furniture, &c., conform to an inventory, and also of the house in Dublin Street, in favour of the said Agnes Martin in liferent, for her liferent use allenarly, and after her death to the said Robert

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Taylor Traquair, and his heirs, executors, and assignees in fee." The inventory relative to this disposition did not include certain silver articles, and a gold watch bequeathed by the holograph writing of 1863.

In a special case for Robert Taylor Traquair, son of the said Robert Taylor Traquair, and Miss Agnes Martin, the following questions were submitted (along with others which it is unnecessary to mention), for the opinion and judgment of the Court:—"1. Is Agnes Martin, the party hereto of the second part, entitled to the gold watch and silver articles bequeathed by the holograph writing No. 2 of the appendix? 2. Is she also entitled to the liferent of the house and household furniture in terms of the disposition No. 3 of the appendix? 3. Should the foregoing question (2) be answered in the negative, is she entitled to a *surrogatum* out of Mrs Stewart's general estate equivalent to the value of her liferent of said house and household furniture?"

It was argued for the first parties;—Mrs Stewart had no power to execute the disposition of 1867, the power to revoke being reserved only to the granters of the mutual deed during their joint lives.[1]

It was argued for the second party;—The destination in favour of the nephew in the mutual deed of 1852 was purely testamentary, and therefore revocable by Mrs Stewart after her sister's death.[2]

At advising,—

LORD PRESIDENT.—The answers to the questions in this special case depend on certain testamentary papers left by Mrs Stewart, an old lady who lived in Edinburgh with an unmarried sister, Miss Joan Taylor, and survived her for some years.

The second question is the most important, and it is most convenient to take it first. It depends on a disposition executed by Mrs Stewart, by which she conveyed to Agnes Martin in liferent, and to Robert Taylor Traquair in fee, her whole household furniture, as also a dwelling-house, consisting of a flat in No. 20 Dublin Street. The granter reserves her own liferent, and the deed is obviously intended to come into operation only after the death of the granter. Upon this deed registration has taken place in favour of Agnes Martin as liferenter, and Robert Taylor Traquair as fiar, which puts them in the same position as if they were infeft.

As regards the moveables contained in the deed, their identity is ascertained by an inventory which forms part of the deed. These moveables were undoubtedly in the possession of the granter at the time of her death, and unless there was some restraint on her power of disposing of them there is no doubt of the validity of the conveyance. The house stands in a somewhat different situation.

The first argument maintained for the party of the first part, who is son and heir of the Robert Taylor Traquair mentioned in the deed, is that Mrs Stewart was not in a condition to execute this deed at all, in consequence of a mutual settlement executed in 1852 by her and her sister Miss Taylor. In this deed it was set out that the two sisters "from our affection for each other, and other good causes, have agreed to grant these presents." That is the narrative or inductive clause of the settlement. Mrs Stewart, in the first place, conveys to her sister Joan Taylor, in case she shall survive her, in liferent, her whole heritable

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[1] Craich's Trustees v. Mackie, June 24, 1870, *ante*, vol. viii. 898; Macmillan v. Macmillan, Nov. 28, 1850, 13 D. 187; Anderson v. Garroway, Jan. 27, 1837, 15 S. 435.

[2] The following Authorities were referred to, besides those cited by the first parties:—Wright's Trustees v. Wright, &c., March 15, 1870, *ante*, vol. viii. 708; Davidson's Trustees v. Mossman, May 27, 1870, *ante*, vol. viii. 807; Elchies' Notes, 146; Stair ii. 3, 46; Menzies' Lectures, 174 (1st ed.); Bruce v. Bruce, 1675, M. 11,185.

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and moveable estate. Miss Taylor, in like manner, conveys her whole estate in liferent to Mrs Stewart if she shall survive her; the deed provides for the payment of debts and legacies, and the fee of the entire estate is destined to Robert Taylor Traquair, a nephew of both ladies. The deed also contains a clause reserving to each of the ladies their respective liferents of the estates conveyed; then follow the words—"with full power to us, at any time during our joint lives, to alter, innovate, or revoke these presents in whole or in part, as we may see proper; but declaring always that the same, in so far as not altered, innovated, or revoked as aforesaid shall be effectual though found lying by either of us at the time of her predecease, or in the custody of any other person for our behoof, with the delivery whereof we hereby dispense for ever."

It is said that after the death of Miss Taylor it was not in the power of Mrs Stewart to alter this deed, and that her estate, heritable and moveable, necessarily fell to the person designed as fiar; in short, that after the death of Miss Taylor she could not dispose of any part of her estate which she had conveyed to her sister in liferent and her nephew in fee.

It is beyond dispute that two persons may so contract by mutual settlement as to bind one another in the way contended for. Such a deed puts the survivor in a very peculiar and unenviable position. But if they contract in such terms as to leave no doubt of their meaning there is nothing illegal in such a contract, and the Court will give effect to it. The Court, however, will not readily presume from ambiguous words such a very unusual and extraordinary intention, and in this case I am quite unable to gather from the deed that the two sisters entertained any such purpose. It was very natural that, living together as they did, and having the same intentions with regard to a favoured nephew, they should embody their testamentary intentions in one deed. It will be observed that the inductive clause of the deed is the affection they bear to one another—a circumstance to shew that its main purpose was that the survivor should enjoy the liferent of the entire estate belonging to both. But, in regard to the destination of the fee, the deed appears to me purely testamentary as regards the estate of each of them, and effectual to convey the estate of each sister *mortis causa* to the favoured nephew in fee. But as there is no express exclusion of the power of revocation of each sister in regard to her own estate, I cannot infer any such exclusion. I think that Mrs Stewart was quite entitled, after the death of Miss Taylor, by any proper testamentary paper, to dispose of her own moveable estate. It therefore appears that the disposition of 30th July 1867 must receive effect as a disposition to Agnes Martin in liferent of the moveables contained in the inventory referred to.

The heritable property stands in a different position. The house in Dublin Street did not belong to Mrs Stewart alone. It is admitted that the existing title was a disposition by Mr Graham Stirling "to and in favour of the said Mrs Janet Taylor or Stewart, and Miss Joan Taylor, her sister, in conjunct fee and liferent, and their heirs and assignees whomsoever, heritably and irredeemably." The disposition, no doubt, bears that the price was paid by Mrs Stewart alone. But still the title was taken to the two sisters jointly, and they were in fact joint proprietors.

Reading the mutual disposition in the manner most favourable to the party claiming under the will of the survivor, I cannot hold that Mrs Stewart had any power to convey more than one-half of the house. The other half, belonging to Miss Taylor, was effectually conveyed to her sister in liferent and the nephew in fee. So far as regards Miss Taylor's half, the party of the first part is entitled to that. The other half passed in terms of Mrs Stewart's subsequent disposition to Agnes Martin in liferent, and Robert Taylor Traquair, the younger, in fee. This enables us to answer the second question.

In the third question we are asked to say whether, in the event of the foregoing question being answered in the negative, Agnes Martin is entitled to a *surrogatum* out of Mrs Stewart's general estate equivalent to the value of her liferent of the house and furniture. Now, the question, as put, does not require to be answered, because to a very large extent the disposition to Agnes Martin *in* liferent is effectual; but, in so far as regards the one-half of the house, it

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equire to be answered. I entertain no doubt that Agnes Martin is not ed to any equivalent out of the general estate. It is not a case of *legatum lienæ*, where it is assumed that the testator knew that he was conveying roperty of another. Mrs Stewart thought that the house belonged to her, hat she had power to convey it.

regards the first question, it depends on the consideration of the holograph ıg and subsequent disposition. The holograph writing conveyed a quantity niture and a gold watch, and certain other articles particularly described. late of this holograph writing is August 1863. By the subsequent dis- on of 1867 the whole of the household furniture belonging to Mrs Stewart bodied in the inventory, and conveyed in liferent to Agnes Martin. To xtent the bequest of household furniture is altered, and instead of Agnes n receiving a portion absolutely as her own she receives the whole of that ined in the inventory in liferent. But certain things are mentioned in the raph writing which are not in the inventory of 1867. The question is, ıer the holograph writing receives effect as regards these? On that I have ubt. The holograph writing is ineffectual only so far as it is superseded e subsequent disposition. The first question must therefore be answered vour of Agnes Martin.

ıe other Judges concurred.

THIS interlocutor was pronounced:—"Find and declare, in answer to the first question, that Agnes Martin, the party of the second part, is entitled to the gold watch and silver articles bequeathed by the holograph writing No. 2 of the appendix: Find and declare, in answer to the second question, that the said Agnes Martin is entitled to the liferent of one-half *pro indiviso* of the house, and to the liferent of the whole household furniture, in terms of the disposition No. 3 of the appendix: But find that she is not entitled to the liferent of the other half *pro indiviso* of the said house, which belonged to the deceased Joan Taylor, and was conveyed by her to her sister Mrs Stewart in liferent, and Robert Taylor Traquair in fee, by the mutual deed of settlement No. 1 of the appendix: Find and declare, in answer to the third question, that the said Agnes Martin is not entitled to any *surrogatum* or equivalent for the one-half of the house provided by the said disposition No. 3 of the appendix, and to which she has been found not entitled," &c.

W. SKINNER, W.S.—J. & R. D. Ross, W.S.—Agents.

No. 9.
Nov. 1, 1872.
Taylor v. Dunlop.

WILLIAM TAYLOR, Petitioner and Respondent.—*Sol.-Gen. Clark—Moncreiff.*

MES ANDERSON GRAHAM OR DUNLOP AND SPOUSE, Respondents and Appellants.—*Millar—Webster.*

operty—Floor—Roof—Common Interest.—The proprietor of a house con- ıg two square storeys and an unoccupied space between the upper storey he roof sold and conveyed the "upper flat," inserting in his disposition an ıtion on the purchaser to maintain the roof, and on the seller to maintain treet pavement. *Held* (*diss.* the Lord President) that the purchaser had to the space between the ceiling of his flat and the roof of the house, and ntitled to make rooms in it.

operty—Common Property.—*Held* that the proprietor of the upper floor of a and under-ground cellars had no right to carry a flue from the cellar to the hrough a staircase in which he had *not an exclusive* right of property.

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1st Division.
Dean of Guild of Glasgow.
M.

In 1822 Alexander Campbell became proprietor of a piece of ground in Glasgow, described in his disposition as follows:—"All and Whole that area or piece of ground, consisting of 1042 square yards," &c.: "Declaring that the west gable of the lodging belonging to the said Robert Craig, together with the brick dyke enclosing the back area behind the same on the west, shall be mean and common to the said Alexander Campbell junior and his foresaids, and to the said Robert Craig and his successors, now and in all time coming."

Alexander Campbell built a house upon the piece of ground, consisting of two square storeys and a half sunk storey. The gable wall of one side rose above the second storey, and the roof sloped from this gable down to the opposite wall and enclosed a space which was never occupied until the present question arose.

In 1830 Alexander Campbell disponed to Nathaniel Stevenson the second storey of his tenement, which was described as "All and Whole the second or upper flat of the tenement situated on the north side of Bath Street and east side of Wellington Street, together with access thereto by a street door from Wellington Street, and the cellarage on the sunk floor and plot of ground adjoining to Wellington Street, which belong as parts and pertinents to the said second or upper flat, all as sometime possessed by William Buchanan: . . . Declaring that the said Nathaniel Stevenson and his foresaids shall be bound and obliged to maintain and uphold the roof of the said tenement without relief from the proprietor of the lower flat of the same: and that I, the said Alexander Campbell, and my successors in the lower flat of the said tenement, shall be bound to maintain and uphold the pavement and causeway in Bath Street and Wellington Street opposite to the said subjects, without relief from the said Nathaniel Stevenson or his foresaids."

Stevenson subsequently conveyed the subjects to William Taylor.

In 1831 Alexander Campbell disponed to Archibald Grahame Lang the area or piece of ground, "together with the tenement of land and offices erected thereon, excepting from this conveyance All and Whole the second or upper flat of the said tenement, situated on the north side of Bath Street and east side of Wellington Street, together with access thereto by a street door from Wellington Street, and the cellarage on the sunk floor and plot of ground adjoining to Wellington Street, which belongs as part and pertinent to the said second or upper flat, all as then presently possessed by William Buchanan, conveyed by me to Nathaniel Stevenson of Braidwood, Esquire: . . . . . Declaring that the said Archibald Grahame Lang and his foresaids shall be bound and obliged to maintain and uphold the pavement and causeway in Bath Street and Wellington Street opposite to the said subjects, without relief from the proprietor of the second or upper flat of said tenement, and that the proprietor of the said second or upper flat shall be bound to maintain and uphold the roof of the said tenement without relief from the said Archibald Grahame Lang or his foresaids; and also declaring that the west gable of the lodging which formerly belonged to the said Robert Craig, so far as attached to the said tenement erected on the area or piece of ground above disponed, also the brick dyke dividing the said area or plot of ground, shall be mean and common to the said Archibald Grahame Lang and his foresaids, and to the disponees of the said Robert Craig and their successors, now and in all time coming, and that the brick dyke dividing the area or plot of ground attached to the lower ground flat from the area or plot of ground belonging to the second or upper flat of said tenement belonging to the said Nathaniel Stevenson shall be mean and common to the said Archi-

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l Grahame Lang and his foresaids and the said Nathaniel Stevenson his successors, now and in all time coming."

Irs Jane Anderson Grahame or Dunlop afterwards became proprietrix his tenement disponed to Archibald Grahame Lang.

Villiam Taylor proposed to make alterations on his tenement, and ordingly presented a petition for lining to the Dean of Guild of Glasgow. alleged (Cond. 3),—"The operations proposed to be carried out on property, as shewn on the plans in process, consist of—(1) the erection a wooden stair leading from the upper flat to the attic floor, and the version of the latter into four separate apartments, three of which are e used as rooms in connection with the petitioner's dwelling-house, the fourth as a laboratory in connection with the petitioner's business; the putting and fitting in of seven skylight windows in the roof of the l tenement; and (3) the fitting up of a portion of the sunk flat as a shing-house." (Cond. 5). "That the said operations, instead of injuring respondents' property, have materially strengthened and improved it, d the burden on the respondents' property has not thereby been in-eased."

Mrs Dunlop opposed the petition, and stated (Stat. 6),—"That the peti-oner proposes to increase the burden on the respondents' property from ne flat to two flats, to form fireplaces in the said additional flat, with flues, nd to use a portion, if not the whole, of said additional flat as workshops r otherwise. Farther, the petitioner proposes to cut and otherwise injure he roof of the tenement by the insertion of skylight windows instead of wood and slates, which was the original condition of the tenement. The petitioner farther proposes to convert the cellarage which belongs to the upper flat into washing-houses, and to fit up heating-apparatus therein, immediately underneath the property of the said respondents; and this will have the effect of endangering the said respondents' property."

The petitioner pleaded;—(3) The petitioner, in respect of his right of common interest in the tenement in question, is entitled to make whatever alterations, improvements, and additions he pleases *in suo proprio*, provided that in doing so he does not go beyond his title, or endanger the common interest. (4) The petitioner, as proprietor of the upper flat of said tenement, and, as such, burdened with the maintenance of the roof, was entitled to make the alterations, improvements, and additions shewn upon the plans in process. (5) The title-deeds of the tenement having provided for the erection of a house of three square storeys and a storey half sunk, and for windows in the roof of the said property, the petitioner did not exceed his right in connecting the garret floor with his house, and occupying it for family and business purposes. (6) The petitioner's operations having neither increased the burden upon, nor endangered in any way the respondents' property, the respondents are barred from objecting to the said operations.

The respondents pleaded;—(8) The petitioner is not entitled to increase the burden upon the respondents' part of the tenement, which would be done by the erection of an additional flat, with fireplaces, &c., as proposed. (9) The petitioner is not entitled in any way to alter or interfere with the roof of the tenement, so as to make it less wind and water tight than it originally was, which would be done by the skylight proposed. (10) The petitioner is not entitled to make any alteration upon the cellarage which might in any way endanger the respondents' property, or subject it to any risk of fire or otherwise.

The Dean of Guild pronounced this interlocutor:—" . . . Find that, according to a fair interpretation of the foresaid provisions in the title-deeds of parties, the roof *of the tenement* must be held to form an

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essential and inherent portion of the uppermost of 'the second or upper flat' of the tenement in question, and which, as such, the petitioner is bound to uphold, particularly as the roof or attics are not otherwise specially dealt with or conveyed: On this footing, find that the petitioner seems entitled to make all reasonable or beneficial use of the attics, not injurious or prejudicial to the other portions of the tenement belonging to the respondents, and decern; but before approving of or sanctioning the particular erections or alterations on the attics proposed by the petitioner, or the intended conversion by the petitioner of the cellarage in the sunk flat into a washing-house, remit to Messrs James Grant junior and Hugh Kennedy, trades members of Court, to inspect the said subjects in question, and to report whether, in their opinion, the said operations can be carried on without prejudice to the other portions of the tenement belonging to the respondents."

After a report the Dean of Guild allowed the alterations.

The respondents appealed, and argued;—Taylor's property was bounded by the ceiling of the second or upper storey, and he was not entitled to execute any operations beyond that. So far as right went the appellants were proprietors of all above the ceiling, as they acquired from Campbell the whole tenement except what was conveyed to the respondents, and that was merely the second or upper floor. Taylor, apart from the stipulation to maintain the roof, had no more right in it than the other proprietor. He had no right to execute operations which would add a storey to the house. He had no right to erect a flue in the staircase, in which he had only a right of access under his title.[1]

The petitioner replied;—The conveyance of the upper storey included the roof and the space enclosed by it. The roof belonged to the upper storey just as the walls of each floor belonged to the proprietor of the floor. The operations proposed to be made there were within the petitioner's own property, and the lower proprietor could not object, unless he alleged that some injury would be done to his property. No such injury was alleged, and the proprietor of the under floor had no more than a common interest in the roof, which would not entitle him to object unless some danger or injury was done. There was no danger or injury here.[2]

Lord Deas.—It appears from the disposition, No. 21 of process, that in 1832 Alexander Campbell acquired from Messrs Burns and Forrest an area of building ground consisting of 1042 square yards. It is to be inferred from the next disposition, which is one from Campbell to Stevenson, in 1830, that between these dates Campbell had erected a tenement on the area consisting of two storeys and a lower storey one half above and the other below ground. It appears that the tenement had either been originally built as two houses, or had been converted by Mr Campbell into two houses. By the disposition of 1830 Campbell conveys to Stevenson "all and whole the second or upper flat of the tenement situated on the north side of Bath Street and east side of Wellington Street, together with access thereto by a street door from Wellington Street, and the cellarage on the sunk floor and plot of ground adjoining Wellington Street, which belong as parts and pertinents to the second or upper flat." The deed afterwards proceeds to declare "that the said Nathaniel Stevenson and his foresaids shall be bound and obliged to maintain and uphold the roof of the said

[1] Erskine's In., 2, 9, 11; Dennistoun v. Bell, March 10, 1824, 2 Sh. 649, Hume, p. 512.

[2] Stair, 2, 7, 6; Bankton, 2, 7, 9; Sharp v. Robertson, Feb. 5, 1800, M. App. Property, No. 3; Reid v. Nicol, 16th Nov. 1799, M. Property, No. 1; Stewart v. Blackwood, Feb. 3, 1829, 8 Sh. 362; Alexander v. Couper, Dec. 12, 1840, 3 D. 249; Gellatly v. Arrol, March 13, 1863, *ante*, vol. i. p. 592.

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tenement, without relief from the proprietor of the lower flat of the same," and "that I, the said Alexander Campbell, and my successors in the lower flat of the said tenement, shall be bound to maintain and uphold the pavement and causeway in Bath Street and Wellington Street opposite to the said subjects, without relief from the said Nathaniel Stevenson or his foresaids; and also declaring that the west gable of the lodging belonging to the said Robert Craig, so far as attached to the said second or upper flat, shall be mean and common to the said Nathaniel Stevenson and his foresaids, and to the said Robert Craig and his successors now and in all time coming." Mr Taylor, the respondent in the appeal, has come to be in the place of Stevenson, and Mrs Dunlop in place of Campbell. The respondent desired to make certain alterations on his part of the property, and appealed to the Dean of Guild Court for warrant to do so. That Court, after making a remit to two of its members,—described as trades members—that is, two of them skilled in such matters,—and having received a report that the proposed alterations would not be injurious to Mrs Dunlop's property, or to any other, sanctioned the operations. The question is, whether that sanction should be recalled.

If the operations are in any way dangerous or injurious to Mrs Dunlop's property they ought not to be sanctioned, to whomsoever the property of the roof may be held to belong, because there exists, undoubtedly, a common interest in all lower proprietors to object to such operations.

It is necessary to consider separately the operations in the upper storey itself, —those in the staircase—and those in the cellar below the first storey.

As regards the operations in the upper storey, the trades members of the Dean of Guild Court are agreed that no injury to the tenement will be caused by them, but that, on the contrary, it will rather be strengthened and improved. The report does not specify the details of the operations in the upper storey, but these were fully explained to us at the bar, and from the explanations so given it was easy enough to see how it was that the skilled reporters in the Dean of Guild Court had no difficulty in certifying that no injury to the strength and safety of the building would be caused by these operations.

As to the argument that by increasing the accommodation Mr Taylor was changing the character of the building, I can give no weight to that view. He was in that respect simply exercising the ordinary rights of a proprietor. He might equally have increased the number of persons using the staircase by letting each of her previously existing rooms to a separate family, as by increasing the number of the rooms and letting the new ones. There is no restriction of that kind in Mr Taylor's title-deeds, and the common interest of a lower proprietor does not entitle him to interfere on any such ground.

The whole question, therefore, so far as the operations in the upper storey are concerned, comes to be, whether the appellants, although they can qualify no injury from these operations, have nevertheless a legal right to object to them, and that again, I think, depends mainly on whether the property of the vacant portion of the building between the ceiling of Mr Taylor's rooms and the roof itself belongs to Mr Taylor or not. If the property of the vacant space belongs to Taylor, he may make any use of it he pleases which is not injurious to the lower portion of the tenement. There may be a narrower question as to Mr Taylor's right to alter or affect the roof, which I shall consider separately.

As respects the vacant space under the roof, I can have no doubt that it is the property of Mr Taylor. The walls of each flat belong to the proprietor of the flat, and the other proprietors have only a common interest to prevent their being interfered with in a way injurious to their property. In the present case there is a gable wall at one end of the building which is declared by the title-deeds to be common to Taylor and the next proprietor—the vents, on both sides, going up, of course, to the chimney tops. At the other end, the wall, in place of going up all the height in a gable form, finishes with a portion of a pavilion roof. The vacant space inside, up to the top of the gable wall at one end, and to the pavilion roof at the other, might have been used by Mr Taylor to heighten the ceiling (or the coomceiling) of his rooms, if he had thought proper to do so, and I think the appellants *have neither right* nor interest to object

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to his converting that space into additional rooms any more than they v have had to object to his using it as a sort of attic, which it is said he occasionally done by means of a trap-door in the ceiling, so long as the s lants could qualify no injury from the uses so made of the space, which it i pretended they can here do.

All this, however, is not conclusive in favour of the operations in the u storey, because there is to some slight extent an interference with the although not of an injurious kind, and if the appellants have a right of con property in the roof they may stand upon that right as entitling them to o without alleging any injury.

It appears to me, however, that the property of the roof, as well as o upper portion of the walls, is vested in the proprietor of the upper storey. does not appear to have been made matter of express decision. But I s suppose the reason of this is that it has always been taken for granted. roof is just the covering wall which keeps out the weather, and without Taylor's house would not be a house at all. The roof might have been of crete or pavement, or a stone and lime arch, instead of wood and slates. nature of the materials of which the roof was composed would not var nature of the right to it vested in the proprietor of the upper storey, no nature of the burden of maintaining and upholding it which always attacl him—where there is no provision to the contrary—just because he is the prietor. In the present case the burden is expressly laid upon him wi relief, but that is nothing more than an expression of his common law o tion, introduced, apparently, for clearness at the same time with stipulatin the proprietor of the lower storey should uphold and maintain the foot ment and causeway at his own expense.

As regards the washing-house and the flue proposed to be carried up from it in the wall of the staircase I have come to a different conclusion cause I think Mr Taylor has not the exclusive property of that wall, and wh the appellants have the property, or only a right of common property i wall, they are equally entitled—apart from all question of injury—to obj its being interfered with. The flue is by no means so clearly unobjectic in itself as the other operations, but it is not necessary to go further than I done to entitle the appellants to object to it.

Lord Ardmillan.—Mr Taylor, the respondent, is the proprietor of the part of a certain tenement in Glasgow—Mrs Dunlop, the appellant, being prietor of the lower part of the tenement. I need not again refer to the of the titles. The two houses do not enter by a common stair. There are rate doors, entering from different streets. They are quite distinct, both spect of title and in respect of possession.

The first and most important question here raised is, whether Mr Taylor titled to construct attic chambers in the roof, as proposed and explained by In disposing of this question, two points are to be considered—1st, who owner of the roof? I am of opinion that, in the present case, and looki the titles of the parties and the nature and position of the premises, the respo Taylor is the owner of the roof. He is bound by stipulation to maintai uphold the roof, and I think that the obligation so to maintain and u would have rested on him without stipulation, as incident to the owners the roof.

In the case of property in a town, divided into storeys or flats, I think there is a separate property in each flat, but that there is a common inte each owner, from which emerges a right to each owner to protect that co interest, and to insist that the owners of other flats shall not injure or end the property belonging to him. As matter of property, and apart from the eq introduced by the existence of a common interest, the upper flat, or floor, or s of this tenement, including, as I think, the roof, belongs to Mr Taylor, j the lower flat belongs to the appellant, Mrs Dunlop. The idea of there any property or possession above Mr Taylor's house was, I think, not co plated. But the property, whether of the lower or the upper floor, must be

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so as not to injure or endanger the rest of the house. This is quite clear, and has been so decided repeatedly. The existence of a common interest in the tenement imposes an equitable restriction on the owners. Each must use the subject of which each is owner so as to conserve that common interest, which is supported and specially protected by the maxim—*Sic utere tuo ut alienum non ledas*, a sound general rule, and peculiarly applicable to a case of common interest. The limitation of the owner's right is not *in titulo*, but *in utendo*, the use being limited by the equity and the necessity of protecting the interests of the other owners, but the property remaining to all other effects unrestricted. If it appears that the common interests will be injured or imperilled by the operation complained of, the law will restrain the operation; and I think that the party proposing alteration must instruct that the operation does not injure, or create reasonable apprehension of injury.

In this case, I think that Mr Taylor has sufficiently instructed that the operation on his property on the upper floor and attics will not injuriously affect or endanger the appellant's property, or her common interest in the tenement. Perhaps the report by men of skill might have been, in some respects, more explicit, but they appear to have made careful and workmanlike examination, and, taking that report in connection with the decision of the Dean of Guild, I have no doubt that we may rely on it as instructing the absence of actual injury, or of reasonable apprehension of injury. Indeed, the case has been argued at the bar without serious objection to the report in this respect, and also on the footing of the continued possession by Mr Taylor of the whole subject.

Injury, and reasonable danger of injury, being thus excluded, I am of opinion that, having regard to the state of the facts, the restriction *in utendo* is inapplicable, and that Mr Taylor, as owner of the whole upper part of the tenement, is entitled to make the alteration which he proposes in the attics. On this point I concur generally in the opinion of Lord Deas.

On the second question raised—viz., the proposal to convert a cellar belonging to Mr Taylor into a washing-house and to carry up a flue at the side of the staircase into a chimney at the top of the house—I am of opinion that access by the stair, not an absolute right to the stair, is all that is given to Mr Taylor by his title; but that in any view of the question of property in the stair—whether it is common or separate property—Mrs Dunlop's common interest is sufficient to entitle her to object to the proposed operations in the cellar, and to the carrying of this flue up the staircase, which staircase is intended only for access.

LORD PRESIDENT.—My Lords, I agree with what I understand to be the opinion of both of your Lordships, that we must assume that the operations here proposed will not be injurious to Mrs Dunlop's property. That is the result to which the report in the Dean of Guild Court comes, and no attempt has been made to impugn that report. We must, therefore, deal with this case as purely a question of law.

As has already been remarked by your Lordships, there is a material distinction between the two kinds of operations here to be carried out. By one of these the cellar, which is half under ground, is to be changed into a washing-house, with a fire-place—where there had been no fire-place before—and in order to get rid of the smoke which would be caused by the fire, it is proposed to carry a horizontal flue along the cellar, and up the staircase to the roof. I agree with Lord Deas, that Mr Taylor has no absolute property in the staircase, and that I think is sufficient to enable us to dispose of this branch of the case. I do not, and I cannot, go upon the ground that this operation might be injurious, as that would be to go against the report of the men of skill to the Dean of Guild. My ground is that the staircase is the property of Mrs Dunlop.

Upon the other branch of the case, which has regard to the operations on the roof, I have greater difficulty. This question becomes a very peculiar one under the titles. The common author of both the parties to this case, Mr Campbell, stood infeft in an area or piece of ground, unbuilt upon, extending to 1042 square yards and 6 feet or thereby, which formed the corner of Bath Street and Wellington Street. He proceeded to build upon that ground; and I consider

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It very important to observe the precise nature of the tenement which he then erected and which he retained his own property. He built a house with two fronts, one to Bath Street and one to Wellington Street, as he was probably entitled to do by the conditions of his right. That house consists of two squares—one of which is the street or lower room floor, and the other the upper or drawing-room floor. There was also what Lord Deas has properly called a half sunk story, the upper part being above, and the lower below, the level of the street. The tenement also contained a space between the drawing-room floor and the roof which might be turned into attics; and which might be turned by Mr Campbell into attics for the whole house, or for the upper story, or the attics might be made use of so as to form a separate house by itself. What Mr Campbell chose to do with the house was this: he divided it into one house (the dining room floor, which entered from Bath Street, and another house (the drawing room floor, which entered from Wellington Street, and he assigned to each a portion of the half sunk flat. He, however, left the space below the roof unconverted into attics, and it comes to be a very important question whether Mr Campbell intended to, and did in point of fact, leave this space unoccupied, and designed that it should remain unoccupied and belong to the owner of neither the one house nor the other as regarded occupation. That depends upon the wording of the titles. Mr Campbell, being himself the owner of the entire tenement, first proceeds to convey the upper or drawing-room flat to Mr Taylor's predecessor in June 1830; and what he conveys is described as follows:—"All and whole the second or upper flat of the tenement situated on the north side of Bath Street and east side of Wellington Street, with access thereto by a street door from Wellington Street, and the cellarage on the sunk floor."

Now, the words of that disposition confine the right of the disponee, in my view, to the second flat, which is also called the upper flat: and in so far as the words of the conveyance are concerned I see nothing which could have prevented Mr Campbell from selling the attic flat to another person, and giving that person access to the flat by the same staircase. He did not do so, because I conceive his intention was that this space was to be left unoccupied. He did some things which not only indicate that such was his intention, but which actually prevented him from ever making the vacant space into a separate house, with an access through the staircase from Wellington Street.

The disponee was also taken bound to maintain and uphold the roof, and it seems to be thought that this obligation infers a right of property in the roof. I take a very different view. If the disponee had a right of property in the roof then the burden of maintaining it would have been laid upon him at common law, so that the very insertion of this clause seems necessarily to infer that he had no property in it. The clause here was inserted in order to divide the burdens connected with the whole tenement, because, while the disponee was taken bound to maintain the roof, Mr Campbell bound himself "to maintain and uphold the pavement and causeway in Bath Street and Wellington Street opposite to the said subjects without relief."

Now, what was Mr Campbell's position after granting this disposition. He remained infeft in the 1042 square yards along with the buildings which he had erected, with the exception of what was conveyed in this disposition. Whatever he had not given out remained feudally vested in him. Upon that ground I agree with Lord Deas that he retained the property of the staircase, the right of access through which he conveyed to the disponee. In like manner the property in the roof, and in everything above the joists of the upper flat, remained in Mr Campbell. The only thing he had given out was the second or upper flat of his tenement. Now, I do not think that it is necessary here to consider any general question of law applicable to such tenements. The whole of this case depends upon the construction of the titles, and I do not think that there is any difficulty as to the general law. If the floor here disponed had been an attic floor, there is no doubt that the roof would have been the property of the disponee, because, as Lord Deas has said, the roof would be the wall of his house; but when the disponee is not the owner of the space between the roof and the ceiling of his house, what right of property can he have in the roof itself? The owner of the

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re storey next the roof has no concern with the roof beyond what the pro- tors of any other square storey have, merely because he happens to be higher The only person who has a right of property in the roof is he who lives in roof, so to speak,—that is, whose house is formed by the roof. There is no son like that here, and I think it was intended from the beginning that there uld be no such person. Accordingly, when Mr Campbell sold the rest of the ement to Mrs Dunlop's predecessor, we find that it is not the lower flat that conveyed, but the centre tenement, with the exception of the second or upper . Whatever remained in Mr Campbell after the disposition of 1830 he con- ed to the predecessor of Mrs Dunlop in 1831.

The conclusion to which I come is, that the owner of the upper floor has no re right, and probably less right, than the owner of the rest of the tenement construct a house in the roof. The latter has, in my opinion, a greater right every way. I do not think, however, that Mrs Dunlop could now make any a house in the roof, because Mr Campbell left the staircase as an access to second floor alone. But so far as title is concerned, Mr Taylor has still less ht to do so, because if it is in his power to construct such a house he would entitled to sell that house off separately, and so introduce three families, and o owners into a tenement which was constructed by the common author to tain only two families and two owners. For these reasons I cannot concur h your Lordships in the judgment which you propose to pronounce allowing e operations in the roof of this house to be carried out.

THE COURT pronounced this interlocutor:—"Alter the interlocutor of the Dean of Guild, dated 28th February 1872, in so far as it approves of and authorises the operations proposed to be made by the respondent on the cellar belonging to his property, and the construction of the relative flue and chimney: Find that the respondent is not entitled, as owner of the second or upper floor of the tenement at the corner of Bath Street and Wellington Street to execute the said operations: *Quoad ultra* refuse the appeal, and affirm the interlocutor of the Dean of Guild, and decern: Find no expenses due to either party in this Court."

JAMES BUCHANAN, S.S.C.—MACONOCHIE & HARE, W.S.—Agents.

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Macadam v. Martin's Trustee.

MRS MARY MACADAM OR ANDREW, AND MISS MARGARET MACADAM, Petitioners.—*Watson—Strachan.*
ALEXANDER M'CUTCHEON (Martin's Trustee), Respondent.—*Lord-Adv. Young—Marshall.*

rincipal and Agent—Bankruptcy—Payment for specific purpose.—A sum of 00 was sent by clients to a law-agent on 8th June for the purpose of being sted in a heritable security. On 15th June the agent paid it into his own k account, which shewed a balance in his favour, until the transaction uld be formally completed; and he died on the 21st. His estates were eafter sequestrated, and the trustee claimed the £1000 in bank as part of bankrupt estate. In a petition at the instance of the clients, under sec. of the Bankruptcy Act, *held* that the £1000 having been sent to the rupt for a specific purpose, and being still distinguishable from his s, fell to be taken out of the sequestration of his estate and paid to the ioners.

1ST DIVISION.
Ld. Mackenzie.
M.

HE deceased David Martin, writer in Newton-Stewart, was employed he petitioners, Mrs Andrew and Miss Macadam, sisters, residing in chester, to find a safe investment for a sum of £1000 which was about e paid up to them at the term of Whitsunday 1871. On 8th May Mr Martin wrote that he had found a safe investment on heritable

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security at five per cent interest, of which he gave particulars in subsequent letters. The transaction was concluded with the borrower, and on 5th June Mr Robert Macadam, the petitioners' brother, forwarded to Martin, on their behalf, two cheques on the London and Westminster Bank in their favour, requesting him to send the odd money to his sisters in Manchester at his earliest convenience, "retaining the £1000 for their new investment." He sent the cheques to the petitioners for indorsation. On 8th June he received them back, and wrote as follows to Miss Macadam:—"I am this morning favoured with your letter of yesterday, returning the two cheques, value £1020, 11s. 6d., indorsed by you and your sister. I enclose bank order in your favour for £20, 11s. 6d., being the interest due by Messrs Chambers on the two bonds. The new bonds will be with you in course of next week. I shall take care that the money is not paid over until the bonds are duly completed. As I mentioned before, they will bear interest at 5 per cent from 26th of last month."

Some delay having occurred in completing the transaction, Mr Martin, on 15th June, without the knowledge of the petitioners, paid the two cheques into the British Linen Company's Bank at Newton-Stewart to the credit of a deposit-account which he kept with them in his own name. At this date there was a balance of £186 standing at Mr Martin's credit in the account, and the only subsequent entry was a payment of £4 to Mr Martin's order. Mr Martin died a few days after, on 21st June 1871.

The receipt given to Mr Martin by the bank agent was in these terms:—"Newton-Stewart, 15th June 1871.—Received from David Martin, Esq., Ten hundred and twenty pounds 11/6 sterling, which is this day placed to his credit with the British Linen Company.

"£1020 : 11 : 6. DAVID STROYAN, Agent."

In consequence of Mr Martin's death the transaction with the intended borrower was never completed. Martin's estates were sequestrated on 21st May 1872, and Mr M'Cutcheon was elected trustee.

The Bankruptcy (Scotland) Act, 1856, enacts (sec. 104) that "any person claiming right to any estate included in the sequestration may present a petition to the Lord Ordinary praying to have such estate taken out of the sequestration, and the Lord Ordinary shall order the trustee to answer, within a certain time, and on expiration of such time he shall proceed to dispose of the application."

The petitioners brought this petition under the said clause, praying the Lord Ordinary to "find that the said sum of £1000 and bank interest accruing thereon belongs to the petitioners, and does not form part of the estates of the said David Martin, to take the same out of the said sequestration accordingly, and to grant warrant to and authorise and empower the said bank to make payment thereof to the petitioners."

The trustee lodged answers, in which he stated,—"The money obtained by the deceased from the discounting of the cheques sent him by the brother of the petitioners was, as has been stated, lodged by him in the ordinary bank account kept in his own name, in the same way as any monies he received on his own account. It was not lodged in the bank or entered in the bank-account as money belonging to the petitioners, or as held by Mr Martin in trust for them or for their behoof, and it was in no way identified as belonging to the petitioners. The said money thus became part of the ordinary funds belonging to the bankrupt, which he or his representatives alone could claim from the bank, and which falls to be administered as part of the bankrupt estate."

The Lord Ordinary pronounced an interlocutor (22d July 1872) find-

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ing "that the petitioners have right to the sum of £1000 specified in the prayer of the petition, with the bank interest which has accrued thereon since 15th June 1871, and that the same must be taken out of the sequestration of the estate of the deceased David Martin: Grants warrant to and ordains the British Linen Company to pay to the petitioners the said sum of £1000, with the whole interest which shall have accrued thereon since 15th June 1871, and decerns: Finds the petitioners entitled to expenses," &c. *

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* "NOTE.—The deceased David Martin, writer in Newton-Stewart, the agent of the petitioners, was entrusted by them on or about 8th June 1871 with the two cheques in their favour for £510, 5s. 9d. each, Nos. 20 and 21 of process, making together the sum of £1020, 11s. 6d., in order that he might remit them £20, 11s. 6d. thereof, being interest, and invest the balance of £1000, being principal, on a heritable security over certain subjects in Kirkcowan, belonging to Mr Milroy, to whom the £1000 were to be paid in exchange for that security. These two cheques were delivered to Mr Martin in trust for that special purpose. Although, in consequence of some difficulty in connection with the completion of Mr Milroy's title, the settlement of the transaction was delayed for a few days, and Mr Martin paid the sum on 15th June 1871,—that is, six days before his death,—into his deposit-account with the branch bank of the British Linen Company at Newton-Stewart, in which there was then a credit balance in his favour, it was not mixed or confounded with the other moneys in that deposit-account belonging to him so as not to be distinguishable; and it was not operated upon so as to be extinguished. On 15th June 1871 there stood to the credit of that account the sum of £186, 11s. 6d., and the only operations thereon afterwards were the paying in on that day of the £1020, 11s. 6d., the proceeds of the two cheques, and the drawing out of a sum of £4 on 17th June 1871. On 21st June 1871, the date when Mr Martin died, there stood at the credit of this account, exclusive of interest, £1203, 3s., which consisted of the £1020, 11s. 6d. remitted by the petitioners, and £182, 11s. 6d. the balance of Mr Martin's own funds, after deducting the draft of £4 above-mentioned. The petitioners' money was and still is quite distinguishable from Mr Martin's own funds.

"The rule of law, as defined by Mr Bell (Com. i. 267), is, that 'where the factor is entrusted with property or money of his principal to buy stock, exchequer bills, &c. and misapplies it, the produce will be the principal's if still clearly distinguishable;' and he refers to the leading case of Taylor v. Plumer, 1815, 3 Maule and Selwyn, 562, in which the authorities are reviewed by Lord Ellenborough, who delivered the judgment of the Court. Mr Bell further states (Com. i. 268), that 'the general rule may be laid down that in all cases of factory, where the property remitted by the principal or acquired for him by his order, is found distinguishable in the hands of the factor, capable of being traced by a clear and connected chain of identity in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor, who has become a bankrupt, have no right to the specific property.' The case of Sayers, 22d January 1800, 5 Ves. jr. 168, cited by Mr Bell, is a strong example of the application of this principle.

"In the present case, the sum of £1000 claimed by the petitioners (the £20, 11s. 6d. having been remitted to them by Mr Martin), is clearly identified as their money. It is not mixed and confounded with Mr Martin's money, but is distinguishable in his hands. It remained in his hands as a specific trust, and was never otherwise dealt with either by him or by the petitioners, and it never degenerated into a general debt. Mr Martin evidently paid the money into bank for safe keeping, after retaining the cheques in his hands for seven days, when he found there was delay, from the state of the title, in completing the transaction, and he had no intention of applying it, and he never converted or applied it to his own uses and purposes.

"The Lord Ordinary is of opinion that such payment into Mr Martin's bank

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The respondent reclaimed, and argued;—The money in question wa dealt with by the bankrupt as part of his ordinary funds. It was pai into his own bank account in his own name, and entered in that accoun to his credit; and he would have been allowed to operate upon it to th full amount. It could not be distinguished from the other funds in th bankrupt's bank account.[1]

The petitioners argued;—The money must be regarded in this case a if it was in the hands of Mr Martin. No fraud is insinuated; and it plain that he put the money into the bank merely for safe keeping durin the few days of delay which occurred in completing the security transa tion. The money never ceased to be the property of the petitioners, an having been handed to Mr Martin for a specific purpose, he was merel custodier of it, and it can make no difference that he chose to keep it i his own bank account, the account itself shewing that he never dea improperly with it in any way, and that the only transaction in th account after it was paid in was a payment to his order of £4. Even he had acted with a dishonest intention in paying the cheques into h own account, the proceeds would have remained the property of th petitioners as long as they were distinguishable. The trustee has n higher or other right than Martin himself could have claimed in thi question.

At advising,—

Lord Deas.—I am of opinion that the Lord Ordinary's judgment is right Mr Martin was employed to find an investment for the money of these ladies He did find a suitable heritable security, and he intimated to them that he ha done so. After concluding the transaction with the borrower the cheques no in dispute were sent to him, on the part of the ladies, and were received by hi on the 7th or 8th of June. His letter of the 8th, acknowledging receipt of them says:—"I am this morning favoured with your letter of yesterday, returnin the two cheques, value £1020, 11s. 6d., indorsed by you and your sister. enclose bank order in your favour for £20, 11s. 6d., being the interest due b Messrs Chambers on the two bonds. The new bonds will be with you in coun of next week. I shall take care that the money is not paid over until the bon are duly completed. As I mentioned before, they will bear interest at 5 p cent from 26th of last month.—With best regards to you and Mrs Andrew, am, &c."

The terms of the transaction are contained in that letter. The money was bear interest from the date specified (May 26), whether the borrower was ready take it or not. The only reason why the bonds were not at once received a transmitted to the ladies, was, that the borrower was not quite ready, in co sequence of the state of his title, to take the money. Mr Martin, after retaini the cheques for some days very properly cashed them with the bank with whi he usually dealt, thinking that they would be in safer keeping there than in l office. The two cheques were specifically entered in the cash-book of the bran bank in the terms which we have in the print. It next appears that the co pletion of the transaction was prevented by the death of Mr Martin almo

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deposit-account, in which there was then a credit balance, cannot, having rega to the fact that there were thereafter no operations thereon which in any w affected the money, alter the rights of the petitioners, or divest the funds of t trust in their favour, or confer upon the respondent, as the trustee on Mr M tin's sequestrated estate, any greater right than Mr Martin had therein. T Lord Ordinary considers that the respondent can, as trustee for the credit in the sequestration, only take the right of the bankrupt to this sum *tanti et tale* as it stood in his person—(Gordon v. Cheyne, 5th February 1824, 2 675)."

[1] 1 Bell's Com. 255, 259; Parke v. Elleason, 1 East. 544.

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mediately after, viz., on the 21st of the same month. But for the delay in completing the borrower's title in the first place, and for Mr Martin's death in the second place, there is no room for doubt that the transaction would have been completed. A sequestration of Mr Martin's estate was, however, obtained a year after his death; and the question now arises whether these ladies, the owners, are to get this money, or whether it is to go to the trustee in the sequestration, for the benefit of Martin's general creditors. I am clearly of opinion that the latter result would not be according either to law or justice. If Martin had appropriated the money to his own purposes that would have been a fraud. One thing is quite clear in point of law that if a person gets money for a specific purpose it must be applied to that purpose or returned to the owner. That doctrine was recognised in the case of Blyth, &c. v. Maberley's Assignees, June 10, 1832, 10 S. 796, although it is true that in that case the point was not decided. The Lord President there says:—"Had there been a Scotch sequestration we should have remitted the multiplepoinding to it, and so we may dispose of the multiplepoinding to the effect of having the questions it involves disposed of in the Court of Bankruptcy in England. I have considerable doubt as to the right of property in the funds in dispute; but the lawful possession of these funds is clearly with Maberley. It has been found that money paid in for a specific purpose must be so applied without being mixed up with the general estate on a bankruptcy occurring. But such a question involves a claim of preference merely, not of property; and I think the existence of such a claim ought not to bar the assignees from obtaining possession of the disputed funds leaving the preference to be tried in England." It was thus laid down in that case that the fact that money had been paid to a bank-agent for the fulfilment of a special purpose did not prevent a claim of preference over it by the party who had so paid it in. I remember the discussion in that case quite well, and that Lord President Hope stated the doctrine I have referred to, and it has remained in my mind since. I see that in another report (5 Deas and Anderson, p. 488), it is added to what Mr Shaw has given, that the Lord President said that it had been so decided again and again. As regards any claim the bank may have, I am clearly of opinion that there is no need for any reservation at all. Such a reservation might appear to the officers of the bank to lay on them an obligation to try a question in which, as it seems to me, the bank has no interest.

LORD ARDMILLAN.—The two cheques from the London and Westminster Bank reached Mr Martin covered by a special trust for a well defined purpose, and they passed into the possession of the British Linen Company's Bank only for temporary custody and security, with a view to the early—the almost immediate—fulfilment of the purpose of the trust, viz., the investment of the petitioners' money. All this appears clearly from the documents, the entries in the books of the bank, and the letters of Mr Martin. I have no doubt that Mr Martin was, up to the date of his death, which occurred within a week, under the responsibility of a special trust for the benefit of the petitioners. It was his duty—and I feel sure it was his intention—to apply that money, according to the trust, to the specific trust for which he held it. Martin was not rendered bankrupt during his life. When he died he was bound to fulfil, and appeared able to fulfil the trust as above. £1200 was then at his credit with the bank. Since his death it has been discovered that he was insolvent. In respect of that fact, of the subsequently ascertained insolvency, the trustee on the estate of Mr Martin claims this sum.

I am of opinion, and, I must add, without difficulty or hesitation, that the specific trust under which alone Mr Martin received the money was not discharged or impaired by the deposit for safe temporary custody in the bank, but that the trust adhered to the sum so deposited. To have used the money for his own purposes would have been a breach of trust and a fraud on the part of Mr Martin, and I am of opinion that Martin's trustee cannot claim this money.

The authority of the law of England on this question is most important, and

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is explained by Mr Lewin (Lewin on Trusts, p. 647), who refers, among other cases, to a case of Pennell, which is very instructive.

LORD PRESIDENT.—I agree with your Lordships. I have no doubt that the doctrine of Lord President Hope is directly applicable. The point which arises here has been expressly decided in one case in England, viz., in Pennell v. Deffell, 4 De G. M. and G. 372. That was a long and complicated case, but the result is clearly and accurately stated by Mr Lewin in his book on Trusts, p. 647. He says:—"If a trustee pay trust-money into a bank to the account of himself, not in any way earmarked with the trust, and also keep private monies of his own to the same account, the Court will disentangle the account and separate the trust from the private monies, and award the former specifically to the *cestui que trust*." The law being thus clearly settled it is unnecessary to say more on the special circumstances of this case. I agree with Lord Deas that no special reservation should be inserted. If the bank has a claim, it is a claim of retention which can be quite easily settled independently of this question with the trustee in the sequestration.

THE following interlocutor was pronounced:—"Having heard counsel on the reclaiming note for Alexander M'Cutcheon, trustee on David Martin's estate, against Lord Mackenzie's interlocutor of 22d July 1872, No. 44 of process, adhere to the said interlocutor and refuse the reclaiming note: Find the petitioners entitled to additional expenses; allow an account thereof to be given in, and remit," &c.

WATT & ANDERSON, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

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JOHN COOPER, Petitioner and Appellant.—*Sol.-Gen. Clark—Scott.*
ANDREW FRASER and JAMES SCOTT, Respondents.—*Shand—Asher.*

Bankrupt—Discharge—Bankruptcy (Scotland) Act, 1856, *sec.* 146.—Circumstances in which a discharge was granted to a bankrupt convicted of breach of trust and embezzlement after the expiry of the term of his imprisonment, and after the lapse of a year from the date of his application for discharge.

2D DIVISION. Sheriff-substitute of Forfarshire. I.

JOHN COOPER, who was sequestrated on 5th March 1870, presented, on 16th November 1871, a petition for his discharge, in the usual terms, to the Sheriff of Forfarshire at Dundee. The accompanying report of the trustee on his sequestrated estate was as follows:—"I hereby certify and report that the bankrupt has complied with the provisions of the Bankruptcy (Scotland) Act, 1856, and in particular that he has made a fair discovery and surrender of his estates, has attended the diet of examination, has not been guilty of any collusion, and that his bankruptcy has arisen from innocent misfortunes or losses in business."

Appearance was entered to oppose the discharge by the respondents, on the following grounds:—"Mrs Jane Jamieson or Fraser, residing at Blackhill, farm of Balgay, who died on 14th May 1866, by her trust disposition and settlement appointed the appellant her sole trustee and executor. By her said trust-settlement the said Mrs Jane Jamieson or Fraser, '*inter alia*, and thirdly, appointed her said trustee, as soon as convenient after her death, to invest the sum of £600 sterling on heritable or personal security, railway debentures, or otherwise, as to her said trustee might seem best, and to pay the annual produce to be derived therefrom half-yearly, quarterly, or at such other times as her said trustee might consider best, to David Fraser, her son, as an alimentary provision during all the days of his life, which should not be assignable, or subje

to his act or deeds, or liable to be attached by the diligence of his creditors, but paid to himself, on his own receipt therefor; and at the death of the said David Fraser, or as soon thereafter as convenient, £100 of said sum to be invested should be paid to David Fraser, son to David Fraser; and the balance of £500, or, failing the said David Fraser junior, the said sum of £600 to be equally divided betwixt the respondent, Andrew Fraser, her son, and Jessie Fraser, now wife of the respondent, James Scott, her daughter, or their issue.'"

The appellant accepted of the trust, and realised the estate. He did not, however, make any investment of the £600 as directed by the third clause of the settlement, but applied it to his own purposes, paying regularly the interest thereon at the rate of five per cent up to the date of his sequestration, at first to the said David Fraser junior and afterwards by concurrence of the respondents to his widow—David Fraser junior having predeceased.

In August 1867 the appellant purchased heritable property in Hilltown, Dundee, which he professed to be an investment for the £600. He paid £2275 for the property, and borrowed £1750 on the security of it, taking the titles in his own name, and without any reference to the trust. The respondents, who, on the death of the Frasers, became in right of the £600, only obtained an ordinary ranking upon the appellant's estates to the extent of £128, 18s. 3d., in place of the £600 to which they were entitled under Mrs Fraser's trust-deed.

They accordingly pleaded;—That the appellant's fraudulent conduct in embezzling trust-funds and the circumstances had been such as to disentitle him to a discharge from his debts.

The appellant pleaded;—(2) There being no fraud or embezzlement with the funds of the property of the estate, and no reckless or culpable conduct on the part of the petitioner, he was entitled to his discharge. (3) The trust-funds referred to in the objections having been left, by arrangement of parties, in the hands of the petitioner, at interest, and he having paid, and the beneficiaries having received such interest, they were barred by acquiescence and homologation from now stating objections to such arrangement.

The Sheriff-substitute (Cheyne), having allowed the parties a proof of their averments, on 16th January 1872 pronounced the following interlocutor:—"Defers the consideration of the petition for three months from this date: Further, appoints the Sheriff-clerk to transmit the proceedings to the Lord Advocate for his consideration."

As stated in a minute for the appellant, "the proceedings were accordingly transmitted, and a criminal charge was preferred against the petitioner of breach of trust and embezzlement. The trial on this charge took place before the Circuit Court of Justiciary held at Dundee on 24th and 25th April last, before a jury. After evidence had been led, and addresses delivered by the counsel for the Crown and the petitioner, the jury, after retiring, returned with a verdict finding, by a majority of five, that the petitioner was guilty of breach of trust, but without felonious intent. The presiding Judge stated that he could not take that verdict; and having read over the libel to the jury, he asked them to retire again and reconsider their verdict. They did so, and returned to the Court with a verdict unanimously finding the petitioner guilty as libelled, but recommending him to the leniency of the Court; and thereupon the presiding Judge sentenced the petitioner to three months' imprisonment, which sentence the petitioner has undergone."

On the expiry of the term of imprisonment the appellant again applied to the Court to grant the prayer of his petition for discharge. On 16th

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September 1872 the Sheriff-substitute pronounced the following interlo cutor:—"In respect it is in his opinion proved that the petitioner ha been guilty of breach of trust and embezzlement in connection with th sum of £600 of trust-funds referred to in the objections, finds that he i not entitled to a discharge under the Bankruptcy Statute: Therefore di misses the petition and decerns."

The bankrupt appealed.[1]

At advising,—

LORD JUSTICE-CLERK.—The petitioner in this case became bankrupt and w sequestrated in March 1870. In September 1871 he obtained a certificate fro his trustee in terms of the 146th section of the Bankruptcy Act, and al obtained the concurrence of a number of his creditors who are certified as bein a majority in number and value. So armed, he applied, in terms of the Ban ruptcy Act, to the Sheriff for his discharge, in a petition dated 16th Novemb 1871. This was opposed by the present respondents, the beneficiaries under trust-deed under which the bankrupt was trustee. It seems that the bankrup had used £600 of the trust-estate for his own purposes. The Sheriff-substitut allowed a proof, and pending the proof the Sheriff adjourned the inquiry fo three months, and directed the proceedings to be laid before the Lord Advocate They were so, and the result was that the bankrupt was tried at the Circui Court in April 1872, on a charge of embezzlement under which he was con victed, and suffered three months' imprisonment. He has now resumed the pro ceedings, and again applies for his discharge. The Sheriff has refused it, and hi judgment is now under our review.

I have no doubt that the appellant was guilty of a fraud in the use he mad of these trust-funds. That indeed was evident enough from the statement mad on his behalf; and it was a fraud of a dangerous kind, for this trustee admit that he used this money in making a purchase of real property, the titles o which he took in his own name, at a time when there seems some reason t think that he knew himself to be embarrassed. On the other hand, there ar some considerations on the other side. The bankrupt has obtained the certificat of the trustee, which has not been impugned, and indeed could not be, for th fraud was not to the prejudice, but was rather to the advantage of the gener body of creditors; and there is no reason to suppose that it in any way con duced to his becoming bankrupt. Moreover, the extent of the sentence inflicte shews that Lord Cowan did think there were mitigating facts in the case.

The question therefore arises, what effect are we now to give to this delinquenc on the appellant's part? I do not think that he has a legal right to deman his discharge, should we think he was guilty of dishonest or irregular or unfa dealing. This would entitle us to delay the discharge for such period as w might think sufficient as a penalty; and the question is, whether we are t exercise this power. Now, here the appellant has satisfied the public intere so far as his sentence went, and he has also suffered a delay of a year in obtai ing his discharge. I am of opinion that he has suffered sufficiently, and ough now to obtain his discharge.

LORD COWAN.—The objection to the discharge for which the petitioner appli is his conviction of the crime of breach of trust and embezzlement in the crimin Court. The case came before me last April, at the Circuit Court of Justicia in Dundee. The bankrupt was indicted by the public prosecutor on a charge breach of trust and embezzlement; and the jury at first proposed to return verdict finding by a majority that the panel was guilty of a breach of trust wit out felonious intent; but as the charge of embezzlement was not noticed by th jury, and as there could be no guilt, if there were no felonious intent, I direct the jury to reconsider the matter. They accordingly retired a second time, an

[1] Wilson v. Wilson's Creditors, Dec. 20, 1842, 5 D. 346; Dixon's Trustees Campbell, March 20, 1867, *ante*, vol. v. p. 767.

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thereafter returned with a unanimous verdict finding the panel guilty as libelled but with a strong recommendation to the leniency of the Court. And there were certainly circumstances in the case tending greatly to diminish the criminality attaching to the panel. Indeed I should not have been surprised had the jury returned a verdict of acquittal. At the same time, it is impossible to say that the verdict was contrary to evidence, and I cannot adopt the argument of the Solicitor-General that the petitioner was really not guilty of any crime, seeing that it appeared at first to the jury that he had acted without felonious intent. The verdict which the jury actually returned was "guilty as libelled"; and such a verdict necessarily implies felonious intent. We must take it for certain that the petitioner has not only been convicted, but has been truly guilty of the crime of breach of trust and embezzlement.

But when I come to consider the present application on its own merits I do not think that the objection of the petitioner's criminality is in the circumstances of the case sufficient to deprive him of the privilege conferred by the Bankruptcy Act to obtain a discharge. Having complied with all the statutory requisites he is entitled to his discharge, in a certain sense as a matter of right, unless there has been proved against him concealment of funds or something criminal in his conduct by which the interests of his creditors are affected. In that case there may be room for refusal, either *in hoc statu* or for a period more or less in endurance, of the petition for discharge. But here the sentence pronounced in the criminal Court of three months' imprisonment, and which the petitioner has undergone, may well be regarded as adequate to the offence, and such as to preclude the necessity of delay in granting his discharge for any longer period.

Another circumstance which I cannot altogether throw out of view in the present application is that the only parties who oppose the petitioner's discharge are the beneficiaries under the private trust which has been abused; and that they appear, from the letter of their agent, dated 27th February 1871, to have proposed, as the condition of their consent to the bankrupt's discharge, an illegal arrangement or bargain struck at by the Bankruptcy Act; and their opposition may so far be traced as proceeding from sinister and selfish sources.

On the whole matter, I think that the petitioner is entitled to his discharge.

LORD BENHOLME.—The Sheriff-substitute has found by the interlocutor now submitted to our review that the bankrupt is not entitled to a discharge under the Bankruptcy Act, and has therefore dismissed the petition. Now, that looks very like an absolute bar to his ever obtaining a discharge; and the respondents have so argued. But I hardly think that a case of fraud even much worse than the present would deprive a bankrupt for ever of his right to obtain a discharge. We could scarcely hold so in any case. We must therefore take for granted that if we refuse the present application the petitioner may again apply for his discharge, after the lapse of some time. Any delay that we may impose must be regarded as a punishment. Lord Cowan, who necessarily knows more about the circumstances of the case than any of us, has told us that the offence of which the bankrupt was convicted was not of an aggravated character; and in that view of the case I think the imprisonment of the petitioner for three months was a punishment quite adequate to the offence.

Reference has been made to the supposed analogy of an application under the Cessio Act. But the analogy is not very strict; because a decree of *cessio* does not discharge a bankrupt from his obligations, but merely frees him from incarceration. Still, the proceedings in the two cases agree in this respect, that any delay in granting the application must be considered as a matter of punishment. On the whole, I am inclined to think that the punishment already inflicted is sufficient, and that we ought not to delay granting the discharge.

LORD NEAVES.—I am of the same opinion. I heard the whole evidence in the criminal trial, although I did not happen to be present when the jury returned their verdict. There were many mitigating circumstances in the case, and I should not have been surprised if the verdict had been "not guilty." The

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sentence of three months' imprisonment was, I think, quite adequate to the offence.

Where bankruptcy is the result of a system of fraud upon his creditors generally, the bankrupt is not within the provisions of the statute conferring the privilege of a discharge. But when bankruptcy has been brought about by innocent misfortune I do not think that a discharge is to be refused merely because the bankrupt may have acted culpably towards one or more of his various creditors.

In the present case, it appears to me that the petitioner has sufficiently expiated the wrong which he did to the objectors, and that in every other respect his conduct as a bankrupt has been unexceptionable. I therefore concur with your Lordships in thinking that his discharge should be no longer delayed.

THE following interlocutor was pronounced:—"Recall the judgment: Find the appellant entitled to his discharge, and remit to the Sheriff to grant the same: Find no expenses due in either Court, and decern."

ADAM & SANG, W.S.—LINDSAY, PATERSON, & HALL, W.S.—Agents.

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Nov. 6, 1872. Brand and Son v. Bell's Trustees.

CHARLES BRAND and SON, Pursuers.—*Sol.-Gen. Clark—Johnstone.*
Mrs JESSIE HILL or BELL and OTHERS (Bell's Trustees), Defenders.—*Watson—Mackintosh.*

Relief—Agreement to allow building-stone to be taken out of lands at a specified rate—Lease.—By an agreement between a railway contractor and a landed proprietor the former was allowed to take building-stone for a viaduct from any part of certain lands, at a certain rate per superficial yard, of whatever depth, the contractor being bound to make good all surface damages, and fill up the quarry when his contract was completed. The contractor opened a quarry near the bank of a river, and in consequence of his operations water flowed into the quarry, and thence into an old coal-waste which communicated with going coal-mines on the estate of the same proprietor. The lessee of the minerals brought a process of suspension and interdict, in which the contractor was ordered to execute certain works, and was found liable in the expenses of process. In an action of relief brought by the contractor against the proprietor, *held* that the agreement was not a lease, and the pursuer was not entitled to be relieved by the proprietor, either of the sums which he had been obliged to expend for the protection of the coal-mines, or of the expenses of the former process.

1ST DIVISION. Ld. Ormidale. B.

IN 1868 Messrs Brand and Son, railway contractors, undertook to construct for the Glasgow and South-Western Railway Company a large viaduct across the river Ayr, at Knockshoggle Holm, on the estate of Enterkine, belonging to Mr Bell. Finding that there was suitable rock on the lands of Knockshoggle Holm, close to the site of the intended viaduct, they entered into an agreement with Mr Bell, dated 11th and 15th December 1868, in the following terms:—"Whereas the said Charles Brand and Son are to be allowed to open up a quarry at Knockshoggle and Craufurdstone Holms, in order to obtain building stones, to be used towards the execution of their contract for the formation of certain branch railways of the Glasgow and South-Western Railway, and it is proper that the arrangment made for the said quarries be reduced to writing, Therefore it is hereby witnessed as follows:—First, The said Charles Brand and Son are to be allowed to open quarries in these farms on either side of the river Ayr, in the property of the said John Bell, and to work the same during the period of the formation of said railways. Second, The said Charles Brand and Son are to pay to the said John Bell 6s. for every square yard of rock wrought out, of what-

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ver depth, payable at the following times and in the following proportions—viz., £50 at the 1st day of January 1869, and the remainder by uarterly settlements thereafter. If the lordship on the quantity of rock rought out at 1st January 1869 shall not amount to £50 they shall be ntitled to credit for the balance at next settlement. Third, The said harles Brand and Son are to settle all surface damages of every kind, ntil the ground shall have been restored as hereinafter provided. ourth, The said Charles Brand and Son are also to preserve carefully he top soil, fill up said quarry, and restore and make up the ground after heir operations are completed, in every respect as good as before they ommenced operations, to the satisfaction of the said John Bell and his enants. In witness whereof," &c.

In pursuance of this agreement Messrs Brand opened a quarry in Knockshoggle Holm, near the south bank of the river. The river was very liable to floods, and in the autumn of 1869 the trustee for Mr Taylor Gordon, the tenant of the minerals in Enterkine estate, complained that the water of the river percolated through the bank into the quarry, and thence found its way through a coal-waste into the going coal workings in the neighbourhood.

In consequence of these complaints and of a process of suspension and interdict brought in the Sheriff-court of Ayrshire, certain dams and works were erected by Messrs Brand; but these proved insufficient to keep out the water.

In December 1869 Mr Taylor Gordon's trustee raised a process of suspension and interdict against Mr Bell and Messrs Brand in the Court of Session. After some procedure, in the course of which answers were lodged for both defenders, and Messrs Brand and Son intimated to Mr Bell that they would hold him liable to them for any loss or expense they might incur by or through the interdict proceedings, the complainer, on 19th July 1870, abandoned the action as against Mr Bell, and paid his expenses, and the action was dismissed as against Mr Bell.

The process was proceeded with against Messrs Brand, who were ordained to execute certain operations at the sight of Mr M'Creath, a mining engineer. These operations were executed, and the cause being exhausted, the Lord Ordinary decerned against Messrs Brand and Son for he expenses of process.

Messrs Brand and Son brought this action against Mr Bell (whose trustees were sisted in his room on his death) for relief (1) of the sum of £195, 10s. 2d. of taxed expenses, and £1, 0s. 4d. of dues of extracting he decree in the said process of interdict; and (2) of the extra cost or xpenditure (amounting to £629, 14s. 9d.) incurred by the pursuers in xecuting the operations ordered in the said process, "over and above or n excess of the operations stipulated for in the lease of the said quarry ranted by the defender to the pursuers, and relative agreement between he defender and the pursuers," dated, &c.

The pursuers pleaded;—1. The defender having let to the pursuers he stone in question, for payment of a fixed rent, and stipulated for the hole operations or works required by him to be performed by the purers in filling up and restoring the ground, he is bound to free and elieve them of the action at the instance of Mr Jamieson foresaid. 2. he pursuers having opened the quarry and excavated the stone in quesion under and in terms of the lease or agreement foresaid between them nd the defender, and in a proper and workmanlike manner, and being illing to execute the whole operations stipulated in their agreements ith the defender, the defender is bound to relieve them of the proceedngs foresaid, and also of the expense of the operations foresaid not con-

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templated by said agreements, and of all claims at the instance of the mineral tenant. 3. The pursuers were only bound to fill up the quarry in the manner and with the material agreed upon between them and the defender, and the defender is bound to relieve them of the extra expenditure incurred by their having been compelled as aforesaid to fill up the quarry in a different manner, and to execute extra works for the protection of the mineral workings. 5. The pursuers having fulfilled all their obligations under their lease of the said quarry, and paid the defender for the stone excavated, are entitled to be protected from all claims of damages that may be instituted by the defender's mineral tenant because of the opening of, or in connection with, the said quarry.

The defenders pleaded;—1. The defender is not bound to relieve the pursuers as concluded for—(1) In respect the defender did not come under any obligation to relieve the pursuers; (2) in respect that upon a sound construction of the defender's agreement with the pursuers the pursuers only acquired such rights as the defender himself had and could lawfully exercise; (3) in respect that the said application for interdict, and the said operations ordered by the Court, were rendered necessary by the undue and improper exercise by the pursuers of the right derived by them from the defender; (4) in respect that, in any view, the expenses of filling up the quarry in the manner ordered by the Court were expenses which the pursuers were bound to incur in order to fulfil their obligations under their agreement with the defender. 3. The pursuers are barred from insisting in the claims of relief sued for (1) by having allowed the action of suspension and interdict to be abandoned as against the defender without objection; and (2) by having thereafter made an arrangement for filling up the quarry in any way to be recommended by Mr M'Creath, to which arrangement the defender was not a party.

A proof was led before the Lord Ordinary, the import of which is stated in the latter part of his Lordship's note.

The Lord Ordinary (26th March 1872) pronounced this interlocutor:—"Finds that the decree and sums of money, relief from and payment of which are concluded for in this action, resulted from the acts and conduct of the pursuers themselves, and that they have failed to establish any ground or obligation of relief from or payment of said decree or sums against the defenders: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.*

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* "NOTE.—This action of relief and payment, as originally brought, was directed against the late Mr Bell of Enterkine, and, in consequence of his death during its dependence, has been latterly insisted in against the present defenders, his trustees and executors.

"The foundation of the action is the document called 'minute of agreement,' No. 18 of process. It bears to have been entered into by the late Mr Bell and the pursuers on the 11th and 15th December 1868, and is to the effect—(1) That the latter were to be allowed to open quarries in the farms or grounds belonging to the former, called 'Knockshoggle and Craufurdstone Holms,' for the purpose of obtaining building stones to be used in the execution of their, the pursuers', contract for the formation of certain branches of the Glasgow and South-Western Railway Company. (2) That the pursuers were to pay Mr Bell six shillings for every square yard of rock wrought out, of whatever depth. (3) That the pursuers were to settle all surface damages, of whatever kind; and (4) That the pursuers were 'to fill up the quarry, and restore and make up the ground after the operations are completed, in every respect as good as before they commenced operations, to the satisfaction of the said John Bell and his tenants.'

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The pursuers reclaimed, and argued;—The right given to the pursuers by the agreement of December 1868 was not qualified or restricted by

"This agreement contains no express warrandice, or indeed any other obligation whatever on the part of Mr Bell, except that he was to 'allow' the pursuers to open quarries in the grounds referred to. It is not said that Mr Bell did not fulfil his engagement to allow the pursuers to open any quarries they pleased on the grounds referred to, nor is it said that he in any way whatever controlled or interfered with them in their operations, so as to bring about the claims of his mineral tenants against the pursuers in respect of which the present action has been brought. It is important also to observe that although the pursuers are taken bound to pay Mr Bell at the rate of six shillings per square yard for the 'rock wrought out,' it is not made incumbent on them to put out any given quantity, or to open the quarries on any particular plan, or to work them in any particular way, or to any particular depth. All that appears to have been left to themselves.

"Such being the nature of the agreement, the question arises—upon what ground can it be maintained that Mr Bell is bound and liable to relieve the pursuers from the consequences of their operations as affecting Mr Bell's mineral tenants, Messrs George Taylor and Company? These parties complained that by and in consequence of the pursuers' operations in working the quarries which they had opened on Mr Bell's property their mines were inundated with water, and on this ground they presented a suspension and interdict against both the pursuers and Mr Bell. The latter was, after some procedure, assoilzied; but decree was pronounced against the pursuers, *inter alia*, ordaining them to execute certain works connected with the filling up of the quarry necessary for the protection of the mineral tenants, besides being found liable in certain expense of process. It is for relief of that decree and their liabilities under it, as well as for payment of the expenses incurred by themselves in resisting the proceedings taken against them by the mineral tenants, that the present action has been brought. The defenders cannot be liable in such relief, in respect of any express warrandice or obligation in Mr Bell's agreement with the pursuers, for by that agreement Mr Bell undertook no express warrandice or other obligation whatever. As already remarked, he merely gave the pursuers leave, so far as he was concerned, to open quarries on certain grounds of his. They were left apparently to do so or not, and where and in what manner they pleased. The defenders cannot therefore be liable to the pursuers in the relief and payment they conclude for, in respect of any express warrandice or other obligation in their agreement with Mr Bell, and this was not maintained by them.

"The next question which arises is, whether Mr Bell was under any such implied warrandice or obligation? That he was, the Lord Ordinary understands was the contention of the pursuers. He understood them to maintain that under the agreement there was an implied, if not an express warrandice or undertaking by Mr Bell that they were to have the right to take out all the rock in his grounds of Knockshoggle and Craufurdstone Holms, and that he was to free them from all the consequences of carrying out and making that right effectual so long as they conducted their operations with ordinary skill, and according to the ordinary methods of quarrying. The Lord Ordinary has been unable to satisfy himself that the pursuers are sound in this contention. It appears to him to be founded on assumptions which have no place in the agreement or circumstances of this case. Mr Bell did not give a lease to the pursuers, and in respect thereof take them bound to pay him a certain or definite amount of rent. All he did was to give them leave to open a quarry or quarries. And, on the other hand, the pursuers did not become bound to open a quarry or quarries in any particular spot, or to put out any specific quantity of rock, or to conduct their operations in any particular way. All that was left to themselves. Where, then, is the implied warrandice or obligation on which the pursuers rely, and how does it arise? The pursuers failed at the debate satisfactorily to answer that question; and, as it appears to the Lord Ordinary, no clear or dis-

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any right previously communicated by the landlord to his mineral lessees. If Mr Bell had worked his own minerals he could not have insisted on

tinct answer to it is to be found in the record. The Lord Ordinary cannot indeed collect either from the pursuers' condescendence or their pleas in law, looked at separately or in combination, the precise grounds upon which the warrandice or other obligation on which the pursuers rely, is founded.

"Even in the case of a regular lease, where a subject is let to a tenant for an onerous consideration, the lessor is not, in the absence of express obligation, liable to protect the tenant against rights affecting the subject let arising from vicinage—1 Bell's Comment. p. 644; and 2 Hunter's Treatise on Landlord and Tenant, p. 260. And the case of Reid v. Shaw (21st February 1822, 1 Sh. 334), cited by these learned authors, appears to have an important bearing on the present. There a party who had obtained for a money consideration right to take by any course he pleased the spring water from a farm for the purpose of a bleachfield having been interdicted by a neighbour from diverting the water from its previous course through his estate was found not entitled to claim damages from the granter of the right, 'in respect,' as the interlocutor of the Lord Ordinary, which was adhered to by the Inner-House, bears, 'that the pursuer has not been deprived of the water from the fields mentioned in the libel by any act or deed of the defender; that absolute warrandice is not expressed in the contract or agreement libelled on; that the said agreement has been fully implemented by the respondent; that under it the pursuer has obtained all that he stipulated from the defender; and that the respondent is not responsible for the interruption of the pursuer's operations by a third party, of whose rights to interrupt them it must be presumed that both parties were aware at the date of the agreement.' These grounds of absolvitor appear to the Lord Ordinary to be in all essential respects applicable to the present case. In one respect indeed—and a not unimportant one—the case referred to is an *a fortiori* authority in support of the defenders here, for there the party seeking relief had, under the agreement on which he founded, obtained for an onerous consideration, in express terms, the full and unqualified right to take the whole spring water on a particular farm in any course he pleased, and yet the granter of that right was not held liable in warrandice of it against the claims of a neighbour.

"Independently, however, of either express or implied warrandice, the Lord Ordinary understood the pursuers to maintain that the special circumstances of the present case entitled them to the relief and payment from Mr Bell for which they conclude. But it appears, on the contrary, to the Lord Ordinary that the special circumstances of the present case, as disclosed on the proof, are adverse, rather than favourable to the pursuers' claim. (1) It was the pursuers, in consequence of their having ascertained, in the course of their railway operations, that there was rock of the description they wanted in Mr Bell's grounds, who applied to him for leave to quarry it. There is no evidence of Mr Bell having made any statement to them on the subject. There is no evidence, indeed, that he was previously aware that the stone in question was to be got in his grounds. (2) The pursuers state, in their letter to Mr Shaw of 4th February 1869, that they could have taken the quarries under the railway's compulsory powers; and from this circumstance, as well as others disclosed on the proof, it appears that the agreement with Mr Bell was entered into merely in order to save the pursuers the expense of enforcing the compulsory powers. Now, if this be so, and supposing the pursuers had proceeded under their statutory powers, it cannot be disputed that they would have been liable not only to Mr Bell, but to his mineral tenants also, for all the consequences of their operations—that is to say, they would have been bound to compensate and make good to each of these parties their respective claims arising from the quarrying operations in dispute without any right of relief whatever. If this be so, it is not very easy to see how a right of relief can be available to the pursuers because they have proceeded by the private agreement in question with Mr Bell, in place of under the railway statute, there being no stipulation

rformance by the pursuers of any operations beyond those expressly No. 12.
ited in the agreement between them.
advising,—

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D DEAS.—The question in this case is as to the construction of the agree-
ntered into in December 1868. The material facts lie in a narrow com-
lthough the proof extends to a considerable length. At the date of the
ent matters stood thus:—The late Mr Bell of Enterkine was proprietor
farms of Knockshoggle and Craufurdstone Holms mentioned in the
ent, extending along both sides of the river Ayr. The Glasgow and
Western Railway Company were in the act of forming a viaduct across
er Ayr, in the course of constructing a railway through Mr Bell's lands.
Brand were the contractors for building the viaduct, and were naturally
s to get freestone for it as near the spot as possible. Mr Bell's farms,

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; effect in the agreement. (3) The defenders knew perfectly well when
ntered into the agreement that Messrs Taylor and Company had right to
inerals, and were working them, if not actually under the quarry, in its
iate neighbourhood. (4) They also knew, or had good and sufficient
to know when they entered into the agreement, that there was a coal
under the quarry communicating with the mineral tenants' workings.
s other pregnant evidence to this effect, the pursuers' manager Thomas
, who had explored the underground workings, expressly says—'I had no
the waste extended to the quarry and under the quarry.' (5) On 7th
ıber 1868, being a few days before the agreement was entered into, Mr
ıt, the manager of the mineral tenants, wrote the pursuers, warning
of the risk they were incurring by their quarrying operations (which had
enced, although the agreement had not been actually executed), and
ning them that 'the growth of the water in Craufurdstone Coal, No. 3
ıre, has increased so rapidly of late as to become quite alarming;' and Mr
ıt added—'At the same rate of increase the colliery will be flooded and
n ruins in a few weeks. From information which has reached me this
se can only be attributed to your operations at Knockshoggle and Crau-
one in connection with the railway works you are constructing there for
lasgow and South-Western Railway.' The pursuer, Mr Brand, when exa-
l in regard to this letter, said,—'I don't think I wrote him (Mr Wright)
ly.' And he does not say that he communicated the letter, or the infor-
n it contained, to Mr Bell. And (6) there is no evidence whatever to the
that it was through the fault or wrongous conduct in any way of Mr Bell
he injurious consequences of the pursuers' operations, which have given
the decree and claims, relief and payment of which are now concluded
ere caused.

ll these are important features of this case, tending, in the Lord Ordinary's
of them, to shew that the pursuers' present action is not well founded. In
ular, they shew that although the pursuers were well aware before they
enced, and throughout their quarrying operations, not only of the risk
were incurring, but of the actual injury that was being done to the mineral
, they persisted in these operations without even notice to or communica-
with Mr Bell on the subject; and this was all the more culpable, seeing
hey might, by using the necessary precautions, have obtained all the stone
hey required without danger or injury to any one. The Lord Ordinary
s that this sufficiently appears from the proof, and especially from the
lers' witnesses, Mr William Robertson and Mr Robert Brown.

f the Lord Ordinary is right in the preceding view, it is unnecessary to
e how far the circumstance of the pursuers having entered into the refer-
o Mr M'Creath, without the concurrence of Mr Bell, affects the question
ef, as there is enough in the case otherwise, and independently of that cir-
ance, to entitle the defenders to the absolvitor which has been pronounced
ir favour."

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referred to, are notoriously situated in a mineral country, and it was quite well known that there were coal wastes and going pits in the neighbourhood. Mr Bell had let his minerals to Mr Gordon; and Messrs Brand knew the existence of the mines still better, if possible, than Mr Bell, because the railway company had sunk a number of shafts down to what proved to be a coal waste in endeavouring to get information to enable the contractors safely to found the viaduct. The plans of these operations of the company were laid before Messrs Brand to enable them to prepare an estimate. Mr James Brand was bred a civil engineer. He says that he did not know that a waste extended under the piece of ground where he opened the quarry; but he cannot dispute that he knew that coal wastes existed in the neighbourhood, and might very probably extend under it.

Under the agreement Messrs Brand were entitled to take the stone from any part of the farms, and were to pay a specified lordship for each superficial yard. They fixed to begin at a distance of 100 yards from the river, and to work forward to within 30 yards of the river. They had previously tried to get rock on the other side of the river. But it is not proved that there was not good freestone in other parts of the ground to which the agreement applies, although the precise extent of that ground does not appear. There is in no view any evidence that rock could not have been found somewhat further from the river within the ground from which Messrs Brand were entitled to take it.

If, then, the pursuers were to take rock from near to the river—a river subject to floods, and with its banks considerably higher than the surface of the ground where the pursuers began to dig—it must have been quite clear to any man of common sense, who turned his mind to the subject, that the rock could not be taken out with safety to the mineral field below without precautions. With due precautions there was no impracticability in taking out rock even in that spot. Even there the stone could be got, only it was necessary to incur expense in protecting the quarry against the river. If this had been done at first the expense would have been moderate.

Such being the state of matters, the whole question comes to be whether it was incumbent on Mr Bell or on Messrs Brand to provide for that expense. It has been observed repeatedly in the course of the argument that this is not a question under a lease, and that we do not need to go into the matter of leases; for this was not a lease, but an agreement to purchase a quantity of stone for the construction of the viaduct, at a certain price per superficial yard, to be taken out at any place within the lands where Messrs Brand could most conveniently get it. Is it reasonable to suppose that Mr Bell was to be at the expense of whatever operations might be necessary to enable Messrs Brand to get that rock wherever they chose to work for it? That is an extravagant idea, and would require something very plain in the agreement to support it.

Even if we go beyond the agreement, and look at the history of the proceedings, everything goes to confirm the view which I have stated. At the very outset we find the letter of 7th December from Mr Wright, Mr Gordon's manager, calling Messrs Brand and Son's attention to the increase of water in the Craufurdstone coal at No. 3 pit, and stating that it could only be attributed to their operations at Knockshoggle, which he desired permission to examine. To this Mr Brand did not return a written answer; but it appears from the proof that some conferences took place, at one of which Mr Brand had "a long discussion" with Mr Taylor Gordon on the subject. Then from time to time calls were made on the pursuer to take the precautions which in the end it was found necessary to take. In short, the whole expense and all this litigation appears to me to have arisen from that sort of fearlessness—I shall not call it recklessness—so common with contractors and other persons engaged in similar operations, who trust to providence that certain unfavourable contingencies, which may or may not be involved, will turn out not to be involved, and so go on without due inquiry or due precautions against the risks they are incurring. Mr Brand admits that he made no inquiry at all. He paid no attention to the nature of the soil between the quarry and the river, or to the near vicinity of the coal waste. It is said not to be surprising that Mr Brand took that easy *view* of matters, but the foundation of this simply is that others say they might

have done the same. That, in my opinion, is no answer to the case made for the defender, and on the whole I concur in the result at which the Lord Ordinary has arrived.

LORD ARDMILLAN.—I have come to the same conclusion as the Lord Ordinary, though I do not entirely agree with some of the remarks he has made on the law applicable to leases, which is a subject of great delicacy.

The commencement of the correspondence here is an application by Mr Brand for leave to open the quarry. Then he has a personal communication with Mr Bell; and after that he writes a letter to Mr Bell's agent on 26th September 1868, in which he, inadvertently, or otherwise, uses the word "lease." But in the reply that word is not used, and more correctly the word "agreement" is used, and that word agreement is thereafter alone used throughout the whole correspondence.

Therefore the first remark that I would make is, that this was not a lease, but a mere permission to open a quarry for purposes not apparently permanent, and to raise stones from a considerable extent of ground, payment to be made for the stone, according to what at first strikes one as a strange system, but which appears to be not unusual, viz.—at so much per superficial yard, whatever the depth might be. The next point which attracts consideration is, what was the knowledge which, at the date when he obtained this permission, Mr Brand had with regard to the coal workings in the neighbourhood. I must observe that the viaduct was close by the field for quarrying, upon the same estate, on the same farm even, and there is no doubt that it was in the knowledge of Mr Brand that the viaduct was over a coal waste; and it is proved that the manager for the mineral tenant gave Mr Brand distinct warning as to the hazard of flooding the workings. There is abundant evidence to instruct his knowledge. It is in the knowledge of all this that Mr Brand takes permission under this agreement to work out the stone. Now, I agree with the Lord Ordinary that where these two parties were equally aware of the existence of the coal workings, and also, at least generally, of the waste, Mr Bell came under no obligation, written or implied, to bear the cost, or to share the cost, which might be incurred in preventing the working of the quarry from injuring the mineral tenant's rights. Brand must have known from the very beginning that he incurred great risk, and that in the course of his work he might be involved in expense; but that he was bound to expect and to meet. It gives him no claim against Mr Bell, for it was a danger incident to his contract or agreement, and to the working of the quarry. I think that, looking to the circumstances of this case, the Lord Ordinary has come to a right conclusion; though, if there had been a regular lease to Mr Brand, I would, as I have already said, have some difficulty in agreeing with all his remarks.

LORD PRESIDENT.—This is an action of relief. The claim made under the conclusions of the action is that Bell, the landlord, shall reimburse Messrs Brand, the contractors, for the expense which they have been obliged to incur for the protection of the mineral tenant from the consequences of their quarrying operations. The pursuers propose to deduct from the total amount of such expenses the estimated amount which they would have incurred in carrying out their agreement with Mr Bell. That does not, however, vary the nature of the claim, which is a claim to be relieved of the expenses disbursed by the pursuers in protecting the minerals against these quarrying operations. This is an action not at all in the nature of a claim of relief by a cautioner against the principal debtor, nor is it founded on any express clause of warrandice, or obligation of relief, or any joint written obligation out of which an obligation of relief might be inferred in favour of one of two co-obligants against the other. The only possible ground of the claim is implied warrandice, or an implied obligation by the landlord in favour of Messrs Brand.

In order to determine whether there was implied warrandice or an implied obligation of relief, it is necessary to bear in mind the leading facts of the case. In the first place, it is beyond dispute *that the pursuers* were directly liable to

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the mineral tenants for the consequences of their operations, and that they could not resist the claim of the mineral tenant in the process of interdict and restoration at his instance. Not only do the pursuers admit this, but it is a necessary part of their case; because if they had not been liable to the mineral tenant, they would have lost their right of recourse against the defender by consenting to decree against them. It is therefore an absolutely necessary part of the pursuers' case that they were directly liable to the mineral tenant to make such operations as Mr M'Creath directed for his protection.

In the next place, this liability of the pursuers should be no matter of surprise to them. It is perfectly well established either that the pursuers did know, or that they ought to have known, that there was great risk in working this quarry of injuring the rights of the mineral tenant. The nature of the ground itself suggested this. Still further, the pursuers knew that in the immediate neighbourhood of the viaduct there was an old coal waste, and they must have known that this waste was likely to communicate with the existing workings, and that if they worked the freestone down to the waste, and allowed water to get into the waste, it was almost inevitable that the water should find its way into the existing coal workings. They entered into this agreement, then, with quite sufficient knowledge that they must incur risk.

In the third place, it is clearly proved that it was quite possible to take freestone out of this very ground without injury to the mineral tenant. No doubt the precautionary measures necessary for this purpose might have cost a good deal of money. But if, after entering into this agreement, the pursuers had found that the cost of the precautionary measures was too great,—that the value of the stone to them was insufficient to justify so great an expenditure,—it was quite within their option not to take any stone out. They had not come under any obligation to pay a rent, or to work under the agreement at all. As far as they were concerned, the agreement was purely permissive. If they found the risk too great, or the expense necessary to avoid the risk too great, they had nothing to do but to give up working.

Keeping these facts before us, we come to the construction of the agreement. By it the landlord gives permission to the contractors to take the stone out of these lands upon the condition that they shall pay at a certain rate for what they took. He was quite entitled to do this in a question with his mineral tenant. It cannot be said that he incurred any liability to his mineral tenant by allowing some one else to do what he was entitled to do under a reservation in the lease to him, viz.,—to take out freestone. No doubt he was not entitled himself to take out the stone in such a way as to injure the mineral tenant, but he was quite entitled to take out the stone in such a way as not to injure him. And the question is, whether, by this agreement, he authorised the pursuers to work out the stone without reference to the interests of the mineral tenant, and in such a way as to injure him. *Prima facie* this is a very unlikely obligation for a man to undertake. If the pursuers, in the full knowledge of the circumstances, intended to reserve a right of relief, it was their duty to insist upon an express obligation to this effect. There is no such express obligation, and nothing in the agreement from which I can infer any such obligation.

If it could be shewn that the defender was directly liable to the mineral tenant that might create a right of relief *ex lege* in favour of the pursuers, for they would then be in the position of having stood between the defender and a claim which was primarily exigible from him. But can it be maintained by the mineral tenant that Mr Bell has done anything in violation of his rights? He simply gave permission to another to take the stone; he did not prescribe any mode of working. That throws us back on the supposed obligation of warrandice or relief in the agreement of December 1868.

For these reasons I entirely agree with your Lordships, and with the result at which the Lord Ordinary has arrived.

THE COURT adhered to the interlocutor of the Lord Ordinary.

T. J. GORDON, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

MRS AGNES DOWNIE or MITCHELL AND OTHERS (Michie's Trustees), Pursuers.—*Watson—Asher.*
DAVID RAIT LYALL GRANT, and THE LORD PROVOST, BAILIES, AND OTHERS, OF ABERDEEN, Defenders.—*Sol.-Gen. Clark—Robertson.*

No. 13.
Nov. 8, 1872.
Michie's Trustees v. Grant and Others.

Statute—Police Commissioners—Property—Improvement of Street—Solum of Street.—The Aberdeen Police and Water-Works Act, 1862, authorised the commissioners under it to "allow, upon such terms as they think fit, any building within the limits of this Act to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated." *Held*, in a question between two neighbouring proprietors in a street, that this clause authorised the police commissioners, within reasonable limits, to allow proprietors to build beyond the limits of their property upon the *solum* of the street.

1ST DIVISION. Lord Gifford. M.

THE trustees of the late George Michie were proprietors of a large tenement situated opposite the head of the Flourmill Brae in Aberdeen. Flourmill Brae is a street running east from St Nicholas Street, an important business thoroughfare in Aberdeen.

Mr D. R. L. Grant was proprietor of certain subjects lying on the north side of Flourmill Brae, which were described in the disposition to him as "bounded on the south-east and south by the street or road called Flourmill Brae."

In February 1871 Mr Grant was about to build a new block of buildings upon his ground, and he submitted to the commissioners of police a plan shewing how he proposed to straighten and improve Flourmill Brae. The line was to be set forward at the south-eastern corner, and set back at other places. The building plan was finally approved by the commissioners of police on 17th April 1871. Thereafter the buildings were proceeded with, and in December 1871 were ready to be roofed in.

Michie's trustees brought this action in January 1872, concluding for declarator that the said D. R. Lyall Grant had no right or title to encroach on the *solum* of Flourmill Brae Street, or to erect buildings thereon, or to exclude the pursuers from the full use and enjoyment thereof, which they had enjoyed as an access to their premises. There were also conclusions for interdict and for removal of the erections.

The pursuers averred that the effect of the encroachment was materially to injure and impair the access to their property, and otherwise injuriously to affect and diminish the value of their property.

They pleaded;—(1) The defender, David Rait Lyall Grant, having unwarrantably encroached upon the *solum* of the public street, to the great prejudice of the pursuers, they are entitled to decree against him in terms of the conclusions of the summons.

The defender Grant pleaded;—(4) The action cannot be maintained, in respect that the defender's buildings have been constructed upon the lines and in accordance with the plans approved of by the commissioners acting under the Aberdeen Police and Water Act, 1862, as above mentioned.* (5) The defender is entitled to absolvitor, in respect that the erection of his buildings upon the said lines, and in accordance with the said plans, has not been, and will not be, productive of any loss or damage to the pursuers or their property, but has been and will be a great public improvement. (6) At all events, the action cannot be maintained, in respect that the defender's operations are *innocuæ utilitatis.*"

The nature of the pursuers' objection to the proposed encroachment

* The sections of the Act founded on are quoted in the opinion of the Lord President

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upon the street appears from the evidence of an architect examined as one of their witnesses:—"I think the pursuers' property has been injuriously affected by Mr Grant's erection outside of the old building line. The chief ground on which I base that opinion is that the shop at the north end of the house is entirely obscured from St Nicholas Street, from which it was previously seen, and that the entrance to Barnett's Close is very much narrowed by the erection. The bell-mouth which the access had before gave a much more open appearance to the front of Mr Michie's property than it now has. St Nicholas Street is one of the principal thoroughfares in Aberdeen. The signboard of the northmost of Mr Michie's shops was formerly quite visible from St Nicholas Street, and that board had evidently been put over the door for the purpose of being seen from that street. I don't think that part of the property is now of any value as a shop in consequence of losing its view of St Nicholas Street."

The Lord Ordinary, on 29th March 1872, pronounced an interlocutor finding "that the defender, David Rait Lyall Grant, had and has no right or title to encroach or build upon any part of the *solum* of the street called Flourmill Brae Street of Aberdeen, or to erect any buildings on the said *solum*, or to exclude the pursuers from the full use and enjoyment thereof; and to this effect finds and declares in terms of the declaratory conclusions of the libel, and decerns: Finds that the defender, the said David Rait Lyall Grant, by the buildings recently erected by him, and which were in the course of erection when the present action was raised, has encroached upon the *solum* of the said street called Flourmill Brae Street of Aberdeen; and finds that the said encroachment is injurious to the property of the pursuers, situated in or at the end of the said street; and before farther answer, and with reference to the views stated in the annexed note, appoints the case to be enrolled, that the decree of declarator and findings now pronounced may be applied, and the case exhausted; reserving meantime all questions of expenses."*

* "NOTE.—It is not without great reluctance, and after a good deal of difficulty and hesitation, that the Lord Ordinary has found himself obliged to pronounce the decree of declarator and the findings contained in the preceding interlocutor.

"The questions of law involved in the declarator are attended with considerable difficulty, and there will be great hardship if the defender should be compelled to take down the projecting angle of his building which is complained of as an encroachment. On the other hand, however, the pursuers are entitled to vindicate their absolute rights, and the defender has really himself to blame for the embarrassment and probable expense to which he may be exposed.

"The grounds of the Lord Ordinary's judgment are, shortly, the following:—

"(1) The Lord Ordinary holds it to be completely proved that from time immemorial the line of Flourmill Brae Street of Aberdeen, at and opposite the pursuers' property, ran in the curved line represented by the blue tint on the plan No. 6 of process. It is not disputed that from time immemorial the whole space outside that curve was part of the public street, and was causewayed and used as such. This was not seriously contested by the defenders.

"The effect of this curve was to form opposite the pursuers' property a wide or bell-mouthed entry leading from Flourmill Brae into Barnett's Close, and to give to the pursuers' property more light and space than it would enjoy if the curve had been converted into a projecting angle narrowing the street at the place. Among other advantages which the pursuers' property derived from the curve was, that a part of the pursuers' westmost shop was seen by persons passing along St Nicholas Street and looking up Flourmill Brae; and as St Nicholas Street is one of the chief business streets of Aberdeen, it is said to be of great advantage that the pursuers' shop could be seen therefrom.

"It seems to follow that the pursuers have right and interest to maintain the

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lefender reclaimed, and argued that the 338th section of the statute rly intended to enable the commissioners to give proprietors, in Flourmill Brae, and to prevent any encroachment thereon unless the king such encroachment can instruct a good and sufficient right to

The defender purchased his property in 1867 from the Lord Provost, tes, and Town-Council of Aberdeen. He purchased it conform to a lan, No. 11 of process, which shews precisely the curve in question as of Flourmill Brae Street; and in the disposition the defender's subjects ibed as bounded on the south-east and south 'by the street or road ourmill Brae.' Still farther, the defender's subjects are described in the on as tinted red in the signed plan, and the red tint terminates with the question. It is plain, therefore, that the defender, by his title, got no ncroach or to build upon any portion of Flourmill Brae. The whole the street, that is, all outside the curve, is, both by description and by luded from the defender's title. All this is quite clear.

The defender got no right, and could get no right from the commis- f police of Aberdeen, to encroach and build upon the *solum* of Flourmill set.

defender's case was, to a large extent, rested upon the authority which ained he had derived from the police commissioners, acting under 'The n Police and Water-Works Act, 1862;' and there is certainly a great lifficulty in interpreting some of the clauses of that statute. The pro- of the police commissioners are not very regular, and their minutes are l respects inaccurately expressed. It appeared in evidence that at least the commissioners were not fully aware of the circumstances, and the ngs were in absence, the pursuers of the present action not being heard. question, however, is, whether the commissioners under their statute er to make over to the defender, for the purpose of his building thereon, n of the *solum* of Flourmill Brae, without the consent of the pursuers, or f the proprietors of that street.

Lord Ordinary thinks the police commissioners had no such power. not vested, either by the statute or otherwise, with the *solum* of the The vesting clause merely includes paving materials, lamps, &c. They remove obstructions, that is, enlarge the *solum* of the street, by paying ation; and although it is difficult to construe the 338th section, the dinary thinks that a power to allow buildings to be set forward does not ower to alienate any part of the *solum* to the prejudice of those who merly enjoyed it. It would be difficult to say where such a power would d if under the 338th section the commissioners could substitute for the ve which the pursuers beneficially enjoyed a projecting angle, to a con- extent obscuring and shutting up the pursuers' property, they might ow the whole street, no matter by what title the proprietors held it. tle apology that by way of compensation for the encroachment upon l Brae the defender gave as much or more ground at the foot of Barnett's This is virtually improving the close at the expense of the street, and the linary cannot find warrant for this in any part of the statute. On a con- of the statute, therefore, the Lord Ordinary feels himself compelled to t the commissioners of police could not make over to the defender a por- he *solum* of Flourmill Brae, and could not give the defender right to thereon.

It is clearly proved, and indeed is not disputed, that the defender has ed upon the *solum* of Flourmill Brae Street by his buildings, erected in l 1872. There is some difference as to the exact extent of the en- nt, arising, it appears, from some variation between the building as and the original plan, but the discrepancy is immaterial. The Lord r is also of opinion that the encroachment is to some extent injurious to ers, although probably the pursuers and their witnesses have exaggerated lting injury.

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proper cases and within reasonable bounds, power to build on the *sol* of the street.

Argued for the pursuers;—Such an interference with the rights of p prietors could only be conferred by very clear and express words, wh were not to be found in the Act.

At advising,—

LORD PRESIDENT.—The parties in this case are proprietors of ground adja to the Flourmill Brae in Aberdeen. It does not appear when Mr Michie, pursuers' author, acquired his property, and it is not of importance in the pre question. Mr Grant acquired his property in 1867 from the Magistrate Aberdeen. It consists of an irregular piece of ground of considerable ext situated on the north or north-west side of Flourmill Brae, which was occu when Mr Grant acquired it by a mill and granary. These buildings at one p abutted on Flourmill Brae in an inconvenient manner, and it was part of arrangement between the Magistrates and Mr Grant that this portion should removed within five years after his entry. The effect of this was to make breadth of Flourmill Brae not less than 25 feet at any part. Mr Grant desi to make a certain further alteration in the line between his property and street, represented by a red line in the plan. This could not be done with authority from those in whom the administration of the public streets is vest The question is whether he has obtained such authority, and, if so, whether th who gave him such authority had power to give it. This depends on the c struction of the "Aberdeen Police and Water-Works Act, 1862." It is said the pursuers that if the line sanctioned by the police commissioners is carri out, and if the buildings on Mr Grant's property are advanced to that line, a extends along Flourmill Brae and a street without a name which turns from at right angles towards the left in going from St Nicholas Street, the effect w be to injure their property on the other side of that unnamed street, by preve ing people going along St Nicholas Street from seeing the property at a distan That is a curious kind of injury, and one which seems a little fanciful. I do n think the disadvantage can be very great. Looking at the proposed alteratio of Mr Grant, with reference not only to his own property and the street, but the property of the pursuers, it appears that Mr Grant's proposal, as sanctione is a great improvement on the locality. However, this does not enter ve deeply into the question. If it could be shewn that the change sanctioned the police commissioners was injurious to the public or a disadvantage to t street, or even if it could be shewn that great injury arose to one or more p prietors, there would be room for interfering, but on other grounds than th stated by the pursuers.

The main question is, had the police commissioners power to sanction t proposal of Mr Grant. That proposal is to advance the buildings in Flourm Brae at one place, but, in compensation, to throw into the street at another pl a considerable portion of what had been Mr Grant's property.

It is said that the proceedings of the police commissioners, even supposi them to have power under their statute, were not regularly carried through. do not attach any importance to that objection. By their minute the poli

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Lastly, the Lord Ordinary is of opinion that the pursuers are not barred anything which they have done or abstained from doing, or by anything whi has taken place, from insisting in the present action. . . . .

"Logically, perhaps, the Lord Ordinary should have ordained the projecti corner to be taken down and set back. He has a strong impression, howev that it would be more equitable and more for the interest of both parties th the defender, instead of taking down the projecting corner, should make pecunia compensation to the pursuers for any injury their property has sustaine Having in view a possible amicable adjustment on this footing, the Lord Or nary, while pronouncing the decree of declarator and the findings contained i the preceding interlocutor, has, *quoad ultra*, continued the cause. If the views *the Lord* Ordinary are well founded the pursuers are entitled to expenses."

commissioners very distinctly signify their approval of the proposed plans, and that is all that is necessary.

The question then is, have they power to allow a proprietor in Mr Grant's position to occupy a portion of the *solum* of the street in one place, and to require him at the same time to set back his buildings at another place for the purpose of improving the street?

There are two portions of the statute which run a good deal into one another. The 24th part, beginning with section 277, relates to the construction and maintenance of sewers. In section 296 it is required that "before beginning to build any new house or building, or to rebuild any existing house or building within the limits of this Act, the person intending to build or rebuild such house or building shall give to the commissioners notice thereof," accompanied with a plan shewing the level at which the foundation is proposed to be laid, "by reference to some level ascertained under the direction of the commissioners, and also shewing the line of the proposed new house or building in reference to the line of the front of the adjoining buildings on both sides." This part of the statute goes on to provide what the commissioners are to do with regard to the levels, having in view the drainage of the house in relation to the drainage of the entire street. But the notice, besides shewing the level, is also to shew "the line of the proposed new house or building in reference to the line of front of the adjoining buildings on both sides." That part of the notice is of no use in reference to the levels or drainage, and is introduced plainly with reference to the next part of the statute, the 25th, which begins with section 307, and relates to the paving, maintaining, forming, naming, and improving streets. That part is subdivided into smaller divisions, with various headings. One of these is "improving the lines of streets, and removing obstructions." It is under this last set of clauses that the question before us immediately occurs. In some of these clauses reference is made back to the notice required by section 296. Section 333 empowers the commissioners from time to time to cause any of the streets to be enlarged, widened, or otherwise improved, "and any new streets to be opened up and formed, and for that purpose they may agree with the owners of any lands within the limits of this Act for the purchase thereof, and they shall resell any parts of the lands so purchased which shall not be wanted for such purpose." Section 334 empowers them to "fix and lay down the line of any house or building to be erected or re-erected in any territory within the limits of this Act, after the date at which this Act shall come into operation within such territory, and may require such house or building to be set back, or the corner thereof, where such house or building is at the corner of a street, to be rounded off to the height of the first storey or floor at least, and in such manner as the commissioners shall direct, for the purpose of widening or otherwise improving any street, provided that the commissioners shall make full compensation . . . in the manner provided by the said Lands Clauses Consolidation Acts." Here, then, the commissioners are empowered to interfere with the property of an owner for the purpose of widening or improving the street. The commissioners may require him to "set back" his building, which plainly means to build within the outside line of his property. Very properly, compensation is required to be given in such cases. By section 335 the commissioners may signify the line fixed by them within fourteen days after receiving notice. Section 336 gives a very important power to the commissioners. No building can take place without notice to them, and if anything is done without that notice it may be undone. Section 337 allows the owner to proceed if the commissioners fail to signify within fourteen days after the notice of a line different from the line shewn in the plan submitted to them. Then comes section 338, which is the one of greatest importance in the present question. It is in these words: "The commissioners may allow, upon such terms as they think fit, any building within the limits of this Act to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated." It appears to me that this clause is the counterpart of section 334. In section 334 the commissioners are empowered to require an owner to set back, and in section 338 they are entitled to allow him to set forward his house. What is the meaning in these two sections of "set back" and "set forward"?

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The natural meaning is to construe them with reference to the line of boundary between the private property and the street. It can hardly be the meaning of section 334 that they can require an owner to set back his building only within the limits of the street so as to bring it within his own boundary. There would be no need for an enactment to this effect, and certainly no need of compensation to the owner. The commissioners would merely be checking an encroachment. Certainly, therefore, section 334 must be intended to give a power to make the owner retire within the boundary of his property.

Again: does "set forward" mean that an owner, who has not built up to the extreme verge of his property may be allowed to come up to the verge on such terms as the commissioners may think fit? Every owner is entitled to come up to his own boundary, and surely it would be most unreasonable that a man should not be allowed to do this except on such terms as the commissioners may think fit. The clause is susceptible of only one other meaning. If "set forward" does not mean to set forward up to the limits of the owner's property, it must mean to set forward beyond the limits of the owner's property. That is the construction contended for by Mr Grant; and not only do I think that it is the necessary meaning of the words, but that the power conferred, although it is one of an important kind, and requiring to be exercised with great discretion, is not unreasonable. This very case, as we see from the pictures in process, suggests a singularly good occasion for the exercise of the power. Why should not the irregularities in a line of street be corrected by putting back the property of one, and putting forward the property of another? Keeping in view the object of the clause—the improving of the street—this necessarily imports that in the one case the street must be encroached on, and in the other private property invaded. Mr Grant says—"Allow me to encroach upon the street at the corner where Flourmill Brae turns to the left. I shall leave, notwithstanding the encroachment, a broad and handsome street, and further on to the north I shall surrender you a piece of ground which will enable you to widen and improve the street there." This is very like the case contemplated by section 338. I am therefore unable to concur with the Lord Ordinary. I think that the proceedings were quite within the statutory powers of the commissioners.

It is said that if this is allowed it would be difficult to say where the power is to end. It is said that the whole buildings along a line of street might be advanced several feet into the street; and various other suppositions are made. The answer is, that commissioners acting under a statute are not likely so to exercise their powers. Such proceedings would be a flagrant abuse of their powers. But if they did act thus, they are liable to be restrained by this Court. They would not be exercising statutory powers for statutory purposes, viz. the forming and improving of the street. Where it is shewn that the power is being exercised for a different purpose, or to the effect of doing something which is the reverse of improving the street, the commissioners may be restrained. And I am not prepared to say that there might not be a case of individual hardship, especially where no power of compensation existed, in which the commissioners might not be restrained. I do not think that a street could be so altered as to do material or irreparable damage to an owner. If any such case arises it will be dealt with according to the well established principles of equity. Here I see no grounds for interfering with the discretion of the commissioners.

Lord Deas.—The statute 25 and 26 Vict. cap. 203, confers on the police commissioners of Aberdeen a variety of powers over streets and buildings with a view to the improvement of the town. In 1867 the Magistrates and Council of Aberdeen sold to Mr Grant the site of an old flourmill situated at the corner of a street called Flourmill Brae, taking him bound to remove an angle which projected into that street so that it should be at no part less than twenty-five feet broad. Mr Grant got a plan prepared by Mr Soutar, architect, according to which it was proposed, besides removing the angle, to improve the street still further by keeping the rounded corner of the new building further back than formerly from the pursuers' property on one side, and bringing that corner

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further forward than formerly upon Flourmill Brae—the result being to throw into the street on one side considerably more ground than was taken from it on the other. This plan was sanctioned by the police commissioners, and is obviously enough a public improvement, but it is objected to by an adjacent proprietor, Mr Michie, as injurious to his property, and not falling within the powers of the police commissioners.

The statute in question contains a variety of provisions tending to shew that it was thought expedient by those who framed it to put into the hands of the commissioners large powers, with a view to enable them to improve the town. In particular, the 338th section entitles the commissioners to require any house or building "to be set back" "for the purpose of widening or otherwise improving any street"—(full compensation being to be made to the owner); and the 338th section empowers the commissioners to "allow, upon such terms as they think fit, any building within the limits of this Act to be set forward for improving the line of the street."

Now, I agree with your Lordship in the chair that the words "set back" and "set forward" obviously mean to set back from the street or forward upon the street, from which it necessarily follows that the commissioners may in some cases allow a proprietor to appropriate a portion of the *solum* of the street if that is to be a means of improving the street.

But it has been argued to us, and the Lord Ordinary has held, that the commissioners cannot require a building to be set back without giving compensation in money, and that setting forward upon the street cannot be allowed at all, because that would be an alienation by the commissioners of public property. His Lordship says that a power to allow buildings to be set forward does not infer a power to alienate any part of the *solum* to the prejudice of those who have formerly enjoyed it. Here and in some other passages of his note the Lord Ordinary inadvertently mixes up two different things,—viz. (1st) the alienation of part of the *solum* of the street, and (2d) prejudice to those who formerly enjoyed the use of what is so alienated.

The alienation, however, as has just been observed, is a necessary result of the setting forward. The prejudice is a different matter, which may or may not follow; for surely it is at least possible to alienate part of the *solum* of the street without injuring anybody. The gain may exceed the loss; particularly if as here there is more to be added to the *solum* of the street than to be taken from it.

If the commissioners are entitled to set back a building on paying compensation in money, can they not do the same thing on giving some other equivalent? The 338th section bears that the commissioners may allow a building to be set forward "upon such terms as they think fit." Can they not, then, allow a building to be set forward in one part upon condition that it shall be set back in another part? To ignore an arrangement of that kind would be to defeat the obvious purpose for which both powers were conferred on them. If the commissioners were to abuse their powers this Court might and would interfere to restrain them; for it by no means follows that because they can lawfully do a reasonable thing they could lawfully do an unreasonable thing.

If, for instance, a particular individual could shew that a proposed operation would cause substantial injury to his property, I by no means say that it would be a sufficient answer to say that, although injurious to him, it would be advantageous to the public. Here I find no trace of anything of that kind. There is no substantial injury inflicted. On the contrary, the localities of both properties will be improved. It is true that in coming up Flourmill Brae, from St Nicholas Street, one of Mr Michie's three shop windows will not come quite so soon into view as it did before. But, on the other hand, the street or lane in front of that window, and which leads round the other side of his property, will be widened and improved. What the architects examined differ about is not matter of fact but matter of opinion, and that difference is really not in skilled opinion, but in matters which anybody who looks at the plans can judge of just as well as they can do. I am satisfied that the pursuers' objections are much too shadowy to entitle them to succeed in this declarator, and I agree with your Lordship that there ought to be decree of absolvitor.

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LORD ARDMILLAN.—I entirely concur with your Lordships. I remark, first, t if the police commissioners had the power to sanction the alteration they certai exercised that power. Then, had they the power? This is a very fair quest to try. I think they had. They administer for the public good, and we h no suggestion that in the acts complained of here they had any other end object. In the administration of the powers vested in them it cannot be den that in setting back a house they are really taking from an owner either the p perty or the beneficial enjoyment of a part of his property. If they do this t have power to compensate. On the other hand, if they permit a house to be forward, they are necessarily permitting the occupation of a portion of the st with the property put forward. This they are entitled to do on conditions. these are extravagant or corrupt they will be restrained. But if nothing what is reasonable and fair appears, then they have the power. We are not presume an abuse of power. If any of the things suggested as unjust, or oppr sive, or corrupt, were done, nay more, if the rights of one individual were so juriously affected as to be beyond the limits of compensation competent to t commissioners, it would be for this Court to interfere. In this instance, such question can be raised, and I have no doubt that the commissioners act fairly and judiciously.

THIS interlocutor was pronounced:—"Recall the said interlocuto Sustain the defenders' fourth plea in law: Assoilzie the defende from the conclusions of the summons, and decern: Find the d fenders entitled to expenses; allow an account thereof to be giv in, and remit," &c.

M'EWEN & CARMENT, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 14.

Nov. 9, 1872.
Kilmarnock Gas-Light Co. v. Smith.

THE KILMARNOCK GAS-LIGHT COMPANY, Petitioners and Respondents.—*Watson—Guthrie.*

ROBERT FRASER SMITH, Respondent and Appellant.—*Sol.-Gen. Clark—Moncreiff.*

Landlord and Tenant—Subject of Lease—Rent—Retention.—A gas compa let to a tenant a piece of ground adjoining their works, with right to the wh ammoniacal liquor and tar produced at their gas-work, at a rent of £130. *He* that an averment by the tenant that the company had not implemented t contract by supplying the whole tar, &c. was a relevant defence in a petition f sequestration for the stipulated rent.

2D DIVISION.
Sheriff of Ayrshire.
I.

THIS was an appeal from the Sheriff-court of Ayrshire at Kilmarno in a petition for sequestration for rent brought by the Kilmarnock G Light Company against their tenant, Robert Fraser Smith, the appellar

By the lease the Kilmarnock Gas-Light Company set to Mr Smith small piece of ground adjoining their works, "with right to the wh of the ammoniacal liquor and the tar which shall flow into the tenar cistern produced and arising from the company's works in their operatic of making gas, and that for the period of ten years, subject to the br after-mentioned, from the term of Whitsunday of this year, it being he by stipulated that the tar, after being distilled by the tenant, shall returned by him to the company, as was done by the former tenant, a that the tenant shall thereafter receive back again what the company not require for the heating of their retorts, or otherways connected with works: For which causes, and on the other part, the said Robert Sm and with and for him the said William Smith as his cautioner and j obligant, bind and oblige themselves, conjunctly and severally, their h and successors, to make payment to the said first party of the ann fixed rent of £130 sterling, and that by equal portions, at two terms the year, Martinmas and Whitsunday, beginning the first term's paym thereof at Martinmas 1860.

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The stipulated rent of £130 was regularly paid up to Whitsunday 1868. The half year's rent due at Martinmas 1868 was unpaid, and the petition for sequestration was presented on 19th January 1869. It prayed the Sheriff, in ordinary form, to sequestrate the appellant's effects on the premises subject to the petitioners' hypothec, "in security and for payment of the rent of said subjects, being £130 for the current year ending at Whitsunday 1869, due at Martinmas 1868 and Whitsunday 1869, by equal portions, with interest and expenses; and to grant warrant for selling the said effects liable to the petitioners' hypothec as aforesaid, or as much thereof as will satisfy and pay the said rent, interest, and expenses, the term of payment being always first come and bygone as regards the second half or moiety thereof to become due at Whitsunday 1869."

The defence stated was a denial of resting owing any portion of the sum sued for; and it was explained that the appellant, in terms of the lease founded on, and which was itself referred to for its terms, in respect of a fixed yearly rent of £130, was entitled to the whole of the ammoniacal liquor and tar produced and arising from the company's works in their operations of making gas, but that he had not received the subject leased, in respect the petitioners claimed the right, and had exercised it, of diverting, for purposes of their own, large quantities of the tar and ammoniacal liquor to which the respondent was entitled, and that by means of underground pipes or concealed communications, whereby the tar or liquor was diverted from the respondent.

No objection was raised in the Sheriff-court to the competency of sequestration under a contract of lease of the nature of that founded on.

The gas company, petitioners in the inferior Court, pleaded;—(1) The defender had neither set forth any sufficient or relevant ground, nor did any sufficient or relevant ground exist, for his refusing to pay the rent claimed. (4) The defender was not entitled to refuse payment of his liquid and unambiguous obligation to pay the rent claimed from him on any of the grounds stated in defence, even though an action had been raised by him for the purpose of constituting his alleged counter claim.

The appellant pleaded;—The defender, not having received the ammoniacal liquor and the tar to which he was entitled under the lease, was not bound to pay the rent sued for, and should be assoilzied, with costs, reserving all his claims against the pursuers.

On 3d November 1869 the Sheriff-substitute (Mure) pronounced the following interlocutor:—"Repels the pursuers' first additional plea in law, in so far as it denies the relevancy of the defender's allegations to infer the right of withholding payment of any term's rent, *pro tanto* of the value of the amount of crude products stipulated under the lease to be furnished during the term in question but withheld: Reserves said plea to all other effects: Allows, before answer, a proof to the parties of their several averments as to the alleged undue withholding or abstraction, and as to the arrangement of the gas company's works, their communication with the 'tenant's cistern,' and the position of the latter, all in their relation to one another, and as parts of a going concern at the time the contract was made, and to both parties a conjunct proof."

The Sheriff (Campbell), on appeal, recalled this interlocutor, and opened up the record, and remitted to the Sheriff-substitute.

The appellant thereafter was allowed to amend his record, and to extend his averments of abstraction to the whole of the years from Whitsunday 1867 to Whitsunday 1869, being the year for which sequestration was craved and the year preceding.

On 22d June 1870 the Sheriff-substitute (Anderson) sustained the defences, to the effect of allowing the defender a proof, before answer, of

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his averments that since Whitsunday 1867 the pursuers had clandestinely withheld large quantities of the ammoniacal liquor and tar which they were bound to send him, and that the quality of the diminished supply had been wilfully deteriorated.

After proof had been led at great length, the Sheriff-substitute, on 4th January 1872, found that the respondent had failed to prove that the petitioners, since 1867, had clandestinely withheld large quantities of tar and ammoniacal liquor which they were bound to send him, and that the quality of the diminished supply had been wilfully deteriorated. He therefore decerned against the respondent in terms of the prayer of the petition, authorised the petitioners to uplift the consigned money, and allowed them to give in an account of expenses, &c.

The Sheriff adhered on appeal. The respondent, Mr Smith, appealed to the Court of Session.[1]

Argued for the respondent;—If this contract was a lease, then retention was not competent by reason of an illiquid claim of damages. If it was not a lease, but a contract of sale, then there could be no hypothec and sequestration was incompetent.[2] But no objection was made to the relevancy of the process. It must therefore be taken on the footing of lease. If, then, the proper subject of the lease was not given, the tenant might throw up his lease and claim damages.[3] He was not entitled to continue in possession under his lease and yet withhold the rent. The defence, therefore, was irrelevant, and a proof should have been refused.[4]

LORD JUSTICE-CLERK.—This case presents itself to us under a somewhat novel aspect. The original petition is one for sequestration in security, and for payment of rent for the year ending Whitsunday 1869, and, so far as I can see, nothing was done in the course of the proceedings to extend its application. We have therefore no question before us excepting this, whether the prayer of the petition ought to have been granted.

The lease is in itself a somewhat peculiar one. It is a lease of a certain piece of ground adjoining the Kilmarnock Gas-Works. The subject is a heritable subject, but it is let with the right to the whole ammoniacal liquor and tar "which should flow into the tenant's cistern, produced and arising from the company's work in their operations of making gas." The tenant, on the other hand, undertakes to pay the annual fixed rent of £130, and to return the distilled or boiled material to the petitioners' works. Now, it should be remarked, in the first place, that the rent is to be uniform and constant; and it certainly occurs to me that in the expectation of parties the supply was also to be uniform. There is, however, no guarantee that there should be any specific amount supplied, but only that that amount which was produced should be conveyed to the respondent's tank. There is no restriction on the mode of working the process of gas making or on the machinery to be used; but the landlord was not entitled capriciously or fraudulently to diminish the amount of refuse produced. The gas company could not utilise these secondary products themselves under their company contract, while, on the other hand, the tenant found considerable advantage in getting the use of them, as is proved by his demand in this case. In fact the lease was a favourable contract for both parties.

The lease was entered into at Whitsunday 1860, and was to continue for ten years. In 1867 a quarrel seems to have arisen between Mr Walker, the peti-

[1] *Authorities for the Appellant*:—Ersk. iii. 3, 86; Taylor v. Forbes, Dec. 2, 1830, 9 S. 113; Kerr v. Dundee Gas-Light Co., Jan. 18, 1861, 23 D. 343; Johnston v. Robertson, March 1, 1861, 23 D. 646.

[2] Tennent v. Catterns, May 12, 1835, 1 S. and M. App. 694.

[3] Bargaddie Coal Co. v. Wark, Nov. 22, 1860, 22 D. 44.

[4] Gordon v. Suttie, July 13, 1826, 4 Mur. 86; Hunter on Landlord and Tenant, vol. ii. p. 265, *et seq.*; Fortune v. Dods, Feb. 3, 1854, 16 D. 478.

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's manager, and the respondent. The subject of that quarrel is unimport- nt it had two results. First, Mr Smith began to complain of not getting oper amount of tar and ammoniacal liquor, and, in the second place, Mr ar began to complain that the boiled tar was not returned in terms of the ct. The boiled tar ceased to be regularly returned, and there is a sus-, but it hardly goes beyond suspicion, that the stoppage of it was not ntal. But, on the other hand, the tenant says that there was a design of epting his supply and obstructing his working systematically carried on. bjected, on the part of the landlord, that that allegation is not relevant to e the tenant from the claim of rent made in this sequestration process. I t think that, after the parties have joined issue and gone to proof on the s of the case, we can now go back on such a point. But I do not think his question, had it arisen as the main question for judgment, would have ttended with difficulty. The landlord is as much bound to put and con- the tenant in possession, as far at least as his own action is concerned, as nant is to pay his rent. It does not follow that every alleged deviation incidental stipulations in the contract will entitle a tenant to resist the d of the landlord for the liquidated rent; and questions have often rd in regard to caution or consignation as the condition of allowing the t to defend or suspend the demand on such grounds. But by a series of ons it is well fixed that if the lessor by his own act withhold from the t the whole, or any material part of the subject of the lease, the tenant resist payment to the extent at least of what he has suffered. The case of on v. Suttie, reported in the 4th vol. of Murray, p. 86, is a good example is, in which a tenant of a water power was allowed to plead, in a suspension harge for rent, that he had been deprived of the water power for a portion s lease. Mr Hunter in his last edition so states the law, and supports it ny authorities. The continuance of the tenant in possession may prevent from rescinding the contract, but will not deprive him of his defence to ndlord's demand. When, however, the defence is pleaded, it must be y proved. An opportunity was allowed the tenant to establish his allega- but we are of opinion, on a careful consideration of the evidence, that he iled in doing so. I think, therefore, that the result of the whole case is, while the defence is quite relevant it has not been proved in such a way as pport it against the landlord's claim.

RD COWAN.—Though this appeared at first sight a somewhat perplexing the elements of fact on which our judgment may proceed have been clearly ed in the course of the argument. The contention of the gas company, as d by Mr Watson, was that this defence ought not to have been sustained l; that it is an irrelevant defence to a petition for sequestration for rent, that therefore the Sheriff-substitute's interlocutor of 3d November 1869, ted on 22d June 1870, was erroneous. That interlocutor, however, of the ff-substitute which embraced a consideration of all the tenant's allegations t the withholding of the tar and ammoniacal liquor was not carried to w, but was virtually, as I think, acquiesced in by the parties, and made ubject of a long and expensive proof by both parties extending over the e period from 1867 till the end of the lease in 1870. No doubt it is true the landlord's claim for rent cannot be met by an illiquid claim of damages. I do not hold this defence to be a claim of damages at all. The defence is the whole subject has not been given, and to that defence I see no good d for the objection of irrelevancy. If the tenant has not got the whole cts of his lease, he cannot be required to pay his full rent. The proof has d been allowed to extend beyond the years for which rent is sought to be ed, and unless the interlocutor of June 1870 had been acquiesced in, as I t it was, and the parties had joined issue and gone to proof, there might been some difficulty in extricating the case and disposing of it on proper iples; but as the case stands it appears to me that the rights of parties be judged of on the proof, and as to its effect I concur in the opinion de- d by your Lordship.

No. 14. LORD BENHOLME and LORD NEAVES concurred.

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THE COURT pronounced the following interlocutor:—"Find that lease, dated 24th and 28th September 1860, the respondents to the appellant a piece of ground adjoining the Kilmarnock G Works, with right to the whole of the ammoniacal liquors and tar which shall flow into the tenant's cistern, produced and aris from the company's works in their operation of making gas, that for a period of ten years, at a rent of £130: Find that pos sion was given and continued under the said lease: Find alleged by the appellant that in the year 1867 the pursuers their servants wilfully obstructed the substances in question their passage to the appellant's works: Find that the appell has failed to prove any amount of specific loss arising to him fr the said cause: Therefore dismiss the appeal, affirm the judgm appealed from," &c.

M'EWEN & CARMENT, W.S.—DUNCAN & BLACK, W.S.—Agents.

No. 15 JOHN ARNOTT and DAVID DRYSDALE (Wilson's Executors) and OTHERS Pursuers and Respondents.—*Sol.-Gen. Clark—Mackay.*

Nov. 14, 1872. Arnott and Others v. Burt. CATHERINE BURT, Defender and Reclaimer.—*J. A. Crichton—D. Crichto*

Writ—Authentication.—In a reduction of a testament, *ex facie* probative, the ground that it had been signed by the witnesses *ex intervallo* and after t testator's death, *held*, after a proof, that the deed was not intended by t granter to be completed, and had not been completed.

Question, Whether a deed can be subscribed by the instrumentary witnes after the death of the granter.

Writ—Forgery.—Observations on the amount of evidence required to pro an averment of forgery in a civil action.

Process—Summons—Amendment.—At the end of the pursuer's proof in reduction on the ground of forgery, he craved leave to amend the record b adding an averment and plea of invalid attestation. Leave *granted*, und Court of Session Act, 1868, sec. 29; but expenses found due to the defend down to the date of lodging the minute of amendment.

2D DIVISION. Lord Gifford. I.

THE late Adam Wilson of Auchengownie, in Perthshire, and Tannerhal in Kinross, died on 25th June 1871, unmarried, and considerably over eight years of age. He left a disposition and settlement, dated 25th Decemb 1865, which lay in the hands of his law-agents, Messrs J. and J. Miller Perth. By it he disponed to Robert Arnott, farmer at Hatchbank, by Ki ross, his estate of Auchengownie, worth about £5500, under real burden an annuity of £40 to the testator's sister, Helen Wilson, to David Dry dale, draper, Milnathort, his estate of the sixteenth part of Middletown Cullenoquhies, otherwise called Tannerhall, worth about £1000, and a pointed John Arnott, farmer, Bowhouse, and the said David Drysdale, l sole executors, directing them to divide the free residue of his moveal estate (which turned out to amount to about £500), among such of t said John Arnott's children as should survive him, other than the sa Robert. By codicil, dated 7th October 1870, annexed to the said sett ment, he confirmed the same with the exception of the provision as to l moveable estate, which he now directed his executors to pay over James Hutton, overseer at Hallgreig, near Kinross.

On the 4th of August 1871, more than a month after Adam Wilso death, the defender, Catherine Burt, daughter of David Burt, farmer

Deuglie, in Perthshire, produced an *ex facie* probative deed, signed "Adam Wilson," and bearing in the testing-clause to have been subscribed by Adam Wilson of Auchengownie, at Deuglie, on 9th February 1871, before the said David Burt and his son David Abercromby Burt, physician at Aberdour, in Fife. By it Wilson disponed his whole estate, heritable and moveable, to the defender, Miss Burt, and appointed her his sole executrix and universal legatary. No provision, like that in the prior deed, was made in favour of his sister.

The present action was brought by the said John Arnott and David Drysdale, the accepting and acting executors under the settlement of 1865, and by the said Robert Arnott, David Drysdale, and James Hutton, disponees under the same, for the purpose of reducing the said pretended settlement in favour of the defender, on the ground of forgery.

After the record was closed, a proof was allowed by the Lord Ordinary under the "Evidence (Scotland) Act, 1866;" on the second day of which, and near the close of the pursuers' evidence, their counsel applied to be allowed to amend the record to the effect of adding an additional statement and plea in law thereto in the following terms, viz.:—(Cond. 9). "Assuming the signatures to the disposition and settlement, dated 9th February 1871, to be the signatures of Adam Wilson, which is denied, the said disposition and settlement is null and void, not having been tested or executed according to law, or with the requisite solemnities. In particular, neither the said David Burt nor David Abercromby Burt, whose names appear on the said disposition and settlement as witnesses to Mr Wilson's signature, subscribed it in the capacity of witnesses to Mr Wilson's signature. They were neither called to act, nor did they act as witnesses to Mr Wilson's alleged signature, nor were they intended by the said Adam Wilson to be witnesses to such signature. They did not sign their names to the disposition and settlement till a considerable time after Mr Wilson's death, and when they so signed their names neither the said David Burt nor David Abercromby Burt knew or had the means of knowing that the document signed by them was the document alleged to have been signed by the said Adam Wilson at Deuglie on 9th February 1871." (Additional plea in law). "The pretended disposition and settlement of 9th February 1871 is ineffectual, and ought to be reduced, in respect it was not executed in conformity with the solemnities required by law."

The Lord Ordinary, on 2d March 1872, issued the following interlocutor:—"Having heard parties procurators on the pursuers' minute of amendment, No. 147 of process, lodged this day, opens up the record, and allows the pursuers to add to their condescendence and pleas in law the additional statement and additional plea in law contained in said minute, and to this effect sustains the said amendment: Allows the defender to answer the said statement, and to make any addition to the record and plea in law which she may consider necessary, and that by Tuesday next, and appoints the case to be enrolled for that day to close the record of new, and adjourns the proof till Tuesday, the 12th current, at half-past ten o'clock forenoon; reserving in the meantime all questions of expenses occasioned by the said amendment, and by the adjournment of the proof."

The defender, in answer to the foregoing additional statement, admitted that the said David Burt and David Abercromby Burt did not sign their names to the said disposition and settlement till after Mr Wilson's death, and *quoad ultra* denied the statement. On 12th March the defender led other evidence, and on the same day the proof was closed.

In the course of the proof *the defender was* examined with reference to

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what took place at the time when Mr Wilson signed the settlement in h favour, and she deponed that on the 9th of February 1871 her father a brother came into the room in Deuglie farm-house, where the deceas was sitting with her: that then "my brother objected to signing it, a thought it better to have strangers; but Mr Wilson said, 'Dawvid, y are quite good enough.' (*Q.*) What was said after that? (*A.*) There w something said about witnesses, and my father suggested that if we we requiring witnesses we could get them at Damhead—and he propos William Laing and James Taylor, who lived at Damhead. Mr Wils said no, and that my father and brother were good enough: but he said my brother had any objection, he (Mr Wilson) was going to Aberdo when he would do away with that objection, and would acknowledge h signature there to two who were no relations. (*Q.*) Your brother declin to sign? (*A.*) Yes, he declined. (*Q.*) And the intention was that M Wilson should come some day to Aberdour to acknowledge his signatu before two other persons? (*A.*) He said so, to obviate any objection h had. My father did not sign; he was not asked to do so. Nobody w asked to sign except my brother David, and he declined." In thi account the defender was substantially corroborated by her father an brother. It was further proved that Mr Wilson never went to Aberdou as proposed; and that on his deathbed he was under the belief that h had provided for his sister and Mr Hutton, who had both been favoure in the settlement of 1865. It appeared, also, that no attempt was mad by the defender to have the deed completed by the addition of the signa ture of witnesses till the end of July or beginning of August 1871, mor than a month after Mr Wilson's death, when, on receiving the intelligenc that relatives were competent to act as instrumentary witnesses, she ob tained the attestation of her father and brother.

The Lord Ordinary, on 27th March 1872, pronounced the following interlocutor:—"Having heard parties' procurators, and having considered the closed record as amended, proof adduced, and whole process, Find that the pursuers have failed to prove that the deed under reduction, No 19 of process, is false or forged, and assoilzies the defender from the con clusions of the action so far as laid on the ground of forgery; but finds that the said deed, No. 19 of process, was never completed by the deceased Adam Wilson, and was never intended by him to receive effect as his final and completed settlement: Therefore reduces, retreats, rescinds, and annuls the said deed, No. 19 of process, and decerns and declares the same to have been from the beginning, to be now, and in all time coming void and null, and of no avail, force, strength, or effect in judgment or outwith the same in all time coming, and decerns in the reduction accordingly: Finds no expenses due to or by either party, and decerns." *

* "NOTE.—The two great questions raised in this action are (first) Whether the deed of settlement founded on by the defender bears the genuine subscription of the testator, or whether it is not a forged and fabricated deed? and (second) Whether, assuming the signature to be genuine, the deed is properly and legally tested, or rather, whether the deed was signed by the testator as his completed deed?

"But before approaching either of these two questions it is impossible to avoid remarking that the deed in question, assuming the subscription to be genuine, is exposed to the strongest possible suspicion, and the circumstances in which it was prepared and executed cannot be left out of view in considering and determining the two questions which are submitted for the decision of the Court. The testator was, at the date of the deed in question (1871), a very old man, apparently nearly ninety years of age. The solicitor who prepared the deed never saw the testator, and never received any instructions from

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The defender reclaimed against the interlocutors of 2d and 27th March, and argued;—The amendment of record allowed by sec. 29 of "the

him, either oral or written. No draft of the settlement was ever communicated to the testator, or approved by him. The testator's ordinary agents were not consulted on the subject. The instructions to prepare the settlement were given, as from the testator, by Miss Burt, the defender, the sole beneficiary under the deed. To no human being, excepting the defender, were the testator's intentions ever communicated. The deed was not read over aloud to the testator; and, although he had an opportunity of reading it himself, it is not shewn that he understood its nature and import. The instrumentary witnesses to the deed were the defender's father and brother, but even they had no conversation with the testator on the subject-matter of the deed; and, lastly, after the deed was signed, the testator acted in a manner inconsistent with the deed, and on his deathbed referred his friends to previous settlements in the hands of his agents, Messrs Miller, as the final and subsisting testamentary settlements of his affairs. The details connected with all these circumstances are fully brought out in the proof, and even if there had been no question of forgery, and no question regarding the testing or completion of the deed, the Lord Ordinary cannot help entertaining the gravest doubts whether such a settlement could receive effect.

"There is a most salutary jurisdiction in Courts of equity to set aside, on grounds of general or public policy, deeds obtained gratuitously by a donee standing in relations of confidence towards the testator or donor, in circumstances which create a presumption that undue influence had been exercised. The principle is of the widest application. It extends to all the relations of life, but each case necessarily depends on its own peculiar circumstances. (See a great variety of such cases collected in 'Tudor's Leading Cases in Equity,' vol. ii., p. 528, in a note to Huguenin v. Basely). A familiar illustration of the application of the principle occurs when a law-agent takes a settlement from his client in favour of himself; and in such cases it has been held that there is a presumption against the deed, which the grantee must overcome by evidence, otherwise the deed will be set aside. (See the recent case of Grieve v. Cunningham, 17th December 1869, 8 Macph. 317.) In this case, Lord Barcaple observed, and his observation was approved by the Court, that 'in many, perhaps in most cases, the presumption against the deed, created by the mere circumstance that the party favoured is the law-agent who prepared it, will supply the want of all other elements of fraudulent impetration. It never can be a proper course, in any ordinary circumstances, for a law-agent so to act, and the Lord Ordinary conceives it will always lie upon him to shew that the making of the settlement in his favour was the free and uninfluenced act of the testatrix, deliberately entertained, and carried through with an entire knowledge of its effect.' The case of a beneficiary who prepares a deed in his own favour may be more favourable, but still it is analogous; and the circumstances of the present case seem to make Miss Burt's position almost as unfavourable as if she herself had written out the deed. The employment of Mr Blair goes for nothing. He was merely the defender's hand, and had nothing whatever to do with the testator, and it is in evidence that the defender had an influence over the aged testator which might very easily be improperly used. In the present case, however, the deed is not challenged on the ground of undue influence, and it is unnecessary further to consider this aspect of the case. The Lord Ordinary has only referred to it because, in his view, it has a bearing, and perhaps not an unimportant bearing, on the two questions on which the parties have joined issue. To these questions the Lord Ordinary will now shortly advert.

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"On the whole, therefore, and on the question of forgery, the Lord Ordinary finds for the defender; but

"2. Is the deed duly tested? or, rather, was it signed by the testator as a completed deed, and with the intention that, without any further act on his part, it should receive effect as his settlement? This is a most important and a most delicate question, and one on *which, perhaps,* there is no direct prece-

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Court of Session Act, 1868" did not permit a party at the close of his case to introduce an entirely new element of controversy.[1] The case

dent. It was not raised on the record as originally closed, but only came out in the course of the proof, and led to the amendment which, after full discussion, was allowed by the Lord Ordinary by interlocutor of 2d current. The Lord Ordinary thought it right to allow the amendment, because, in conformity with the recent statute, all questions really arising between the parties, and within the conclusions, should be determined in the present action, instead of remitting the parties to a new suit. He reserved the question of expenses, and to this reservation he has given effect in the present judgment. In considering the question raised by the pursuers' amendment and additional plea the Lord Ordinary assumes the entire truth and accuracy of the depositions of the defender, her father, and brother. His judgment proceeds upon the facts as stated by the defender's own witnesses, corroborated by the conduct of the testator, and by the real evidence in the case. According to the evidence of the defender, her brother, and father, it appears that Dr Burt objected to signing as instrumentary witness, on the ground of relationship to the defender, an objection in the circumstances most natural and proper. The objection, though not stated by or for the father, was equally applicable to him, and he was never asked to sign as witness. The testator yielded to Dr Burt's objection; and although he signed the deed, he did so on the footing that neither Dr Burt nor the father were to be the instrumentary witnesses, but that he, the testator, should come to Aberdour some other day, and there acknowledge his subscription before two witnesses who were 'no relations.' It was upon this footing that the signed deed was retained by the defender and taken to Aberdour. It is impossible to dispute upon the evidence that this was the arrangement upon which the deed was signed and left with Miss Burt. Dr Burt and his father were not to be witnesses, but the testator was to come to Aberdour and acknowledge his subscription before two independent witnesses there. No doubt this arrangement was made to obviate Dr Burt's objection; but the important fact is, that the objection was assented to by all the parties, particularly by the testator, who left upon the understanding, indeed upon the express agreement, that Dr Burt and his father were not to be witnesses at all. Now, the testator never went to Aberdour, he never acknowledged his subscription before two independent witnesses, or before any witnesses at all, and the question is, was he not entitled to conclude that the deed was an incompleted deed, and to act accordingly? Or, to put the question in another way, were Dr Burt and the father, after declining to be witnesses, after having their declinature admitted by the testator, and after allowing the testator to leave the deed on the footing that other witnesses were required, entitled at their own hands, *ex intervallo*, and after the testator's death, to change their mind, and to complete the deed which the testator thought could not be completed without an acknowledgment to be made by the testator himself?

"The question thus arising on the evidence of the defender's own witnesses is extremely important, and it must be kept in view that that evidence is entirely and very strongly corroborated by the conduct of the testator himself, as well as by the conduct of the defender and her brother. The testator, as is proved by Mr Menzies and others, evidently thought that he had completed no new settlement inconsistent with that of 1865, in the hands of Messrs Miller, and the defender and her brother admittedly thought that the deed of 1871 was worthless, the same never having been completed, and they acted upon this footing for a considerable time.

"There seems no direct authority applicable to circumstances like the present. The recorded case most nearly in point is that of Home v. Dickson, June 1730 (Mor. 16,898), where a mutual contract was left in the hands of one of the parties incomplete and unsigned by witnesses. At the instigation of the

[1] Forbes v. Watt's Trustees, Nov. 9, 1870, *ante*, vol. ix. p. 96.

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revealed upon the closed record was one of forgery only. If the amendment was allowed it should only be on condition of the pursuers paying expenses.[1]

On the merits,—(1) It was not a sufficient objection to an "*ex facie*" probative deed that the attestations were added not *unico contextu* with the principal signature, but *ex intervallo*. This appeared from a survey of the statutes and cases from 1540, c. 117, down to the present time, and especially the case of Frank,[2] and the text-books on conveyancing and evi-

party in whose hands the deed was left, the witnesses afterwards signed, but it was found that the imperfect deed could not be thus completed without the consent of both the contracting parties. The true ground of judgment, as explained by Professor Menzies (Conveyancing, p. 119), and by Professor M. Bell (i. 49), was that the parties had not completed the deed when they broke up, and that it could not be in the power of witnesses to complete a contract which the parties themselves had left imperfect. If the deed itself was really completed it is no objection that the witnesses sign *ex intervallo*. This is of everyday occurrence, and is established by many cases. Nor does the Lord Ordinary think there is any reasonable doubt as to the identity of the deed signed by the witnesses in August with that which the testator signed in February preceding. The true, and in the Lord Ordinary's view, the only point is, that the testator did not sign the deed, and did not leave it with Miss Burt as his final and completed will. In point of principle it seems clear that, if the testator did not intend to complete the will, any two persons who happen to see him sign could not, in spite of his intention, make it complete. Most of our writers lay it down that instrumentary witnesses must be called as such, either expressly or by implication. It is not a mere accidental sight of the signing that will make an instrumentary witness. Suppose the testator had expressly prohibited Dr Burt and his father from signing or from acting as witnesses, could they, in spite of his prohibition, act and sign as such, especially after the testator's death? Or, suppose that the testator, knowing that instrumentary witnesses were necessary (the deed not being holograph), should sign in the privacy of his own room, could two persons, who had stealthily or accidentally seen him sign, by looking in at his window, complete and validate the deed without his knowledge? It is thought not; and the Lord Ordinary, while admitting the novelty, and, in many respects, the delicacy of the question, has really little hesitation in holding that, if it be once proved in point of fact that the testator did not really mean to complete his deed by signing it, then it can never be completed by the mere act of the witnesses.

"The result is that while, in the Lord Ordinary's opinion, the deed is not reducible on the ground of forgery, it must be set aside as never having been completed by the testator. As the pursuers have failed in the whole original grounds of action, and have only succeeded on the new grounds introduced on amendment, the Lord Ordinary has found neither party entitled to expenses. He has hesitated whether some expense should not be awarded to the defender, who has been successful in repelling the accusation of forgery. But the defender was so much to blame in the manner in which the deed was got up that substantial justice is done by allowing each party to pay their own expenses."

[1] Gelot v. Stewart, March 4, 1870, *ante*, vol. viii. p. 649; Shotts Iron Company v. Turnbull, Salvesen, and Co., Jan. 11, 1870, *ante*, vol. viii. p. 383.

[2] 1540, c. 117; 1579, c. 80; 1681, c. 5; Gray v. Ballegerno, Jan. 18, 1678, M. 16,296; Straiton v. Robertson, Jan. 19, 1710, M. 8344; Frank v. Frank, March 3, 1795, M. 16,824—aff. June 10, 1809, 5 Pat. Ap. 278, reported in Bell on Deeds, p. 235; Robertson v. M'Caig, Dec. 1, 1823, 2 S. 544 (N. E. 474); Hogg v. Campbell, March 12, 1864, *ante*, vol. ii. p. 849 (855); Leeds Banking Company v. Walker's Trustees, Jan. 22, 1836, 14 S. 332; Hill v. Arthur, Dec. 6, 1870, *ante*, vol. ix. 223; Yeats v. Yeats' Trustees, July 6, 1833, 11 Sh. 915; Brown, March 11, 1809, F. C.

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dence.[1] It was common in practice for the same clerks, by one subscription, to attest the signatures of railway directors who had signed the same deed on different days. (2) The objection that a witness might thus have the option of making a man testate or intestate might be got over by the Court compelling an unwilling witness to subscribe, or holding his attestation unnecessary. (3) Attestation was only a mode of proof, indispensable in certain cases; it did not complete the deed; for if it did, the date would be that of the attestation, not of the principal signature. (4) As to the effect of the testator dying before the witnesses had added their signatures, if attestation was only a mode of proof such an event could make no difference, as the deed had been already made. (5) The question whether Mr Wilson understood the settlement to be a completed deed was nowhere raised either in the original record or in the amendment. But he was himself quite satisfied with the Burts as witnesses, and he delivered up the deed into the hands of the defender.

Argued for the pursuers;—(1) The amendment of the record was rendered necessary by the reticence of the defender's father and brother, who did not reveal, till cross-examined for the defender, the fact that their signatures as witnesses were added *ex intervallo*. (2) The Burts were not intended eventually by the testator to act as witnesses.[2] (3) There was no case in which such a long interval of time, as here alleged, had elapsed between the signatures of the principal and of the witnesses. Nor was there any case in which a deed signed by the witnesses after the death of the granter had been sustained as well executed. (4) There was no sufficient proof that the Burts could identify the deed which they signed as the same which they had seen signed by Wilson. (5) Wilson never understood that the alleged settlement was a completed deed.

At advising,—

LORD JUSTICE-CLERK.—This case has been ably and fully argued before us. Originally the action was a reduction on the ground of forgery, but at the close of their proof the pursuers proposed to add another ground of action expressed in a minute of amendment, which in substance amounts to this, that even if the deed had been signed by the testator it was not tested or executed according to law, and in particular the witnesses were not called as witnesses—they did not subscribe their names at the time of the testator's subscription, but only after his death, and when they signed they had not the means of identifying the deed. The Lord Ordinary admitted that amendment, and he was entitled under the terms of the Act of 1868 to add it to the record. In the case of Forbes v. Watt, cited by the defender, an amendment was tendered after the case had been decided on the ground on which the parties had come into Court. As the case had been decided we refused to allow the amendment, and a similar case we should decide in a similar way. The case of Stewart v. Gelot is similar to the present. There, even after a verdict had been returned, a new ground of defence was allowed to be added to the record. I do not think we can exclude this amendment. There is no object to serve in doing so, for as the pursuers could have raised another action on the second ground of reduction the matter resolves itself into a question of expenses.

Now, there are two grounds of reduction. The first ground, that of forgery, is a very serious matter. The counsel for the defender gave us a most able and

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[1] Bell on Deeds, 272; Menzies, 119; Duff, Feud. Conveyancing, p. 16; Dickson on Evidence, i. p. 444, sec. 701.

[2] Home v. Dickson, June 1730, M. 16,898, as explained in Menzies, p. 119, and Montg. Bell's Conveyancing, i. 49.

masterly argument on that question, and I must own that it is difficult to come to a positive decision one way or the other. I am not prepared to say that the charge is proved. It depends entirely on the comparison of handwriting. There is nothing else in the case which tends to prove or even imply forgery. No doubt there are circumstances that make it improbable that the testator should have signed the deed, but there are also circumstances which make it possible or even probable that he did sign it. With regard to the surrounding circumstances of the case they are quite as consistent with the deed having been signed as with the deed not having been signed. It is clearly proved that the defender and her brother made an expedition to old Mr Burt's, that Mr Wilson met them, and that they had the deed with them. Certainly Mr Blair did prepare the deed, on the employment of Miss Burt, and obviously it was prepared with a view of being signed. I cannot agree with the Solicitor-General that the whole story of that visit is a myth, spoken to as it is by five witnesses. For, besides the defender and her father and brother, we have also Margaret Burt and the boy who speak to it. On the question of the fact of the visit the evidence is conclusive that it took place. The real question is whether it is proved that on that occasion Wilson did not sign the deed. Now, the main evidence on that point is from the comparison of handwriting. So far as that evidence goes it may shew that the signature of Wilson to the alleged forged deed is not Wilson's ordinary signature. But *comparatio literarum* can go no further. I should hesitate to go simply on a comparison of handwriting,—a kind of evidence which often leads to fallacious results. During the debate something was said about experts. I think that a person acquainted with the particular handwriting of the party, or even an ordinary person unacquainted with it, is as likely to ascertain the truth of the matter as those witnesses who, looking at it from a scientific point of view, are apt frequently to exaggerate small distinctions. Such witnesses are in a different position from men of skill in such matters as chemical and mechanical facts, which are not known to ordinary observers. In a question of the mere identity of handwriting I think we ourselves are quite able to judge. If I had been required to decide on a *comparatio literarum* I should have said that it did not appear to me that the signatures were written by the same person. As, however, I have only a comparison of handwriting to go upon I find the charge of forgery not proved.

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There remains behind what gives this case a very great deal of importance. Supposing the question of forgery to be resolved not absolutely in favour of the position that Mr Wilson did sign the deed, but that it is not proved that he did not sign it, the question remains whether this deed can be sustained as a probative deed. It is challenged on the ground that the witnesses signed after an interval of six months, and after the death of the testator; and it is further said that under the circumstances the testator was in the belief or might reasonably have been in the belief that his deed was imperfect, and in point of fact it was incomplete during the whole of his life. Now, the question is whether that is a relevant ground for setting aside a deed having otherwise the statutory solemnities; and secondly, whether it has been proved. We are not called upon here to say whether it be a relevant ground in all cases to set aside a deed that the instrumentary witnesses did not sign at the time the subscription was appended by the testator, or that they signed after an interval, whatever the length of that interval might be, or that they did not sign till after his death. My impression is, as far as authorities were quoted to us, that it would not be easy to come to an abstract conclusion upon that matter. It seems to have been fixed that it is not necessary that the witnesses should sign in presence of the granter of the deed, and that they may sign at an interval after the deed has been signed by the granter and they themselves have witnessed the signature. That was clearly decided in the case of Frank, but there is no case that has been quoted to us where there was anything like a considerable interval between the signature of the granter and that of the instrumentary witnesses. Lord President Campbell, in the full report which we have of that case of Frank in Mr Bell's book on Testing of Deeds, which is well worthy of study on this matter, simply lays it down that if an interval is allowed to elapse, and other circumstances

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concur, the deed may be set aside. And so the law stands. For my own part I should not be prepared to say absolutely that the mere fact of the instrumentary witnesses signing after an interval was of itself a sufficient ground for setting aside a probative deed. My impression is the other way, but only with this proviso, that there appear in the circumstances leading to the delay reasonable cause, and an absence of elements of suspicion. If witnesses follow so loose a course as to delay their subscription for a considerable period it lies with the person who brings forward the deed to explain the circumstances in which the delay took place, and to shew that these circumstances raise no suspicion as to the good faith of the deed itself. As to the question whether witnesses can subscribe after the death of the granter I do not think it necessary to come to an absolute conclusion on that matter. On the one hand, it may be said that as the witnesses only attest the fact of subscription by their signatures, it does not matter when they do so, for the fact remains the same. Death cannot alter the fact of the subscribing. But, on the other hand, the concurring facts of the lapse of an interval and of the death of the testator are material elements.

Applying that test to the present case, how does it stand. I must own it stands in a very unsatisfactory and suspicious position. It is said on the part of the defender that the delay occurred in this way—that Catherine Burt, the defender, gave the instructions for this deed to Mr Blair, who is not the agent of Mr Wilson,—an unusual proceeding and one which I think Mr Blair ought not to have countenanced without some communication with the man whose settlement he was proposing to draft. We start with that. I do not say that Wilson did not give authority to Burt to do this. He certainly did once give her a bill as a gift. I think it is plain enough on the evidence that she had some influence over him; that he gave the bill one day and asked for it back the next; that he was infirm of purpose, as an old gentlemen of his years might be expected to be, and did not remain of the same mind. Then it is said that this deed having been extended was sent to Miss Burt, no draft having been sent to Mr Wilson; that Mr Wilson appointed to meet the Burts; did meet them; read the deed over, and then signed it in their presence, and Mr Burt and the brother afterwards declined to sign it, because they were relatives of the beneficiary. Accordingly the following arrangement was made,—that Miss Burt, the beneficiary, should take the deed unexecuted as it was, and it should remain with her till Mr Wilson could go to Aberdour to acknowledge the deed before neutral witnesses, as he did not wish his neighbours to know about the matter. Now, that is not a story in itself free of suspicion. It is not intelligible why those persons who went there should have objected to become instrumentary witnesses. It is very odd that the difficulty had not occurred to them before going. But be that as it may, the deed is taken back; it is kept for six months; there is no communication with Mr Wilson on the subject at all; there is no proposal to get other instrumentary witnesses; in short, Miss Burt, I think, plainly gave up the hope of having that deed executed; and then there is the clearest evidence that on his deathbed Mr Wilson regarded the settlement of 1865, with the codicil which he had executed in 1870, as the settlement which would operate on his death. I am therefore of opinion that taking all these circumstances together this deed is not the last will and settlement of Mr Wilson. I think that even if the whole of that account is true—and I am far from saying that it has impressed me with its truth—there was something remaining to be done and understood to remain to be done by both parties. The granter was entitled to hold that the document was incomplete, and could not be made complete without his doing that which it was understood he was to do; and I am clearly of opinion that until that was done, or until further communication with the testator, the instrumentary witnesses were not entitled to adhibit their names to that deed. On the whole matter, without saying anything on the other questions, which remain in the position I have explained, I think that second ground is quite sufficient for the ends of justice, and the application of the law to this case. It really resolves itself into this, that, even if the defenders' statement be true, this deed was never completed or intended to be completed, and the instrumentary witnesses by their signatures could not give

tality to that which was not a completed deed, nor intended to be a completed ed by the granter.

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LORD COWAN.—The first matter which your Lordship has touched upon is a ry important question of procedure and practice in the Court, and it regards e state of the record as it is now presented to us, with the addition of the nendment and plea to which your Lordship thinks that we ought to give fect. Was it competent or not for the Lord Ordinary to admit that amendent at the stage of the case at which it was proposed? I feel the force of the bservation made by Mr Crichton, in reference to the position in which the case ight have stood if it had been a verdict of a jury, under an issue which simply ised the question of forgery—yea or nay; but there was even in that case a emedy open to the party, who had another ground of reduction than that raised n the original record. Such was the precise question that came before us in he case of Gelot. There was a verdict by the jury on the matters in issue in the original record, and the case came before us on a motion for a new trial, in which there were brought forward, as a reason why the new trial should be granted, various views, particularly arising out of some letters which the party admitted, but which were not embraced in the case anterior to that stage of the procedure; and it was then proposed that we should, under the Act of 1868, sec. 29, admit the amendment on the record to the effect of bringing in those other views, upon which it was said the case truly depended. And accordingly we had no difficulty in holding that the Act of 1868 did admit of the Court giving the remedy asked, viz., to open up the record with a view to different issues being presented to the jury on a second trial. We did so under the condition that the expenses of the first trial, except so far as they might be available on the second trial, should be paid by the party. Whether we are to adhere to that rule or not may be for after consideration. But as regards the question of competency, that is a direct authority that even after the verdict of a jury the Court have power to open up the record, so as to have new issues presented to the jury raising the real question between the parties. Now, no doubt it seems to be an anomalous kind of proceeding—that a general proof is to be taken before the Lord Ordinary, simply on the original ground of reduction, and after the pursuer's case is closed that he should come forward and say—"There is another ground which I see was the more proper ground on which to attempt to reduce the deed, and I ask to be allowed to amend the record, and put in the pleas necessary for the purpose of having that other ground disposed of." But the change which has taken place in the procedure as to taking proofs does not affect the question. Trial before a judge has just been substituted for trial before a jury. That being so, the case comes back to us with the verdict, and it seems to me that, subject to such conditions as we should consider necessary with regard to expenses, we should hold that the Lord Ordinary was quite right in admitting this amendment. And having procured that amendment, the pursuers might then, if they thought fit, have asked for an additional proof in support of it. They were entitled to say, "We have some additional proof to lead as regards this new matter which we have now brought into the record." But it appears that the pursuers did not consider that that was necessary.

The next is a very important question, viz., the questionof forgery. I think the evidence upon that point is very much as your Lordship has stated. It appears to me that unless we were prepared, had we been sitting in the Court of Justiciary, to hold that the jury were right in returning a verdict of guilty on a charge of forgery, we cannot sustain the charge of forgery here made. Certainly had I been called on to address a jury or to conduct a case in a criminal Court, on a charge of forgery, I could not but have said to the jury that it would be unsafe for them to pronounce a verdict of guilty on such evidence as we have here. Such being the case, I forbear from saying that we have evidence enough to convict these parties of forgery. But I am not prepared to say there was no forgery, and probably the assoilzieing of the defender upon that ground by the Lord Ordinary was unnecessary.

With regard to the second ground of action, it is contended that after the

death of the testator two witnesses who were present at the time when he [illegible] the deed, or within a short interval of time, [illegible] My impression [illegible] such as were referred [illegible] probative deed [illegible] is incompetent and [illegible] My original impression on looking [illegible] by Mr Crichton has [illegible] upon a consideration of the whole matter that a [illegible] were to arise for the [illegible] to that view; but in any case I think it [illegible] by the authorities on the subject I think it would be a very [illegible] agent to leave the [illegible] till after the death of the testator. The only question is whether the interval which here occurred was sufficient to prevent the deed from being completed. The only extent to which any deed has been completed by subscribing witnesses [illegible] is where the subscription was within the same day [illegible] I do not think there is any case going beyond that, and I appreciate very much the observations of Mr Duff (who is a most [illegible] when he says that the subscription of the witnesses and of the granter of the deed should be *uno actu*, and that is the case [illegible] and others. There a short interval took place, and the signature was completed in an adjoining room, that must be held as a continuation of the same transaction. But it is said that if the interval is six weeks, that the death of the testator the thing being done in good faith, it must be held that there is [illegible] to the validity of the subscription. All I can say is that I have great difficulty in entertaining that argument as sound. It seems to me that the true ground on which this case is to be determined is whether the deed was left under the conviction that he had executed a settlement or that which was in the hands of Mr Miller. I cannot come to an affirmative conclusion on that matter. The father and the [illegible] think that they did not subscribe the deed at the time, because they did not consider themselves competent witnesses. The deceased considered that they were competent witnesses, but they did not subscribe, and the meeting broke up because they would not consent to be subscribing witnesses. The testator was stated to be under the impression at the time the meeting broke up, that there was an valid deed of settlement executed by him in favour of Miss Dott. He put his name to a deed, but the witnesses refused to subscribe as witnesses; and he made an arrangement to go to Aberlour with the view of subscribing his subscription afterwards, before other witnesses, against whom no exception could be taken. But he never went to Aberlour, and therefore the inference is that in the circumstances he did not believe he had executed any other settlement than that which he had executed in 1865 and 1870. Any doubt of the propriety of that inference from the facts to which I have adverted is entirely removed by the evidence of Mr Menzies, which to my mind is conclusive upon this part of the case. He is a perfectly disinterested man. He was acquainted with Mr Wilson, and visited him on his deathbed, getting his instructions as to what was to be done after his death. He was told to send to Mr Miller; and when he was asked whether he had provided for his sister, he said "Yes, Mr Miller has taken care of that." And so he had, because in the settlement of 1865 an annuity of £40 or £50 was provided for the support of his sister. Again, on the day before Mr Wilson's death, Mr Hutton, who was married, I think, to a cousin, was very anxious to know whether he had remembered him in his settlement, and the old man said, "Yes, Mr Miller has taken care of that." And accordingly, in the codicil of October 1870, there is a provision made for the Hutton family in substitution of another family, who were benefited as regards the moveable estate by the settlement of 1865. But neither of these matters is provided for in this new deed. And how are we to regard these statements of Mr Wilson on his deathbed? They are consistent with only

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ne view, viz.,—that the settlement which he had executed in 1865, and affirmed in 1870, was in his view the only settlement he had made regarding his affairs, ading to the necessary implication that the writing in 1871, upon which the efender here founds, was in his estimation one that had never received his final nd completed assent. Upon that part of the case I have no difficulty in holding hat the judgment of the Lord Ordinary ought to be affirmed.

LORD BENHOLME.—The question of forgery is one upon which, in the circumtances of this case, I do not mean to give an opinion, and that for two reasons. My first reason does not depend upon the idea that mere comparison of handwriting would be the only evidence in favour of the forgery, but I think there are many other circumstances which might be taken into view. My reason for thinking that we ought not to express any opinion on that point is that a most material part of the evidence, viz., the production of that envelope addressed by Miss Burt was not stated till the very end of the argument. Now, conceiving that that was a most important piece of evidence brought forward at a very late period, I think it would not be fair to the party against whom that evidence was adduced that I should state any view on that question; and I could not do so fairly without adverting very strongly to that part of the case which has not been answered and met by the defender. But I have another reason, viz., that I think it unnecessary. Whenever there is an objection to a deed sufficient to set it aside it is a rule of law that that should be brought forward and discussed before taking up the question of forgery; and as there is in this case to my mind a most satisfactory ground for setting aside this deed I refrain from saying one word more upon the question of forgery. It is my opinion that, taking the evidence as unexceptionable so far as it goes, Mr Wilson departed this life in the conviction and belief that he had executed no complete settlement on that occasion. The deed, supposing it was signed by himself and in presence of persons who might have been witnesses, was not subscribed by them, and he was left in the belief that until he took an ulterior step it would remain unexecuted. That step he was to take at Aberdour, by getting other witnesses to hear his subscription acknowledged; but that important step was not taken, and he died in the belief that he had executed no completed deed. He had not done that which he supposed it was necessary he should do in order to the completion of the deed. I may have my own suspicion what his reason was, but certain it is that he never did take that step, and consequently I think it is very plain that he understood that he died with the settlement executed in 1865 as his last will and testament. He said so to Mr Menzies, and I cannot doubt that that was his impression. Now, waiving the point whether it was competent for instrumentary witnesses to subscribe after the testator's death, as a question that might admit of some doubt, I look upon it that in view of the important circumstance which I have now stated, the subscribing of these witnesses after his death was neither more nor less than an attempt to make a will for him. Now, the law does not allow of any attempt to make a will for a man, whether during his life or after his death, but especially after his death. I do not know that there are any cases in which after a man's death instrumentary witnesses have been allowed to subscribe so as to validate a deed made at an interval of time. But that general question does not arise for decision, for we have here the important fact that it is clear on the statement of these members of the family that this man did not believe that he had executed a complete settlement, but on the contrary believed that he had an important step to take before doing so. Can I doubt, then, that his intention, if he ever had one, in favour of Miss Burt, had been changed? It had dropped out of his mind, and accordingly when he said to Mr Menzies that he died leaving that settlement of 1865, I have no doubt that that is quite sufficient for the decision of this case. I agree in thinking that we should adhere substantially to the judgment of the Lord Ordinary, although it may be necessary to make some alteration upon it.

LORD NEAVES.—I substantially agree in all that has been said by all your Lordships. With reference to the point of form, I have no doubt it is quite

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competent to look at the amendment. In the course of the discussion I adverted to a peculiarity in actions of this kind, like what occurs in a suspension. The pursuer of a reduction is an inverted defender, for he is bringing an action that is to defend him against the validity of the document which he assails. The style of the summons has from time immemorial been that the action is brought and the conclusions maintained not only for the reasons set forth, but for other reasons that may be proponed in the course of the action. That is not the usual style of a petitory summons, but it is the style of suspensions and reductions. Accordingly it was always competent to add to these reasons, just as it was competent to add to defences without reference to the particular ground that might be put forward; and very often in reductions, until the deed was produced and the subject investigated, it was not easy to tell what was the true reason of reduction. A document of that kind is not in the hands of the pursuer; it is in the hands of his adversary. His first step is to call for it, and to compel its production, and if he then discovers defects in it, or if, in the course of the investigation of the document, which is not his according to his view, he find out other grounds, it has always been competent, and it was certainly competent before the Judicature Acts, to add these. After the Judicature Acts it was competent to add reasons of reduction before the record was closed, and the change made by the existing Act is that it is competent to do after closing the record what it was formerly competent to do before closing the record. The objection is that the deed is not authenticated by persons who were entitled to authenticate it, and that it is an improbative deed, all that going to defend the pursuers against the validity of the deed. I cannot doubt that it was competent and proper to allow that to be added to the record, in order that the question at issue, which I take to be the validity of the deed and the liability of the pursuers to be affected by it, and the right of the defenders to enforce it, might be disposed of as within the compass of this action. Upon the question of forgery I do not mean to give any opinion upon the merits, very much for the reasons assigned by some of your Lordships. I am very averse to enter upon that inquiry, because it is not necessary. It is a very serious charge to bring against any one; and while it is a special charge against Miss Burt as the principal party, I cannot help thinking that it is a charge of art and part in forgery both against her father and brother; for if she forges, and they come forward to attest that as the signature of one who never signed, and in that way give it currency, they seem to be art and part in aiding and abetting the putting into effect of a forged deed. That being so, I would require very strong evidence in support of such a charge, and I am by no means satisfied with the way in which that last adminicle has been brought forward. I think it should have been done at first, and in a much stronger way, and I am averse to let my judgment be influenced by that element. Further, when once you come to the charge of crime in the way that is done here, I am not at all satisfied that you must not prove that charge with as complete and convincing evidence in the civil Court as in the criminal Court. That has often been held in cases where crime has come into consideration as a defence,—for instance, in regard to policies of insurance for fire; if the defence is wilful fire-raising, I think it must be proved by as good evidence as would be required to support a criminal charge. That has been repeatedly laid down. So in regard to scuttling ships,—that must be proved in the same way as it would require to be in the criminal Court. I do not know that it is different in the case of forgery. The important question is, whether this is a probative deed, and if it is not, it does not very much signify whose signature is at it. That is wholly immaterial practically; and on that matter of its being not a probative deed I think the case is clear. I think it plain that what took place at the signing of the deed proved entirely abortive, because the witnesses refused to sign as witnesses, and an ulterior proceeding was contemplated by the testator in order to give effect to the deed. That was not even to be done on that day, but on some subsequent day, and it was something that could not be done without his personal presence on a future occasion; for it could only be accomplished by his either signing the deed of new, or by his acknowledging in the personal presence of new witnesses that he had signed that subscription on

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ɔrmer occasion. The parties broke up on the footing that they would not ɪ unless their scruples were removed, and he undertook to remove their ɪples by going with or without them on a future occasion, and engaging in ɪther act of execution of the deed. Then only was the deed to take effect, it could not take effect earlier. It was not in the power of these parties to ; themselves forward as witnesses behind his back when alive, still less after death to retract their refusal to sign, and to make that a will by him which ɪy had refused to authenticate by a final declaration of their purpose on the ɪasion of his calling upon them to do so. It is not as if he had left them to liberate or to make up their minds, and then to sign if they liked. There nothing of that kind here. He said he thought they were good witnesses, t they said they were not, and would not sign. The remedy which he ɒposed was a totally different one,—an ulterior thing, which, in their estiɪtion or in his estimation, and by mutual arrangement, was to become a ɪmonial necessary for the completion of the deed. Now, the *animus* of ɪtators in this matter is of the very greatest consequence. There is no stronger ɪtance of that than the case of Nasmyth v. Hare,[1] where a Scotchman, Mr Hare f Calderhall, had signed a Scotch deed, and put a seal to it as well as his signaɪre. The seal was wholly unnecessary, but the House of Lords found that, as ɪ seemed to consider it necessary, his taking it away was good evidence that he ɪd recalled the deed, though the deed was otherwise good by the law of Scotɪnd, because it was well tested, and executed by him in a manner which was ɪdmitted to be unexceptionable, if he had not recorded his *animus* that the ɪaling was a necessary part of the intended expression of opinion. In the same ɪay here, if the testator proceeded on the express footing and understanding ɪat something more was to be done before he held this his delivered and final ɪeed, and if that was not done, whether he changed his mind or only delayed to ɒ it,—if that were understood to be an ulterior intention, the deed was wholly ɪbortive, and consequently cannot receive effect. I do not think it necessary to ɔ into the more abstract points. It is better to let them stand. They will ɪake a very good field-day for some future occasion, and we shall be happy to ɪear the argument upon them; but I am sure we shall not readily hear an abler ɪgument than we had to-day from Mr Crichton. What I have said is corroɒorated in the most remarkable manner by the evidence of Mr Menzies, which ɪas been already adverted to, and which shews that whether the testator ever ɪntended to make this his will or not he considered it had gone out of the way, ɪnd that his affairs were to be regulated by the previous settlement and codicil f 1865 and 1870. On these grounds I am for sustaining the new reason of ɐduction. Whether we shall assoilzie from the conclusion of forgery I am not ɒ clear, but I think it is not necessary to go into that.

Lord Justice-Clerk.—It seems to me that it would hardly be fair to the parties not to adhere to the Lord Ordinary's interlocutor as regards the question of forgery, because if the case is not made out the defender is entitled to absolɪitor, and we have not given an opinion on that matter. Therefore we shall ɪimply adhere to the Lord Ordinary's interlocutor as regards the merits.

Counsel having been heard on the question of expenses,

The following interlocutor was pronounced:—"Adhere to the interlocutor reclaimed against, and refuse the desire of the reclaiming note, except as to expenses: Find the defender entitled to the whole expenses up to the date of the minute, No. 147 of process: Find the pursuers entitled to expenses since the date of the said minute, and remit," &c.

Alexander Howe, W.S.—Thomas White, S.S.C.—Agents.

[1] 27th July 1821, 1 Sh. Ap. p. 65.

No. 16. WILLIAM PATERSON, Petitioner and Complainer.—*Sol.-Gen. Clark—Scott.*
GEORGE ROBSON, Respondent.—*Watson.—Asher.*

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Paterson v. Robson.

Bankruptcy—Trustee—Petition and Complaint—Competency—Lord Advocate—Statute 19 *and* 20 *Vict. c.* 79, *secs.* 84 *and* 86.—A petition and complaint presented to the Lord Ordinary on the Bills by a creditor on a sequestrated estate set forth that the trustee was employing the trust-funds in an improper way, and had not complied with the provisions of sec. 84 of the above Act as to the sederunt-book to be kept by the trustee. The petitioner craved to have the trustee ordained to cease from using his powers and the funds of the sequestrated estate in the way complained of. There was further a prayer for censure of the trustee.

The Lord Ordinary having dismissed the petition as incompetent, the petitioner reclaimed, and moved the Court to allow him to amend the petition by striking out the prayer for censure. *Held* (1) that the amendment could not be allowed; (2) that the petition was not authorised by the Bankruptcy Act; (3) that it was not competent at common law, in respect (1) the Bill-Chamber had no jurisdiction, and (2) that, being of a penal character, it had not the concurrence of the Lord-Advocate.

Bill-Chamber. 1st DIVISION. Ld. Mackenzie. M.

WILLIAM PATERSON, one of the creditors on the estate of George Lambie, presented a petition and complaint to the Lord Ordinary on the Bills against George Robson, accountant, Glasgow, the trustee on the sequestrated estate.

The petition stated,—"In or about June 1871 the said respondent professed to require, for the purposes of the sequestration, to examine certain parties in London, and, in particular, Edward Gellatly, James Park, John Morrison, Peter Hamilton junior, and David Hepburn Johnston, relative to the affairs of the bankrupt; and for this purpose he presented a petition to the Sheriff praying for a commission to the London Bankruptcy Court to examine the said parties; and on or about the 10th June 1871 the Sheriff of Lanarkshire, under said petition, ordered the examination of these gentlemen on the affairs of the bankrupt. It was not necessary, or expedient, or beneficial to examine said parties, or any of them, for any purpose of the sequestration, and the object of the respondent in desiring to examine them was not for the benefit of the sequestrated estate, or for any purpose connected therewith, but for a different purpose hereinafter mentioned, in which the said estate had no interest, or by which it will be prejudiced or subjected to loss and expenses. . . . In contravention of section 84 of the Bankruptcy Act, and in breach of his duty as trustee, the respondent has not recorded or caused to be recorded in the sederunt-book any of these examinations, and has not proved them to be signed by the judge and witness in the sederunt-book, according to the invariable usage in Scotch sequestrations. They were all taken on paper apart, and no copy of them or any of them has been made in the sederunt-book. . . . The said examinations were taken not for the benefit or for any legitimate purpose of the sequestrated estate, but for the benefit and purpose of John Smith, trading as Smith, Pender, and Co., and other parties in London, and with the object of enabling the said parties to make out claims against the said Edward Gellatly. The petitioner objects to the funds of the sequestrated estate being expended or risked for such purpose. . . . Farther, the respondent is to get commission from Smith and the other contractors on what is recovered from Gellatly, so that, individually, he has an interest in assisting them though the estate has none."

The prayer of the petition was to "appoint the respondent to appear at a specified diet within four days after service, or within such other period as your Lordship may consider reasonable, and thereafter, after hearing

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vith or without a record, as your Lordship shall consider best, to he respondent to insert copies of said examinations into the -book, and to make said sederunt-book, containing said copies,) the petitioner, or at least to make said examinations or copies patent to the petitioner; as also to ordain the respondent to d cease from using his powers as trustee foresaid, or employing the said sequestrated estate in assisting or furthering the claims of John Smith and the other contractors before mentioned; farther, e said respondent in the premises in such way and manner as to dship may seem meet, and to prohibit him charging the expenses resaid examinations, or any expenses connected with or arising e same, against the said sequestrated estate, and find the respond- e in expenses."

spondent, George Robson, lodged answers, in which he objected mpetency of the complaint. He also stated explanations as to the i in England, and added,—"After the said suit at Mr Smith's in- as raised Gellatly applied to the respondent for a copy of the ns emitted by him when examined as above mentioned before the Court of Bankruptcy. His object in making this application was e him when examined under Mr Smith's suit to depone to the ect as he had previously done. The respondent refused this on. Mr Gellatly thereupon applied to the petitioner, who has an for about £15 for furnishings to the 'Ferdinand de Lesseps,' to in getting a copy of his said deposition."

ord Ordinary pronounced this interlocutor:—"Dismisses the peti- nds the petitioner liable to the respondent in expenses, of which n account to be given in; and remits," &c.*

TE.—The petitioner, as a creditor in the sequestration of George Lambie, s that the respondent, who is trustee in the sequestration, has improperly ie funds of the estate in examining certain persons in England; that ination was made not in the interests of the creditors, but for the pur- abling certain creditors residing in London to make out claims against Gellatly, a shipbroker in London; that the sequestrated estate has no n these claims being established, as, if Mr Gellatly were found liable, would be that he would be entitled to rank upon the estate in the for the debts of these London creditors. The petitioner further com- t the respondent has, in breach of his duty as trustee, and of the pro- the 84th section of the Bankrupt Act, failed to record in the sederunt- he sequestration the examinations in London of the foresaid persons, efused to make the same patent to him as a creditor in the sequestra- l he prays that the respondent should be ordained to insert copies of examinations in the sederunt-book, and to make the same patent to t he should be ordained to desist and cease from using his powers as r the funds of the estate, in furthering the claims of the said creditors; he should be censured, and also prohibited from charging the expenses xaminations against the sequestrated estate.

Lord Ordinary is of opinion that such an application to the Lord Ordi- he Bills is not competent under the Bankrupt Act, and that the proper rocedure is that prescribed by the 159th section of that statute. By on it is provided that the Accountant in Bankruptcy shall take cognis- e conduct of the trustee and commissioners; and 'in the event of their ully performing their duties, and duly observing all rules and regula- osed on them by statute, Act of Sederunt, or otherwise, relative to the nce of those duties, or in the event of any complaint being made to ny creditor in regard thereto, he shall inquire into the same, and, if not with the explanation given,' he shall report to the Lord Ordinary in

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The petitioner reclaimed. He proposed to amend the prayer of the petition by striking out the words "to censure said respondent in the premises in such way and manner as to your Lordship may seem meet." In support of the proposed amendment it was argued, that the application had two separate purposes—(1) to enforce against the trustee a statutory duty, and to obtain for the petitioner a statutory right; and (2) for censure of the trustee. The first of these two purposes was the principal one, and quite distinct from the conclusion for censure, and it was only this latter conclusion which contained anything of a penal nature, and therefore by withdrawing it the respondent's objection would be entirely removed. The fact that the petitioner had concluded for punishment would not prevent him obtaining his civil remedy. Although the petitioner might not be entitled to succeed in his prayer for censure he was entitled to have the respondent restrained from applying the funds in an improper way.

The respondent argued;—The whole of the application was of a penal nature founded on the delinquency of the trustee, and it was not competent to change a penal complaint into a civil action by striking out the penalty.

LORD PRESIDENT.—There is no doubt that to strike out the prayer for censure would be to alter the whole character of the proceedings. It is impossible to read the petition without seeing that the charges against the trustee are of the most serious description. He is charged with improperly applying the funds of the sequestrated estate, not for the benefit of the estate, but for private purposes. No grosser offence could be charged against a trustee, and it is aggravated by the allegation of a bribe in the shape of a commission. If the petition had not contained a prayer for censure it would have been a singular inconsistency. The prayer for censure is of the essence of this petition, not only in form, but in substance. I am of opinion that the amendment should not be allowed.

LORD DEAS.—The ground of this complaint is the alleged misconduct of the trustee. It is said that the "examinations were taken not for the benefit or for

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time of vacation, or to either Division of the Court in time of session, who, after hearing 'and investigating the whole matter, shall decide, and shall have power to censure such trustees or commissioners, or remove them from their office, or otherwise to deal with them as the justice of the case may require.' It seems to the Lord Ordinary that the petitioner's complaint (which is not presented at common law with the concurrence of the Lord Advocate, but under the statute) is one of those which by the statute falls in the first instance within the cognisance of the Accountant in Bankruptcy, and that the Court in time of session, or the Lord Ordinary in time of vacation, is not entitled to decide, and cannot decide thereon, unless the Accountant shall not be satisfied with the explanations of the respondent as trustee, and shall report the matter for decision.

"The grounds of the petitioner's complaint, and the answers of the respondent thereto, are well suited for the investigation and consideration of the Accountant in Bankruptcy. These answers are that the trustee, in examining the persons in London, acted in the discharge of his duty, and for behoof of the creditors in the sequestration; that the present application is made for the purpose of Mr Gellatly, by the petitioner, who only claims as a creditor for £15; and that, in withholding the examinations in question from the petitioner, he is acting in the interest of the creditors, and by their express instructions, given at a meeting called for the purpose of taking these instructions.

"The petition is not, the Lord Ordinary thinks, warranted by the 86th section of the statute, because the respondent as trustee is not called upon to account for his 'intromissions and management,' which is all that is authorised by that section—(See Bell v. Gow, 28th November 1862, 1 Macph. 84)."

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legitimate purpose of the sequestrated estate, but for the benefit and purpose ohn Smith, trading as Smith, Pender, and Company, and other parties in don, and with the object of enabling the said parties to make out claims nst the said Edward Gellatly." "The respondent was nominated and elected tee by them, and he is now lending his name, and the powers and privileges is office, to assist them in establishing their claims." The motive is thus d :—"Further, the respondent is to get commission from Smith, and the r contractors, on what is recovered from Gellatly, so that individually he an interest in assisting them though the estate has none." The prayer is ; the respondent should be ordered to appear at a specified diet; and the er further proceeds :—"As also to ordain the respondent to desist and cease using his powers as trustee foresaid, or employing the funds of the said estrated estate in assisting or furthering the claims of the said John Smith, the other contractors before mentioned." Then come the conclusions for ure which are proposed to be struck out. Now, this is a penal complaint, ch cannot be presented without the concurrence of the Lord Advocate unless e authorised by statute. It must therefore be construed with the strictness n indictment. What the petitioner now proposes to do is to stamp the trus- as a criminal, and to strike out of the complaint the conclusions for the alty of his crime. I consider that this is as incompetent as it would be to ke the words "wickedly and feloniously" out of an indictment, and to allow o proceed as a civil summons. I, therefore, am of opinion that the proposed endment should be refused.

LORD ARDMILLAN concurred.

The Court refused to allow the amendment, and counsel were then ard as to the competency of the petition.

The petitioner argued;—Sec. 86 of the Bankruptcy Act, 1856, provides at "the trustee shall be amenable to the Lord Ordinary and to the heriff, at the instance of any party interested, to account for intromis- ons and management, by petition served on him." The statute here rovides a remedy by petition, and it follows from that that such a peti- ion is competent. The trustee is bound to do certain things for the reditors, and the creditors have the right to compel him to do these ings. A petition is the most simple form in which this can be done, nd is the way contemplated by the statute, as is apparent from the pro- isions of sec. 86.[1]

LORD PRESIDENT.—It cannot be maintained that this application as a petition nd complaint is warranted by any section of the statute. It is not competent nder section 74, for, in the first place, there is not the requisite number of credi- rs, and secondly, it is not in the requisite form, the only remedy therein pro- ided being the removal of the trustee.

As a petition and complaint at common law it is plainly incompetent, first, in eing presented to a Court which has no jurisdiction, the Bill-Chamber; and econdly, inasmuch as it is presented without concurrence of the Lord Advocate.

LORD DEAS and LORD ARDMILLAN concurred.

THE COURT adhered, with additional expenses.

JOHN WALLS, S.S.C.—MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

[1] 19 and 20 Vict. c. 79, secs. 169-84-86; Lang v. Hally, March 19, 1870, *ante*, vol. viii. p. 753; Bell v. Gow, Nov. 28, 1862, *ante*, vol. i. p. 84; 31 and 32 Vict. c. 100, sec. 90.

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Nov. 18, 1872. Campbell v. Morison.

REV. JAMES CAMPBELL (Minister of the Parish of Balmerino), Petitioner.—*Thoms.*

CATHARINE HENRIETTA ADAMINA DUNCAN MORISON AND HER CURATORS, Compearers.—*M'Laren.*

Church—Glebe—Glebe Lands (Scotland) Act, 1866, 29 *and* 30 *Vict. c.* 71. —In an application for authority to feu under the Glebe Lands Act, *held* (1) that in fixing the minimum feu-duty the building value and not the agricultural value of the land fell to be taken; and (2) that the price to be paid by a conterminous heritor for lands taken under sec. 17 was twenty-five times the amount of the minimum feu-duty.

TEIND COURT. Lord Gifford. Teind Clerk.

AN application having been made by the Rev. James Campbell, minister of the parish of Balmerino, under the Glebe Lands (Scotland) Act, 1866, for authority to feu part of the glebe of the said parish, a remit was made by the Lord Ordinary on Teinds (Gifford) to David Rhind, architect, Edinburgh, to inquire and report.

The minister stated that the glebe extended to 21·419 acres, partly arable and partly pasture, and he proposed to feu two separate portions lying detached from the manse and from the rest of the glebe, and also from one another. The first portion proposed to be feued extended to 2·194 acres, entirely pasture and incapable of cultivation, and surrounded on three sides by the lands of Stuart of Balmerino and Miss Duncan Morison of Naughton. The other portion consisted of 11·877 acres of arable land, entirely surrounded by the lands of Miss Duncan Morison of Naughton, and was traversed by the high road from Balmerino to Newport. It was added that Miss Duncan Morison would in all probability take a feu of the whole of the second portion.

Mr Rhind reported in favour of the application to feu. He farther stated that the average value of the first portion as an agricultural subject might be taken at £2, 10s. per acre, and of the second portion at £5, 5s. per acre, and that in his opinion these should be taken as the value to the present incumbent of these portions of the glebe respectively. On the basis of these present agricultural values he suggested £4 and £7, 10s. respectively as the minimum feu-duties which should be allowed to be taken. At the same time he expressed his opinion that as a building subject the actual feuing value, or the expected rate of feu-duty at the present time, might be taken at £6, 6s. for the first part, and £10, 10s. to £12, 12s., according to the site, for the second.

The Lord Ordinary reported the case, adding a note in which he approved of granting the application to feu, but disapproved of Mr Rhind's report in so far as it took the agricultural value and not the building value as the datum or means of fixing the minimum feuing value. He intimated his opinion that the minimum value to be fixed should be £5, 5s. for the first portion and £9, 9s. and £11, 11s. according to site, for the second, these rates being somewhat under the building value suggested by Mr Rhind.

When the case came before the Court the minister, in respect of the right of pre-emption in favour of conterminous heritors contained in section 17 of the Act, moved the Court to fix the minimum feu-duty at the building value approved by the Lord Ordinary. He contended that though in the Blair-Athole case[1] the agricultural value had been

[1] Pet. M'Leod (Blair-Athole), 4th July 1870, *ante*, vol. viii. 955.

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taken as the datum for fixing the minimum feu-duty, this had been distinctly on the ground that there were specialties in the case. Here there were none, and therefore the Lord Ordinary was right in taking the building value as the datum for ascertaining the minimum feu-duty.

The Court held that the building value should be taken as the basis for fixing the minimum feu-duties, and fixed them respectively at the rates proposed by the Lord Ordinary.

Thereafter one of the conterminous proprietors, Miss Duncan Morison of Naughton and her curators, in terms of section 17 of the Glebe Lands (Scotland) Act, 1866, intimated her desire to purchase the portions of the glebe proposed to be feued, and offered twenty-two years' purchase of the minimum feu-duties fixed by the Court.

At advising—

LORD PRESIDENT.—The Court are of opinion that the price should be twenty-five years' purchase of the feu-duties, at the minimum rate already fixed by the Court, on the ground that this price invested at 4 per cent will give the minister the same return as he would have obtained from the feu-duties. It will also enable him, if he likes, to have the same security, for the price is sufficient to enable him to buy feu-duties of the best sort, giving him as good a return as the feu-duties which he would otherwise have received from the lands.

The other Judges concurred.

THE COURT accordingly fixed the price at twenty-five years' purchase.

G. B. SMITH, S.S.C.—R. & J. HALDANE, W.S.—Agents.

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Nov. 22, 1872.
Thomas v. Sandeman.

JAMES THOMAS, Nominal Raiser and Objector.—*Sol.-Gen. Clark—Asher.*
DAVID SANDEMAN AND COMPANY, Real Raisers.—*Pattison — Watson.*

Bankrupt—Preference—Illegal Agreement for the purpose of obtaining the Bankrupt's Discharge—Statutory Penalty—Bankruptcy Act, 1856, *sec.* 150.—A, one of the creditors on a sequestrated estate, who claimed to have a security for his debt over certain machinery, entered into an arrangement with B, a friend of the bankrupt, without the knowledge of the trustee or of the other creditors, by which he was to receive £500 from B, and to rank on the sequestrated estate for the full amount of his claim, as a condition of his agreeing to a proposed composition-contract. *Held* that the penalty under the above section had been incurred by A, although he had believed that B was acting for the trustee and creditors, and although B had successfully resisted A's claim for payment of the £500.

Ante, vol. vii. p. 558.

1ST DIVISION.
Lord Gifford.
M.

In 1867 the estates of R. S. Smith, manufacturer, Walkerton Mills, Fifeshire, were sequestrated, and Mr Findlater was appointed trustee. James Thomas of Transay was ranked as a creditor for £2797, 17s. 6d. and Sandeman and Company for £712, 6s. 2d.

Sandeman and Company raised an action of multiplepoinding in name of Mr Thomas as pursuer, concluding for declarator that Mr Thomas was liable in only once and single payment of £2797, 17s. 6d., being the amount of the debt due by the bankrupt to Mr Thomas, and also of £1000, or such other sum as might be ascertained to be double the value of the preference, gratuity, payment, or other consideration, given, made, or promised to Mr Thomas for concurring in or facilitating the discharge of the bankrupt under 19 and 20 Vict. c. 79, Bankruptcy (Scotland) Act, 1856, section 150, which enacts that "All preferences, gratuities, securities, payments, or other considerations not sanctioned by this Act, granted, made, or promised, and all secret or collusive agreements and transactions

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for concurring in, facilitating, or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void; and if during the sequestration any creditor shall have obtained any such preference, gratuity, security, payment, or other consideration or promise thereof, or entered into such secret or collusive consideration, or agreement, or transaction, the trustee shall be entitled to retain his dividend, and he, or any creditor ranked on the estate, may present a petition to the Lord Ordinary or to the Sheriff praying that such creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, gratuity, security, payment, or other consideration given, made, or promised, and if no cause be shewn to the contrary decree shall be pronounced accordingly, and the sums which in such cases may be recovered shall, under deduction of the expense of recovering the same, be distributed by the trustee among the other creditors under the sequestration; and if the sequestration shall have been closed, it shall be competent to any creditor who shall not have received full payment of his debt to raise a multiplepoinding in name of the person who has obtained such preference, gratuity, security, payment, or other consideration or promise as aforesaid, and on the value of the preference, gratuity, or security, or amount of the sum paid, or consideration obtained, being ascertained, double such value or amount, together with the amount of the debt of the colluding creditor, shall be ordered to be consigned by him, and shall be divided among the creditors who were ranked or were entitled to be ranked in the sequestration, and have not received full payment of their debts, and who shall lodge claims in such multiplepoinding according to their respective rights and interests, and such multiplepoinding shall be executed in terms of law against the colluding creditor, and notice thereof at the same time be inserted in the *Gazette;* and in the event of there being any surplus after paying the full debts of the creditors, and defraying the expenses of the sequestration or other proceeding, the same shall be paid into the account of unclaimed dividends, as hereinafter provided."

The real raisers averred;—

(Cond. 4.) "In June 1867 the bankrupt made overtures to his creditors with the view of obtaining his discharge under his sequestration on payment of a composition; and as the nominal pursuer's claim was a large one, and his consent was necessary, James Waddell, on behalf of the bankrupt, had meetings and entered into a correspondence with the nominal pursuer for the purpose of obtaining his consent and concurrence thereto. A secret and collusive arrangement was at length concluded between the said James Waddell on behalf of the bankrupt, which was embodied in a letter or obligation granted to the nominal pursuer by the said James Waddell, of the date and in the terms following:—'175 Buchanan Street, Glasgow, 9th September 1867.—James Thomas, Esq., Forthar. Sir,—In consideration of your taking the same dividend as the rest of the creditors will be offered and paid by the bankrupt, on the sequestrated estate of Mr Robert S. Smith, spinner and manufacturer, Walkerton Mills, Leslie, Fifeshire, and giving me your mandate to act on your entire claim of £2797 or thereby at all meetings in connection with offer and acceptance of offer on said bankrupt estate, I agree to see you paid or to pay you the sum of £500 sterling, payable as follows, namely, —£300 within two months of the date of Mr Rob. S. Smith's discharge, £100 in eight months from date of R. S. Smith's discharge, and £100 in twelve months from the date of R. S. Smith's discharge, which £500 is over and above the composition upon your entire claim of £2797 or thereby, and all without prejudice or recourse.—I am, &c., JAMES WADDELL.'"

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(Cond. 5.) "The nominal pursuer accepted of this offer, and acted upon it. In implement of his part of said arrangement, and in pursuance thereof, he granted a mandate to James Waddell to act and vote for him at all meetings of the creditors connected with the offer and acceptance of the offer of said composition, and to agree thereto for him as a creditor of the bankrupt." The answer to this article was—"Admitted that the objector accepted the said letter, and granted in favour of Mr Waddell a mandate, which is referred to."

The following facts were stated and not disputed:—

A general meeting of the creditors of Mr Smith was called, and was held on the 23d day of September 1867. At that meeting the bankrupt made offer of a composition of 6s. 6d. per pound to his creditors on all debts due by him at the date of his sequestration, and agreed to take the entire responsibility of the claims made by the pursuer against the estate. The meeting unanimously resolved that this offer of composition should be entertained for consideration. In terms of the Bankruptcy (Scotland) Act, 1856, this resolution was advertised in the *Edinburgh Gazette*, and intimated by circular to the creditors, and another meeting of the creditors was held on 18th October 1867, for the purpose of deciding on the offer of composition. At this meeting it was unanimously resolved to accept of the offer of composition and of the cautioners proposed. The pursuer was represented at both of these meetings by James Waddell, who voted in favour of the acceptance of the offer of composition on the pursuer's entire claims in the sequestration. Messrs Sandeman, who were creditors of the bankrupt, accepted of the bankrupt's composition without being acquainted with the preference and security or obligation which the nominal pursuer had obtained as a consideration for his concurring in and facilitating the said bankrupt's discharge, or with the agreement and transaction entered into by him with the said James Waddell on behalf of the bankrupt for that purpose. The proceedings having been reported to the Sheriff, and a bond of caution for the composition granted by the bankrupt and his cautioners, the bankrupt obtained his discharge under his sequestration, by deliverance of the Sheriff of Fife, dated on or about the 21st day of November 1867, which deliverance also declared the sequestration at an end. The first instalment of the composition due under the said composition-contract and bond was paid to and received by Mr Thomas. The sum of £300 under the composition-contract became payable to Mr Thomas under the said agreement and obligation of 9th September 1867 on the 21st day of January 1868, and the further sum of £100 became payable on 21st July 1868, and the last instalment of £100 on 21st November 1868. Mr Thomas, on the first and second of these instalments becoming payable, raised an action against James Waddell, founding on his obligation, and concluded for payment of £300 and £100. This action was defended by James Waddell, on the ground that the obligation was null and void under and by virtue of the provision in the Bankruptcy (Scotland) Act, 1856, section 150. The Court gave effect to this defence, and found that the obligation was null and void under the statute, and assoilzied James Waddell. (*Ante*, vol. vii. p. 558, 23d February 1869).

Mr Thomas lodged objections to the present action thus brought in his name, in which he stated that £1795, 1s. 4d., part of his debt, was contained in a promissory-note by the bankrupt. (Stat. 2.) "The objector duly lodged with the trustee in the said sequestration claims for the sums due to him. In particular, he lodged a claim for the sum of £1795, 1s. 4d., and in the said claim he stated that he held no security for the said debt, except a policy of assurance effected *on the life* of the said R. S. Smith,

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in name of the objector, with the Edinburgh Life Assurance Company, for £1000, and dated 9th September 1859, and also except 'certain machinery and effects situated in and at the said Walkerton Mills, belonging to the deponent, and specified in an inventory thereof appended to a disposition by the said Robert Suttie Smith in the deponent's favour, dated 22d March 1864, and tack thereof between the deponent and the said R. S. Smith, dated 28th March and 3d April 1865, which machinery and others the said R. S. Smith had a right to purchase from the said deponent on certain conditions, specified in a letter by the deponent to him, dated 22d March 1864,' and the objector declared and protested that, in respect certain questions had arisen or were likely to arise regarding the rights of parties with respect to the said machinery, his rights and interests should not be prejudiced by anything stated in relation thereto in the said oath and claim." (Stat. 3.) "The said machinery and others held by the objector in security as aforesaid were of very considerably greater value than the amount of the said promissory-note, and the security held by the objector was more than sufficient to afford him full payment of his debt." (Stat. 4.) "In the summer of 1867, James Waddell, accountant in Glasgow, acting on behalf of the creditors of the said Robert Suttie Smith other than the objector, and with the full knowledge and sanction of them, and of the trustee and commissioners on the sequestrated estate, had meetings, and entered into a correspondence with the objector, with a view to a compromise or adjustment of his rights to the said machinery and others, and his preferable claims in respect thereof." Mr Thomas further stated that Mr Waddell was acting on behalf of the creditors and the trustee in the sequestration as well as the bankrupt when they entered into the arrangement. (Stat. 5.) "Immediately upon receipt of the said letter the objector addressed to the trustee on the said sequestrated estates a letter in the following terms:—'At Lady Bank Station, September 9, 1867. Dear Sir,—In reply to my telegram, I am now in receipt of a letter of agreement from Mr James Waddell, 175 Buchanan Street, Glasgow, wherein I have agreed to renounce my claim (preferable) on the machinery at Walkerton, possessed by R. S. Smith, and now only rank on the full amount of my three bills and interest thereon, and accept of the composition on said bills same as the other creditors. Therefore trust the commissioners will withdraw the sale of the property.—I am, &c. (Signed) JAMES THOMAS.' The conclusion of the arrangement relative to the said machinery was also made known to and approved of by the commissioners and creditors." (Stat. 6.) "The objector has not received or obtained any money or other consideration under or in respect of the letter of 9th September 1867.

Messrs Sandeman pleaded;—(1) The arrangement made by and with the nominal pursuer, in reference to Robert Suttie Smith's offer of composition and discharge, as above set forth, was a secret and collusive arrangement, and the letter of obligation by James Waddell, of date 9th September 1867, and the sum of £500 thereby stipulated and agreed to be paid to him, constituted a preference, gratuity, security, or other consideration for concurring in, facilitating, or obtaining the said bankrupt's discharge, struck at by the Bankruptcy (Scotland) Act, 1856, and the pursuer is liable in the penalties provided by the said statute, and by section 150 thereof.

Mr Thomas pleaded;—(1) The real raiser's statements are not relevant and sufficient to sustain the conclusions of the summons. (2) The action is incompetent, and ought to be dismissed, in respect that the objector has not been guilty of any contravention of the Bankrupt Statute, and that he has not incurred liability for any of the penalties thereby made exigible.

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(3) Assuming the acceptance of the letter of 9th September 1867, condescended on, to have inferred a contravention of the said statute, the action cannot be maintained, in respect that the said letter never was, and is not now, of any value.

The Lord Ordinary pronounced this interlocutor:—"Repels the first plea in law stated for the nominal pursuer and objector, Mr James Thomas, and, before farther answer, allows to both parties a proof of their respective averments, the real raiser to lead in the proof." *

A proof was taken before the Lord Ordinary.

Mr Thomas deponed,—"I remember Mr Waddell waiting on me about June 1867, with the intention of purchasing my legal claim to that machinery. It was expressed on every occasion that I met him. There was no other object expressed; at first I refused to entertain any proposition, but the last time he came he said the trustee, commissioners, and every creditor was anxious that I should sell my right in order to allow a settlement by composition. I said it would not be for my interest to do so, as the sum he offered was not at all adequate to retaining my

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* "NOTE.—The counsel for the nominal raiser supported his first plea in law by a very ingenious argument, founded on a critical construction of the 150th section of the Bankrupt Statute. He contended that, where the sequestration has been wound up, as in the present case, no penalty can be made good even where an illegal preference has been stipulated for or promised—where, in point of fact, nothing has been recovered or realised under the stipulation or promise. He urged that what was to be ascertained was only the value illegally obtained, that is, realised, not merely promised, the word promise being carefully omitted in the ascertainment clause, that is, the clause under which the fund *in medio* in an action like the present is fixed.

"The Lord Ordinary, admitting the ingenuity of the argument, cannot give effect to it. He thinks that the clause must receive a fair and equitable, and not a judaical or malignant interpretation. Although of a penal nature, it is intended to repress mischievous, if not fraudulent practices, and its true meaning must be sought from the words used. See the opinions of the Judges, particularly in the House of Lords, in Carter v. M'Laren, 26th October 1869, 8 Macph. 64; H. of L., 9th May 1871, 9 Macph. 49. See also Murdoch v. Clydesdale Bank, 29th January 1864, 2 Macph. 515.

"As this was the only objection on relevancy, the Lord Ordinary repels the first plea.

"But the objector pleads that, in point of fact, there was no contravention of the Bankrupt Statute; that no preference was given, stipulated, or promised; but that the real transaction was a compromise between the objector, on the one hand, and the whole body of creditors, on the other, by which, for the sum stipulated, the objector gave up a security which he claimed over part of the bankrupt estate.

"This was not pleaded in the direct action at the objector's instance to make good the alleged illegal preference—see Thomas v. Waddell, 23d February 1869, 7 Macph. 558. Probably in that action it was competent and omitted, and such plea is now excluded in any question as to making good the obligation against Waddell. But Thomas v. Waddell does not constitute *res judicata* in the present action, and Mr Thomas's counsel explained that additional inquiry and information has shewn that the transaction was not of the nature at first supposed. The Lord Ordinary thinks it is not too late for the defender and objector to shew, if he can, in the present process, that the transaction was not a contravention of the statute. He has therefore allowed a proof before answer. It seems expedient to get in the correspondence and documents, which, though used in Thomas v. Waddell, were not formally proved in that process. All ulterior questions as to the amount of the penalty or debt forfeited, or the value of the security, will also arise better upon a completed proof."

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right to the machinery. I told him that £500 was not adequate to retaining my right. Ultimately I did agree, but I told him it was solely on account of all parties being anxious that I should sell my claim, and allow a settlement by composition. I got from him the letter of 9th September 1867—(quoted *supra*). (*Q.*) Had you done anything else except settle your preferable claim? (*A.*) Nothing whatever—it was an open and honest transaction on my part; and I had no object to serve, for I considered I was renouncing my worldly interest in accepting that compromise. (*Q.*) Did you think you were accepting a bonus by consenting to the composition? (*A.*) No. I was losing by it. When I entered into the arrangement with Mr Waddell I understood he was making it on behalf of the trustee and all the creditors."

This interlocutor was then pronounced:—"Finds that the action has been competently and properly brought: Finds the nominal raiser liable in only once and single payment of the fund *in medio*, and, with a view to the ascertainment of the amount of the fund *in medio*, appoints the nominal raiser to lodge a condescendence of the fund *in medio* by the second box-day in the present vacation, and appoints all concerned to lodge claims by the first sederunt day in May next: Finds the nominal raiser liable in expenses to the real raisers from the date of lodging defences or objections down to this date, and remits," &c. *

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* "NOTE.—The Lord Ordinary is well assured that when the nominal raiser, Mr Thomas, in September 1867, made the arrangement which he did with Mr Waddell on behalf of the bankrupt, he was not aware that he was doing anything wrong, or that he was committing a violation of the Bankrupt Act. The Lord Ordinary thinks it certain that at that date the nominal raiser, Mr Thomas, had never read, and probably had never heard, of the 150th section of the Bankrupt Statute; and even Mr Waddell, who is an accountant in Glasgow, seems to have been quite unaware of the effect and scope of that section.

"But the ignorance or the *bona fides* of the nominal raiser will not save him from the statutory consequences if he has really contravened the statute. In the recent case of Carter v. M'Laren and Company it was ultimately held by the House of Lords, 9th May 1871 (9 Macph. 49), that the entire *bona fides* of Messrs M'Laren, even when coupled with the instant repayment of the illegal preference, did not save them from the statutory penalty, and that the Court had no discretion in the matter, but were bound to decern for the full amount thereof.

"The only question in the present case, therefore, is, was there or was there not on the part of Mr Thomas a violation of the 150th section of the Bankrupt Statute. If there was, then the present action of multiplepoinding has been well brought, in virtue of the express provision of the enactment in question. What the amount of the penalty or forfeiture—that is, of the fund *in medio*—may be, is another question which has not been yet discussed. In particular, there is a very important question, whether the 'amount of the debt' means the gross sum ranked for, or only the dividend thereon; but this question only arises after the action is found competent.

"In the previous action at Mr Thomas's instance against Mr Waddell, in which Mr Thomas sued Mr Waddell for the £500 stipulated in the letter of 9th September 1867, the illegality of the transaction seems to have been held by the Court (see Thomas v. Waddell, 23d February 1869, 7 Macph. 558); but as it appeared that in that case Mr Thomas's pleas were of a limited nature, and as the judgment was not *res judicata* in the present action, the Lord Ordinary thought it right to allow the nominal raiser to shew, if he could, that the transaction was not a preference or an illegal agreement in the sense of the 150th section, but a proper compromise between Mr Thomas on the one hand, and the creditors on the other, whereby Mr Thomas, in consideration of the

Mr Thomas reclaimed, and argued that the offence contemplated by the 150th clause of the statute had not been committed. The trustee

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£500, renounced a security which he claimed over the estate of the bankrupt. It is certainly a little awkward for Mr Thomas that the judgment in Thomas v. Waddell stands, for the result would be, if he succeeded now, that the same agreement which in 1869 was held null and illegal under the 150th section, and enforcement of which was refused, should now, in 1872, be held legal, and not inferring statutory penalties.

"On considering the proof and correspondence the Lord Ordinary has come to be of opinion that the transaction in question, of September 1867, constituted in the sense of the statute a 'preference, gratuity, security, payment, or other consideration granted, made, or promised for concurring in, facilitating, or obtaining the bankrupt's discharge.' He thinks the transaction was struck at by the statute. It is not necessary to determine whether the transaction was secret or collusive or not, although, after the observations made in the House of Lords in Carter v. M'Laren, it would probably be held to be secret and collusive in the sense of the statute. It is enough for the purposes of the present action if there was a gratuity, payment, or consideration made or promised for concurring in, facilitating, or obtaining the bankrupt's discharge.

"The Lord Ordinary feels obliged to hold that there was this in the present case.

"(1) The transaction is really embodied in Mr Waddell's letter to Mr Thomas of 9th September 1867, for although there is no written acceptance of this letter addressed to Mr Waddell, it is proved—indeed, it is expressly admitted—that the letter was accepted by Mr Thomas, and that its conditions were implemented by him by taking the composition the same as the other creditors, and by granting the mandate to act and vote on his entire claim. Now, it is impossible to read the letter without seeing that it is an agreement for facilitating or concurring in the bankrupt's discharge on composition. This is the only consideration expressed in respect of which the £500 is promised. Without Mr Thomas's concurrence the composition-contract could not be carried through, and, so far as the letter of 9th September 1867 goes, it is simply a purchase of that concurrence for £500. As such, the transaction is obviously illegal.

"(2) But Mr Thomas contended that the letter of 9th September 1867 does not disclose the real transaction, which was a compromise of a security which he claimed over a part of the bankrupt's machinery; and he referred to his letter to the trustee of the same date, 9th September 1867, whereby he renounced his preferable claim. Now, it is quite true that Mr Thomas had stated a preferable claim or security over part of the bankrupt's machinery. His claim was reserved in the affidavit lodged by him in the sequestration, and it is proved by the correspondence that the preferential claim was stoutly insisted in in the sequestration. But neither the nominal raiser's letter of 9th September 1867, nor any of the other letters, prove that this preferable claim or security was the only consideration for the £500 for which the nominal raiser stipulated. The renunciation of the security was rather a consequence of the bargain by which Mr Thomas consented to the composition contract than the bargain itself.

"(3) Even if the security over the machinery entered to some extent into the bargain, this would not make the bargain legal, for it is beyond all doubt that at least part of the bargain was that Thomas should concur in the bankrupt's composition. If he had not agreed to do this, it is as clear as day that the £500 would never have been either promised or paid. In the most favourable view, therefore, the £500 was promised partly for a legal and partly for an illegal consideration, and this would be enough to infer contravention of the statute.

"(4) The evidence of Mr Waddell and that of Mr Thomas is in direct conflict, and the Lord Ordinary therefore is disposed to lay both out of view, and to proceed upon the evidence of the correspondence and writings passing at the time, and which seem to him to leave no doubt as to what was truly wanted by Mr Waddell and the bankrupt. The oral evidence of Mr Waddell is not very satisfactory, but he could scarcely be mistaken in supposing that he was stipu-

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and creditors were aware that Waddell was negotiating with Mr Thom The trustee was entitled to deal with the bankrupt estate as his ov and to compromise claims. He was entitled to make a bargain with creditor to induce him to concur in a composition contract. If this w done behind the backs of the creditors it might be against the 15(section, but it was done in this case with their concurrence. Mr Thon only intended to sell the preferential security, and did not think of s ing his concurrence in the composition. The 150th section of the stat is intended to provide against a creditor who is in the same position the other creditors receiving a bribe, not the case of a creditor who ho a security for his debt. If the creditor transacts with a person who believes acts for all the creditors he does not commit the offence. Wh ever the creditors consent there is no offence. They were aware of t arrangement between Mr Waddell and Mr Thomas. Mr Thomas nev received anything from Mr Waddell, and therefore, as no preference h actually been got, the statutory penalty had not been incurred.

At advising,—

LORD PRESIDENT.—This is a multiplepoinding brought by one of the credit in a sequestration which has been brought to a close. He has not received f payment of his debt, and the effect of the multiplepoinding, if sustained, and consignation be ordered to be made in terms of the statute, is certainly to infl a very heavy and severe penalty upon the party against whom it is directed nominal raiser. It appears to me that it is indispensable, in the first place, make quite sure of what it is that is advanced here as the statutory charge; I speak of the charge against Mr Thomas very much as if we were consider an indictment against him, the consequence of the charge being sustained relevant, and held to be proved, being so clearly penal.

The 150th section in its outset provides that "all preferences, gratuit securities, payments, or other considerations not sanctioned by this Act, grant made, or promised, and all secret or collusive agreements and transactions concurring in, facilitating, or obtaining the bankrupt's discharge, either on

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lating for a concurrence in the discharge, and was not merely buying a secur It seems plain enough that, whatever Mr Thomas thought, Mr Waddell ca simply and solely to purchase Mr Thomas's concurrence to the discharge.

"(5) If Mr Thomas's view was correct, that he was to get the £500 as price of the security, and nothing else, then this sum should have been deduc from his claim. He was not entitled to rank and vote on his full claim, realise the security besides. But it was expressly stipulated that the rank should be for the full claim, and this itself constitutes an illegality. In man contested vote a majority might be carried by means of the full claim, whe deduction of securities would throw the party into a minority.

"(6) It is clear, contrary to the averment on record, that the trustee general creditors were no parties whatever to the agreement with Mr Thor In this sense the agreement was collusive. Mr Thomas spoke of assigning security to Mr Waddell, but if he was to rank for his full claim this was im sible, for ranking is equivalent to payment, and the security cannot be separ from the debt.

"(7) It is scarcely an element in the present case, but, so far as the I Ordinary can judge, the security claimed by Mr Thomas was bad in law, an is hardly conceivable that the creditors, and much less Mr Waddell, viewe an independent third party, should give £500, or anything approaching sum, for an assignation or renunciation of the security. In the Lord Ordina view, however, this was not at all the nature of the transaction.

"It follows that the multiplepoinding has been completely brought under statute, and the Lord Ordinary has pronounced the usual order of once single payment, and ordered claims."

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without an offer of composition, and whether the offer be accepted or not, or he discharge granted or not, shall be null and void." That is the leading provision, and it is very important to ascertain precisely what its meaning is. It may be a question whether preferences, gratuities, securities, payments, and other considerations are not intended to be something distinct from secret or collusive agreements and transactions for concurring in, facilitating, or obtaining the bankrupt's discharge; and in order to elucidate the meaning of the statute in this respect it is necessary to revert to two previous sections which deal with the same matter in another aspect. In the 140th section, which is one of a series of sections relating to discharge upon composition, it is provided that when a deliverance has been pronounced approving of the composition the bankrupt, or his successor, or other party offering the composition, shall make a declaration, or, if required by the trustee or any creditor, an oath before the Lord Ordinary or the Sheriff, as the case may be, that he has made a full and fair surrender of his estate, and has not granted or promised any preference or security, or made or promised any payment, or entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to such offer and security. In like manner, in the 147th section, which applies to discharge without composition, the bankrupt is directed to make a declaration, or if required an oath, that he has made a full and fair surrender of his estate, and has not made or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to his discharge.

Now, reading the 150th section in the light of these previous sections, it seems to me that if there be any preference, gratuity, security, payment, or other consideration, made or promised for facilitating or obtaining the bankrupt's discharge, or, as a distinct thing, any secret or collusive agreement or transaction for that purpose, then the consequences of the statute are to follow. It is needless to pause upon the portion of the section which next follows, and which applies only to the case where the sequestration is in dependence. But I pass on to the second part of the section, which provides that "if the sequestration shall have been closed it shall be competent to any creditor who shall not have received full payment of his debt to raise a multiplepoinding in name of the person who has obtained such preference, gratuity, security, payment, or other consideration or promise as aforesaid, and on the value of the preference, gratuity or security, or amount of the sum paid, or consideration obtained being ascertained, double such value or amount, together with the amount of the debt of the colluding creditor, shall be ordered to be consigned by him," and so on. Now, an attempt was made to construe this portion of the statute as if it did not apply to a promise of a payment for the purpose of obtaining or facilitating the obtaining of a discharge of the bankrupt. But really it is needless to dwell upon that, because nothing but the most judaical and malignant interpretation could possibly reach that construction. It is quite plain that every illegal preference or payment, it does not matter of what kind, whether actually made and obtained, or promised, is to be followed by the penal consequences of this section. Now, having this construction of the statute in view, we must consider what is the nature of the charge actually made on this record against the nominal raiser, Mr Thomas. In the fourth article of the condescendence it is stated that in the month of June 1867 the bankrupt made overtures to his creditors with the view of obtaining his discharge under said sequestration on payment of a composition; and as the nominal pursuer's claim was a large one, and his consent was necessary, James Waddell, accountant, Glasgow, on behalf of the bankrupt, had meetings, and entered into a correspondence with the nominal pursuer, for the purpose of obtaining his consent and concurrence thereto. A secret and collusive arrangement was at length concluded between the said James Waddell, on behalf of the bankrupt, and the nominal pursuer, which was embodied in a letter or obligation granted to the nominal pursuer by the said James Waddell, and in the terms following, viz.:—"175 Buchanan Street, Glasgow, 9th Sept. 1867.—James Thomas, Esq., Forthar. Sir,—In consideration of your taking the same dividend as the rest of the creditors will be offered and paid by the bankrupt,

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on the sequestrated estate of Mr Robert S. Smith, spinner and manufacturer, Walkerton Mills, Leslie, Fifeshire, and giving me your mandate to act on your entire claim of £2797 or thereby at all meetings in connection with offer and acceptance of offer on said bankrupt estate, I agree to see you paid or to pay you the sum of £500 sterling, payable as follows, namely:—£300 within two months of the date of Mr Rob. S. Smith's discharge, £100 in eight months from date of R. S. Smith's discharge, and £100 in twelve months from the date of R. S. Smith's discharge, which £500 is over and above the composition upon your entire claim of £2797 or thereby, and all without prejudice or recourse.—I am yours respectfully, JAMES WADDELL." Now, the letter is not disputed to have passed, and, therefore, the first thing is to ascertain what is the meaning of it with reference to the 150th section of the statute. It was necessary,—that is so far admitted,—to carry through the composition arrangement that Mr Thomas should assent to it. The discharge of the bankrupt upon a composition could not be obtained without Mr Thomas's consent; and he is by this arrangement to obtain a composition at the same rate as the other creditors upon the entire amount of his debt, and he is to obtain over and above that a sum of £500 in consideration of his giving Mr Waddell, the writer of the letter, a mandate to enable him to vote for the composition-arrangement upon the entire amount of Mr Thomas's debt. The £500 is not to be immediately paid down. Not one shilling of it is to be paid if the bankrupt is not discharged, shewing plainly what the object of the arrangement was; for the instalments by which it is to be paid all bear reference in point of date to the date of the bankrupt's discharge. It is therefore, I apprehend, quite impossible to dispute that upon the face of it this is an arrangement between Mr Waddell on behalf of the bankrupt, if it be proved that he was dealing with Mr Thomas on behalf of the bankrupt, and Mr Thomas, to facilitate the carrying through of the composition arrangement, and the obtaining of the bankrupt's discharge, £500 being paid as a gratuity to Mr Thomas for giving his consent to that arrangement. The 5th article of the condescendence states that "the nominal pursuer accepted of this offer, and acted upon it. In implement of his part of said arrangement, and in pursuance thereof, he granted a mandate to the said James Waddell to act and vote for him at all meetings of the said Robert Suttie Smith's creditors, connected with the offer and acceptance of the offer of said composition, and to agree thereto for him as a creditor of the said bankrupt in said sum of £2797, 17s. 6d., and fulfilled the other conditions incumbent on him by said arrangement." The answer to that article is, "Admitted that the objector accepted the said letter, and granted in favour of Mr Waddell a mandate, which is referred to."

Now, so far the main facts of the case are pretty well ascertained by admission. I think it is also proved very distinctly that Mr Waddell, who wrote this letter, was, in doing so, acting on behalf of the bankrupt. Mr Thomas says that he was not aware that he was acting on behalf of the bankrupt—that his impression was that he was acting on behalf of the trustee and creditors; and he says in statement 4, "In the summer of 1867, James Waddell, accountant in Glasgow, acting on behalf of the creditors of the said Robert Suttie Smith other than the objector, and with the full knowledge and sanction of them, and of the trustee and commissioners on the sequestrated estate, had meetings, and entered into a correspondence with the objector, with a view to a compromise or adjustment of his rights to the said machinery and others, and his preferable claims in respect thereof," and he represents that throughout Mr Waddell was in fact acting on behalf of the creditors, and of the entire creditors, in making this arrangement. That is certainly not proved. On the contrary, it seems to me to be proved by the evidence not of Waddell only, but of the trustee also, and the written evidence in process, that Mr Waddell had no authority of any kind to represent or act for either the trustee or the creditors, or any of them. But Mr Thomas says notwithstanding that he believed that he was acting on behalf of the creditors. Now, this appears to me not to found a relevant defence against this action, and not to be a good objection to the multiplepoinding, because if Mr Waddell was not in fact representing and acting for the creditors, the creditors cannot be barred of their remedy under the 150th section of the statute,

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, it be made out in point of fact that a preference or payment of the
ntemplated by the 150th section has been in fact created or made in
f Mr Thomas. Mr Thomas may be perfectly innocent of all improper
nd there are many circumstances that indicate that he was so; but if
red that he was transacting with a party representing the creditors one
lament that he took that for granted instead of making sure that it was
took it for granted upon the statement of this Mr Waddell, who, accord-
Ir Thomas's own admission, was up to that time a perfect stranger to
think there were three grounds chiefly insisted in on behalf of Mr
as an answer to this action of multiplepoinding. The first was that the
ion carried through between him and Mr Waddell was not in its nature
ce against the 150th section of the statute. I have already indicated
ion upon that subject, and I do not think it necessary to add more. It
to me that the arrangement which was made comes precisely within the
ion in the statute. No doubt it is maintained, with reference to this
, that the £500 which was promised to Mr Thomas was not a simple
, but that it was something given as in exchange for a security which
mas said he had over a portion of the bankrupt estate. He maintained
had a good security over the moveables in the bankrupt's mill; and
h the trustees had obtained an opinion of counsel very clearly adverse to
aim, still Mr Thomas had by no means abandoned his claim to that
, but on the contrary was insisting that his claim was good in point of
d alleged that he had been advised that it was so. Now, there could
en nothing at all illegal in Mr Thomas's compromising his claim to this
. That would have been perfectly lawful. But so long as the sequestra-
bsisted, the only party with whom he could competently deal with refer-
such a compromise was the trustee. The trustee, under the statute, has
o compromise and settle claims against the estate, and claims by the estate
other parties, and had he arranged with Mr Thomas, representing the
s, and taking their special instructions upon the subject, it would have
uite lawful for the trustee to pay a sum of £500 to buy off this claim of
nce over the moveables in the mill. But the bankrupt, until he was dis-
l, had nothing to do with that, and nobody was entitled to deal with him
hat subject, for the estate was not his. He had no right to the estate,
uld have none until he was retrocessed under the composition-contract.
herefore, to deal with anybody but the trustee was plainly to incur a very
isk at least, if not to commit a direct illegality.

another defence has been urged, to the effect that Mr Thomas, in point
, got nothing under the agreement. The obligation of Mr Waddell has
out to be of no value; for when Mr Thomas raised an action against Mr
ll for recovery of this £500, Mr Waddell, who seems to be a person of
peculiar views of morality, defended himself upon the ground of the nul-
such transactions under the 150th section, and that defence was sustained,
could not be otherwise. And accordingly Mr Thomas found himself in
ition of being none the better of the illegal transaction into which he had
ingly entered, getting nothing for his illegal preference, and yet he is sub-
to all the penal consequences of this section of the statute. That is very
but I am afraid it is no answer to the demand of an unpaid creditor that
l have the remedy prescribed by the section.

lastly, the defence most seriously and urgently maintained by Mr Thomas
this charge is that in point of fact this arrangement, or an arrangement
nature, was assented to by the trustee and the creditors, or at least by
stee, and therefore that no demand can now be made by any of the credi-
: the infliction of the penalties of the 150th section. The first element
defence is a clause in the offer of composition which is dated the 6th of
ber 1867, and is addressed by the bankrupt to the trustee. He offers a
ition at the rate of 6s. 6d. per pound, and likewise provides for the trus-
muneration and expense attending the sequestration, paying the said com-
n as follows—3s. per pound within two months, 1s. 9d. per pound within
nonths, and 1s. 9d. per pound within twelve months respectively from the

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date of his discharge, and agrees to take the entire responsibility of the made by the nominal pursuer against the estate, and offers two caution payment of the same. Now, the meaning of this, so far as the caution concerned, is—and that is distinctly shewn by what followed upon it—th cautioners as well as the bankrupt himself were to take the entire respons of Mr Thomas's claim against the estate, whatever that may mean. It is sai this clause in the offer of composition ought to have aroused the attention trustee and of all the creditors to the fact that some arrangement was go with Mr Thomas, and necessarily an arrangement between Mr Thomas an bankrupt and his cautioners. Now, it does not appear to me necessarily implied from this clause that there was any arrangement going on, beca that it says is that the bankrupt and his cautioners are to take the respons of the claim of Mr Thomas, meaning plainly to take the risk of his claim (ference being good. I do not see that it can mean anything else than Now, there is nothing very anomalous or extraordinary in an offer of compc being made, coupled with such a condition. If Mr Thomas was satisfiec the estate, when reinvested in the bankrupt, coupled with the caution whi offered, gave him as good a security for his preference, if it should be establ as the sequestration itself, there was no reason in the world why Mr Tl should not assent to the composition arrangement, and take this in place (security which he thought he had under the sequestration. In short, i came to this: here is one creditor claiming a real security over a part (estate. It is disputed, and the trial of it may involve delay and expense may lead to a sale of the most valuable portion of the bankrupt estate, would take from the bankrupt the desire and the interest to get himself cessed; and therefore he and his cautioners say, "We will take this out (way, because let the composition-arrangement be accepted, and we will tal chance of Mr Thomas establishing his preference, and if he does establish will make it good." Now, in such an arrangement as that I apprehend th not the slightest illegality; and that is the nature of the undertaking wl think is shadowed forth in this clause of the offer of composition. It do appear to me, therefore, that either the trustee or any of the creditors cou expected to take alarm at this clause, or to imagine that under cover of it illegal preference was about to be established in favour of Mr Thomas at t pense of the estate, or for the purpose of facilitating the obtaining of the rupt's discharge by composition. There is a good deal of written evidenc nected with this, which it would be quite wearisome and useless to go th in detail. The most that can be said of it is, that before the compositio accepted, before the meeting at which the acceptance took place, the truste made aware that some arrangement had been made with Mr Waddell. Th nothing more proved, I think, by any of the documents than that, and e the trustee had had such communications made to him as ought to have ar his suspicion, I am afraid that would be of no relevancy as an objection Sandeman, the real raiser of this multiplepoinding, unless the knowledge be brought home to him, because the trustee's indiscretion or delict in s matter, I apprehend, would not be binding upon the creditors to the eff barring any of them from their remedy under the 150th section after the s tration was closed. It might be attended with very serious consequences as the trustee is concerned, and if the trustee, during the sequestration, w attempt to enforce the penalties of the 150th section, it might operate to pr him from doing so. But I cannot see how any amount of neglect, or even quency, on the part of the trustee, in reference to such an illegal transact this, could bar the remedy of an unpaid creditor under the second part (section, unless knowledge of these proceedings was brought home to that tor himself. But I am bound to say further, and to say for the trustee, I do not think any communication which was made to him was of such a n as to disclose the existence, or the intention to call into existence, any i transaction or preference. All that was disclosed to him was that an ar ment had been made with Mr Thomas. Mr Thomas himself intimates thi letter of the 9th December, in which he says that an arrangement has been

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under which he gives up his opposition, and in fact assents to the composition. The nature of the arrangement is not in any way explained. Now, if it could be said that no arrangement of any sort could be otherwise than illegal, and that this ought therefore to have aroused the trustee's suspicion, there might have been more in the argument; but I am afraid that is not so. The arrangement with Mr Thomas, that is to say, Mr Thomas's assent to what is proposed respecting him in the composition-contract, is not illegal. If Mr Thomas says, "I see what you propose in your composition-contract, and I do not object to let the composition-arrangement go through, and to vote for it, you and your cautioners undertaking, as I understand, that if I shall be able to establish my preference as good it shall be given effect to just the same as if the sequestration was still in existence," I have already said that I do not think that arrangement would be illegal, and therefore Mr Thomas's assent to that arrangement could not be illegal; and that anything more was done, I think, was not in any way communicated to the trustee. Upon the whole matter, I come to the conclusion, certainly with a feeling of great compassion for Mr Thomas, and with the natural reluctance which one must always feel to enforce a very severe penalty, but still I come to the conclusion, without much difficulty in point of law, that the Lord Ordinary's interlocutor is perfectly well founded in so far as he sustains the multiplepoinding and appoints the nominal raiser to lodge a condescendence of the fund *in medio*. The case has not yet proceeded further than that. What the amount of that fund will be, and what is precisely the meaning of the words in the section, "the amount of the debt of the colluding creditor," I do not at present inquire.

Lord Deas.—Whatever conclusion may be come to in this particular case it is quite necessary, for the sake of the law, to distinguish more clearly than the Lord Ordinary does in his note between this case and the case of M'Laren. Nobody doubted Mr M'Laren's good faith, but still he was in the position merely of an ordinary creditor, who did not even himself suppose that he was entitled to any preference. That was not the position of Mr Thomas. Mr Thomas had obtained a security over the machinery of the mill, which he seems to have helped the bankrupt, out of his own pocket, to purchase, and he *bona fide* believed that to be a good security; and he was advised by intelligent members of the legal profession that it was so. That contention, so long as it continued to be actively asserted, necessarily prevented the creditors from being able to wind up the estate. They might have got the machinery sold along with the mill with Mr Thomas's consent, which he was not unwilling to give; but they could not have divided the money so long as Mr Thomas was insisting upon that claim of preference, which might have been decided in this Court, and might have been carried to the House of Lords, and the dependence of which law-suit would necessarily have prevented the creditors from realising anything for years, and very likely prevented the possibility of any such composition-contract as that which has been entered into being carried through, or even proposed by the bankrupt. There is no reason to think that if there had been a law-suit of that kind in dependence the bankrupt could have produced the money to pay 6s. in the pound, or that he could have got even Mr Waddell,—an adventurous enough individual,—to become one of his cautioners for the composition. I have no doubt, therefore, that the creditors had a substantial interest and saw that they had a substantial interest in obtaining an arrangement with Mr Thomas, even at the expense of paying a considerable sum of money,—perhaps as much as £500,—to enable them to get 6s. a pound on their debts, which they never would have got otherwise; and in that point of view I rather suppose that the transaction, in its result, was not hostile to the interests of the creditors, but for their benefit. Now, in that state of matters it might be difficult to say how far even the trustee could have gone, of his own accord, under the powers conferred on him by the statute to enter into compromises, but most assuredly I agree in what I understand to be the opinion of your Lordship that there would have been no illegality whatever in the trustee and the creditors together agreeing to such an arrangement by which Mr Thomas's preferable claim was to be bought

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off. Moreover, I am humbly of opinion that it would not have invalidated that arrangement, in the least degree, although it had been stipulated, at the same time, that Mr Thomas was to consent to the composition-contract. It would necessarily have been a part of it, because if he did not consent to the composition contract the arrangement would not have been perfected, and it would not have suited the purpose for which it was intended. It is no doubt a very awkward part of that arrangement, that, while Mr Thomas considered his preferable security was to be bought off for £500, he was still to rank for the whole amount of his debts. But even that, if the creditors had agreed to it, might have been defended, for it only amounts to giving him a somewhat larger sum in a different shape. The additional composition he would have got in that way would not have come out of the funds comprehended under the sequestration. If any friend of the bankrupt chose to advance £500 to buy off Mr Thomas's preferable right, that was a thing for the benefit of the creditors, and not to their disadvantage. So that even that perhaps would not have tainted it with illegality, if the creditors had agreed to it. But the whole difficulty is, as your Lordship has pointed out, that we have no evidence, or at least no sufficient evidence, that the creditors did agree to it. I have no doubt that every word of the statement given by Mr Thomas in his deposition is quite correct, and that he was led to believe that the creditors were all desirous for it. I think he was incautious in not making sure, by evidence, that they had consented, or were approving of it, in a form that would bind them. He was incautious in that respect, but I have no doubt he believed that the creditors were all in favour of it, and it is not difficult to suppose that he believed that, for it probably was for the interest of the creditors, and if it had been fairly brought before them it is quite possible, and even probable, that they might have agreed to it. On the other hand, it is plain enough that Mr Waddell, in his evidence, hedges very much, and does not give the same candid statement of what took place which is given by Mr Thomas. In short, it appears that Mr Thomas has been made the victim of Mr Waddell and the bankrupt together; and, if that be so, we cannot help it; still Mr Thomas is not without a plausible case, because there is room for saying that the creditors, or such of them as were taking an active part in the sequestration, must have had a pretty shrewd notion that Mr Thomas's preferable claim was being bought off, and had been bought off. The correspondence shews that there was no secret made about it, and even the offer of composition itself indicates something of that kind, because it bears on the face of it that the bankrupt was to take the entire responsibility of the claims made by Mr Thomas against the estate; and coupling that with the preceding correspondence, and with the letters from Mr Thomas himself, it could hardly be supposed that it meant anything else than that it was understood that a sum of money was to be paid to Mr Thomas in order to get him to give up that preference. It is plain enough that he never indicated that he would give it up for nothing. He was standing out for a sum of money; and the terms of the contract of composition certainly indicate, or might have indicated, to anybody who read it, that in all probability some arrangement of that kind had been come to between them. But I agree with your Lordship that that is not sufficiently explicit to entitle us to go upon it in a question of this kind. If the agreement itself between Mr Thomas and Mr Waddell, on the part of whoever Waddell was acting for, had been embodied in that offer of composition, and so had been put before the creditors, I should have hesitated very much in coming to the conclusion that Mr Thomas was liable in any penalties in this action, because the creditors present at the meeting when the offer of composition was considered certainly could not have made any objection if they had seen the thing embodied in the offer itself, and I am not prepared to say that creditors like Sandeman, even supposing he did not know it, would be entitled, in the first place, to put the composition of 6s. in the pound, which they could not have got otherwise, into their pockets, and then over and above to challenge the transaction in the way done here. There is a great deal to say for this, that supposing a creditor at the meeting for accepting the composition saw on the face of the agreement embodied in it a thing which he was going to

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allenge, he ought to have challenged it before he took the composition; for was not fair to take advantage of the illegal contract, and then to come forard and claim this over and above. But, unfortunately for Mr Thomas, that not the state of the matter; because the bargain is not embodied in the offer composition; and it is not brought either before the trustee or before the editors in that distinct form which I think could alone have sanctioned an angement of this kind, but which I think, if that had been done, would have anctioned it. Therefore I am compelled, not very willingly, I confess, to come o the conclusion that the plea which is stated by Mr Thomas, and which has been argued before us, cannot be sustained. What the other creditors may say to this I do not know. I can only say for myself that if I were a creditor I should certainly not like any portion of that money to come into my pocket. It is an instance, and I am glad to say a very rare instance, in the administration of our law, where the law will give a party a title to money in a way which is dishonest; and I should hold it to be dishonest, if I were a creditor, to come forward and claim any advantage from the success of the plea which is here to be sustained. But that is a matter for the creditors themselves individually to consider. They may take a different view of it from what I do. But whatever view they may take of it, and whether they take advantage of it or not, I agree with your Lordship that we have no course open to us but to pronounce the judgment proposed.

Lord Ardmillan.—I must say that I do in this case regret being compelled to come to the conclusion that Mr Thomas has incurred the statutory penalties. But the decision here is unavoidable, for the decision in the House of Lords in the case of Carter v. M'Laren has taught us that, if the facts are proved, we have no discretion, but that the statute must be construed and applied with inflexible severity. So applying it, the result is here inevitable. I could have wished it otherwise. I cannot help saying that I think Mr Thomas was "more sinned against than sinning." I have great sympathy with him. But I have no alternative. The meaning of the letter of Mr Waddell of 9th September, written to Thomas by Waddell in concert with the bankrupt and Craig, as Waddell depones, is clear and beyond all doubt, and is an offer of a premium or bonus to secure accession to the bankrupt's discharge on composition. The offer was so understood, and was accepted and acted on according to its terms. Mr Thomas's accession was necessary to obtaining the discharge on composition, and that accession was obtained. The legal consequence under the statute of such an offer and such an acceptance is beyond question. It is almost impossible to suggest a reasonable doubt, and as was explained in the case of Carter v. M'Laren in the House of Lords, a Court of justice must assume knowledge of the law, and knowledge of the consequences of such a transaction. I do not see sufficient ground, or indeed any ground, for imputing to Mr Thomas fraud or corrupt intention, or even a desire to take an unfair advantage. But if the act complained of and proved is a violation of the statutory law, so as to incur the statutory penalty, we cannot avoid coming to that conclusion, and having reached it we cannot escape, and must not shrink, from imposing the penalty.

Mr Thomas held a security, and he honestly thought he had a preference. In this the case differs from the case of M'Laren. He stoutly maintained his preference, and seems to have been so advised. He agreed to surrender it for a consideration, and to accede to the composition. I give him credit for believing that he was doing no wrong. Had the transaction been made with the creditors, or sanctioned by the creditors, it would not have been illegal. Had the trustee been made aware of it, it would have been his duty to communicate it to the creditors, and I have no doubt he would have done so. But the serious point which I cannot get over is, that the creditors were not informed that this purchase was to be made, this bonus to be given, and that, in the letter of Mr Thomas to the trustee of 9th September 1867, just after the transaction and on the same day, he does not communicate to the trustee the terms or the particular nature of Waddell's letter and his own agreement, nor does he mention the promise of a sum of money payable on the discharge and contingent on the discharge of the

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bankrupt,—a sum promised and agreed to in order to facilitate the bankrupt's discharge.

I agree with your Lordship in holding that the reference to Thomas's claim in the offer of composition was not sufficient intimation to the creditors of this transaction. Nor is proof of any such intimation to be gathered from the subsequent correspondence. The fact that Mr Thomas did not send the letter to the trustee, or communicate to the trustee the promise, and the fact that, through Waddell as mandatary, and according to the agreement with Waddell, he voted on his whole claim without deducting the security, makes it too clear to need further remark that in regard to the trustee and creditors the agreement was "secret," and that between the bankrupt and Waddell and Mr Thomas it was collusive in relation to the creditors. That the bankrupt and Waddell meant, by the payment of £500, to secure the accession of Mr Thomas to the composition I have no doubt, and the transaction has been already found by the Court to be, as regards both parties, illegal.

I agree with the Lord Ordinary in thinking the testimony of Mr Waddell in this cause, and the conduct of Mr Waddell in the transaction, very unsatisfactory. But Mr Thomas was, to say the least, incautious and indiscreet, and the statutory penalty has been incurred.

A separate argument was ingeniously urged by Mr Asher, to the effect that since Waddell's promise to pay has been escaped from by him on the ground pleaded by himself that it was illegal and void, therefore it is not to be valued, and indeed has no appreciable value, as it was not fulfilled. This plea cannot possibly be sustained. The meaning of it is, that the more manifest the illegality of the proceedings the safer is the wrongdoer; that the transaction is so clearly illegal that the promise to pay is null and void, and therefore the penalty is escaped from. Not even the ability of my friend Mr Asher can make such an argument successful.

I am, though not without some regret, of the opinion expressed by your Lordship that we must apply the statute and enforce the penalty.

THE COURT pronounced this interlocutor:—"Adhere to the said interlocutors, and refuse the reclaiming note, and remit the cause to the Lord Ordinary to proceed further as may be just, with power to his Lordship to decern for the expenses hereinafter found due, when ascertained: Find the nominal raiser liable in additional expenses to the real raisers: Allow an account," &c.

HILL, REID, & DRUMMOND, W.S.—J. Y. PULLAR, S.S.C.—Agents.

No. 19.
Nov. 22, 1872.
Western Bank v. Baird's Trustees.

THE WESTERN BANK OF SCOTLAND AND ITS LIQUIDATORS, Pursuers.—*Millar—Shand—Balfour—Asher.*
BAIRD and OTHERS (William Baird's Trustees), Defenders.—*Lord-Adv. Young—Sol.-Gen. Clark—D.-F. Gordon—Watson—Lee.*

Joint Stock Company—Reparation—Director.—By the contract of copartnery of a joint stock banking company it was declared that no shareholder could be legally a director who resided permanently more than ten miles distant from the head office, and that a director ceased to be one, if he had not attended a meeting of directors for six months. In an action by the bank and its liquidators against a shareholder who had been elected and occasionally acted as a director for loss said to have been caused by his gross negligence, *held* that the defender, having assumed the position of a director, and acted as such, could not plead these clauses of the contract in bar of the action.

Joint Stock Company—Director—Reparation—Negligence—Personal Bar—Process.—In an action brought by a joint stock banking company and its liquidators against a person who had been a director for payment of £299,736, 7s. 6d. as "the amount of loss and damage due by the defender to the bank"

as at the date when he ceased to be a director (five years before the stoppage of the bank)— No. 19.

The pursuer alleged—that by the contract of copartnery it was the duty of the board of directors to superintend and control the manager in his management of the bank's affairs; that the defender had grossly neglected this duty—(1) during two years in which he attended the meetings of directors; and (2) during four years in which he did not attend them. Nov. 22, 1872. Western Bank v. Baird's Trustees.

That the defender—in the knowledge that the bank's affairs were in an embarrassed condition, owing to improper advances having been made by the manager, and in the knowledge that the manager was in the practice of making large advances from the bank's funds, in contravention of the provisions of the contract of copartnery, on open accounts, without security—had grossly neglected his duty along with his co-directors (1) In having allowed the manager, without control, to make such advances to certain persons, as shewn in the books of the bank, which were referred to *brevitatis causa;* (2) in having allowed the manager to make large advances by way of discount on bills to five firms whose circumstances were not such as to warrant their getting credit without security; (3) in allowing the bank's funds to be expended in payment of premiums on policies of insurances effected on the lives of certain debtors of the bank which had been sold by the liquidators at a loss to the bank.

That the whole of these advances were at the date when the defender ceased to be a director irrecoverable to the extent of the sum sued for, but the books of the bank referred to as shewing the advances on accounts-current during the defender's tenure of office shewed further that the bank had subsequently made large additional advances on some of these accounts, and the pursuer admitted that he had stated the loss on these earlier advances at the percentage of loss which the bank had sustained upon the whole account. The books further shewed that the whole of the bills discounted for the five firms had been retired after the defender had left office, either by renewals or by cash payments.

Held (1) that the books of the bank referred to in the summons were to be regarded as part of the pursuer's statement; (2) that with regard to the alleged loss by advances on accounts-current which were closed at the time when the defender ceased to be a director the pursuer had set forth a case sufficiently relevant to be admitted to probation; (3) that the defender could not be made liable for loss on advances on accounts-current to those persons to whom the bank had continued to make advances after the defender had left office, and further, that the pursuer had not made a relevant averment of the loss on these earlier advances; (4) that any liability which the defender might have incurred in allowing the advances by way of discounts on bills had been extinguished by the subsequent actings of the bank in renewing the bills and in making new advances; (5) that any liability for loss by the insurance policies had been extinguished by the sale of the policies by the bank, without notice to the defender; (6) that as the summons, with the books referred to in it, disclosed facts which excluded the action *quoad* the last three items the proper form of interlocutor was one dismissing the action to that extent.

Ante, vol. iv. 1071; and H. L. vol. v. 93. 2D DIVISION. Ld. Kinloch. I.

The late William Baird of Elie was a director of the Western Bank of Scotland, a joint stock banking company, from June 1846 to June 1852.

The bank stopped payment in 1857, and was wound up under the Winding-up Acts. In 1859 the liquidators brought an action against Mr Baird and his co-directors, founded on alternative allegations of joint fraud or joint negligence. Certain of the directors compromised this action and were assoilzied. The case was subsequently insisted in against Mr William Baird and his brother Mr James Baird, but was afterwards abandoned under the statute.

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The present action was brought in 1863 in name of the bank and i liquidators, against Mr William Baird alone, a separate action bei brought against Mr James Baird.

The summons concluded for payment of "£299,736, 7s. 6d., or of suc other sum, more or less, as shall be found in the course of the process t follow hereon to be the amount of loss and damage due by the defend as at 23d June 1852 (the date at which Mr Baird cased to be a directo or from such other date as may be fixed in the course of the said proces The said sum consisted of (1) advances to customers on open accou £132,670, 3s. 2d.; (2) discounts on bills of exchange, £151,574, 11s. 8d and (3) payments for premiums on policies of insurance opened by th bank on the lives of certain of their debtors, £15,491, 12s. 8d.

The action was founded on the gross negligence of Mr Baird ind vidually, or the gross negligence of him and his co-directors.

The following pleas stated for the defenders were first dealt with:- 1. The pursuers have no title to sue. 2. Having regard to the charact and nature of the former action raised at the instance of the Weste Bank and the liquidators of the said bank, and the grounds thereof, th compromises or settlements, discharges, and decree of absolvitor refer to in the preceding statement amount in law to a compromise or settl ment and discharge of the whole claims made in the present action, a the same cannot now be insisted in or maintained to any extent or effe against the defenders. *Separatim*, The action cannot be maintained, b cause by the said compromises or settlements, discharges, and decree absolvitor the pursuers have extinguished or prejudiced the claims relief otherwise competent to the defender.

The Lord Ordinary (Kinloch) pronounced this interlocutor:—"Repe the objection to the title to sue set forth in the first plea in defence stat in the closed record: Repels also the defence founded on the compromi and discharge engaged in with the other directors, set forth in the seco plea in defence: Finds the action relevantly laid, in so far as founded an allegation of gross neglect in duty on the part of the late Willi Baird, and the other directors of the Western Bank in office along wi him, and repels the objection to relevancy in so far as directed agai the case stated under the second plea in law for the pursuers set forth the closed record; but finds the action not relevantly laid, in so far founded on an allegation of individual negligence on Mr Baird's pa giving rise to the loss complained of, and sustains the objection to re vancy in so far as directed against the case stated under the first plea i the pursuers in the said closed record; and appoints the pursuers to lod within six days, the issue or issues which they propose for the trial of t case, as stated under the said second plea in law."

Both parties reclaimed, and on 10th July 1866 the Court pronounc this interlocutor:—"The Lords having heard counsel on the reclaimi notes for both parties against Lord Kinloch's interlocutor of 1st Decemb 1865, adhere to the said interlocutor in so far as it repels the objection the title to sue stated in the first plea for the defenders, and to th extent and effect refuse the prayer of the reclaiming note for the d fenders; *quoad ultra* recal *in hoc statu* the interlocutor reclaimed agains Find that the compromises, discharges, and decree of absolvitor refer to in the second plea for the defenders do not preclude the pursuers fro insisting in their claim against the defenders as stated in the summo and record: Therefore repel the said second plea for the defenders in bo its branches, in so far as it is stated *in limine* as a bar to the actio Before further answer as to the whole other pleas of the parties *hinc in* remit to Mr Charles Pearson, accountant in Edinburgh, to examine th

books and relative documents of the Western Bank, and (1) To report the commencement, progress, and final termination of each of the accounts mentioned in the schedule A, appended to the record; what securities, if any, the bank held at any time for the advances made on the said accounts; what was the balance, if any, at the debit of each of said accounts, as at the 23d June 1852; what payments were after that date received to the credit of each of the said accounts, and (so far as the books shew), from what sources these payments were received by the bank, or made by the customers, debtors in the said accounts, or any persons on their behalf; and further, what was the lowest balance at the debit of each of the said accounts at any time after 23d June 1852, and whether after said date the balances were ever shifted, and to what extent, to the credit side of any of the said accounts: (2) To report what was the amount of bills which had been discounted to each of the firms mentioned in the 35th article of the condescendence, and were unretired at 24th June 1846; to prepare and report a descriptive list of the bills discounted to each of the said firms between 24th June 1846 and 23d June 1852, shewing whether, when, and how these bills were retired, at or after maturity; what bills discounted to each of the said firms were unretired at 23d June 1852, and whether, when, and how the said last-mentioned bills were retired: (3) To report what policies (if any) the bank held on the lives of debtors to the bank at or prior to 1846; what policies on lives of the bank's debtors were subsequently opened by the bank; what were the premiums payable and paid on each of said policies, and what was the ultimate result of each of such insurances: Further, authorise the accountant to report any other matter appearing in the books of the bank fairly falling within the general scope of this remit, which either party may request him to report."

This judgment was appealed, without leave of the Court of Session, to the House of Lords, but the appeal was dismissed.—(*Ante*, vol. v. H. L. p. 93.)

The case now came up on the accountant's report, and on the 2d and other pleas for the defenders;—2. (quoted above). 3. The late William Baird was never legally elected a director of the bank, nor entitled to hold office as such during any part of the period libelled, and his representatives are not responsible for any transactions, except those of which he was personally cognisant, and in which he took part. 4. The said William Baird was not responsible for any transactions which took place subsequently to May 1848, nor for any losses which arose on those transactions. 5. The claim made in the present action is excluded by the 31st section of the contract of copartnery, (which was as follows:—"The said ordinary board of directors shall not be liable for omissions, nor shall they, nor the manager, cashier, or other officer be liable for the responsibility of persons dealing with the company, nor for the sufficiency of the securities or properties in which the funds of the company may be invested as aforesaid; nor shall the said directors be liable for the acts and intromissions of the manager or other officers of the company appointed or to be appointed as aforesaid, or of any other person entrusted with the business of the company, nor shall they be liable *in solidum*, nor for the intromissions of each other, but each of them for his own actings and intromissions allenarly.")

Besides general pleas against the relevancy of the action, the defenders further pleaded;—6. The claims of the pursuers under the present action are excluded (1) by mora, and (2) by acquiescence and adoption. 9. The defenders are entitled to absolvitor, or the action should be dismissed, in respect, (1) that there is no specification of the advances through which

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loss is said to have been sustained; (2) that there is no allegation tha such advances were made by the late Mr Baird, or with his knowledge (3) that there is no specification, or at least no sufficient specification, o the alleged losses, or of the cause of these losses; (4) that there is n relevant allegation of any gross negligence on the part of the late M Baird; and (5) that there is no relevant allegation that the alleged losse were caused by any such negligence. 10. The defenders are entitled t absolvitor, or the action ought to be dismissed, in respect the loss an damage alleged were not occasioned, and are not by the pursuers rele vantly or sufficiently averred to have been occasioned, by the late M Baird, or by any person for whom he was in law responsible. 11. Th sums credited in the accounts of the respective persons or companies an firms mentioned in the condescendence and schedules fall to be imputed in extinction of sums debited therein in the order of their dates. 12 The averments of the pursuers being contradicted by the books of th bank, the defenders are entitled to absolvitor.

The 3d and 4th pleas were rested upon averments that by the contrac of copartnery it was provided that no person was qualified to be electe or to serve as an ordinary director of the bank who should permanentl reside at a greater distance than ten miles from Glasgow; and that a soon as a director should become disqualified in this or any other wa his appointment was *ipso facto* to cease, and his place to becom vacant. Also that by the contract it was provided that a director shoul be disqualified by refusing or neglecting to attend the meetings of the boar for six months without sufficient cause assigned to the satisfaction of hi co-directors; that Mr William Baird had permanently resided during th whole period of his alleged tenure of office at Rosemount, Ayrshire, abou forty miles distant from Glasgow; and farther—(Stat. 10) "Between Jun 1846 and May 1848 Mr Baird attended meetings of the directors of th bank as regularly as his engagements and the distance of his residen from Glasgow would permit. The last meeting of the board attended b Mr Baird was on the 31st day of May 1848. Thereafter he never attend any meeting, or took part in any of the proceedings of the board of dire tors, or acted in any way in the affairs of the bank. On 30th Novemb 1848 the space of six successive calendar months elapsed during whi Mr Baird did not attend any meeting of the board of directors, and th without any cause for this being assigned to his co-directors, and at th time, under the contract, his place became vacant, and he ceased to be director, if he ever was one. Further, on or about the said 31st day May 1848 Mr Baird informed Mr Smith, the company's manager, th he (Mr Baird) was no longer to attend any meetings of the board, or take any part in its proceedings, and thereafter no notices of any mee ings were sent to him. It was not usual to send to the directors noti of the ordinary weekly meetings, but notice of all special meetings w sent to the directors. During the period between June 1848 and Jun 1852 many special meetings of directors were held, but no notice of an of these was given to Mr Baird."

The pursuers stated;—(Cond. 8) "The committee of management, ordinary board of directors appointed by the contract, and those to b appointed thereafter in terms thereof, were thereby 'authorised and em powered to superintend, direct, manage, and transact the whole busine and concerns of the company, and to carry on the business of banking fo behoof of the company, in all its branches, as above specified.'" (Con 10) "The ordinary board of directors was by the contract authorised t give credit on cash accounts to the partners of the company, to the exte or amount of one-half of their advanced stock, and to such further exte

as the circumstances of the company and the current value of the stock might seem to warrant, without any further or collateral security but that arising from the right of retention competent to the company, and assignation in security thereinafter contained, and the contract prescribed the form of application to be made by partners of the company for credit on said cash accounts. It was further by the contract declared that it should not be in the power of the directors to grant a cash-credit or account to any other person or persons than a partner of the company, unless on bond with security, real or personal, to their satisfaction; that if such credits were granted on personal bond there should be at least two securities or cautioners besides the principal party, who should all be taken bound, conjunctly and severally, as co-principals, for the amount to be drawn in virtue of such cash-credit, ... "

They further stated that Mr Baird was an ordinary director from June 1839 to June 1845, and from June 1846 to June 1852. (Cond. 29) "Notwithstanding the said William Baird's knowledge of the embarrassed position and circumstances of the bank, and of the necessity for diligent superintendence of its affairs, and a careful control of the advances of its funds, he, during the period between 24th June 1846 and 23d June 1852, when he held the office of a member of the ordinary board of directors and committee of management as aforesaid, grossly neglected his duties. He failed, during that period, to superintend and control the bank's business and affairs, and particularly the advances of the bank's funds. Ordinary meetings of the board were held at the bank's office in Glasgow once weekly or thereby, in nominal compliance with the provisions of the contract; and during the two years from June 1846 to June 1848 the said William Baird attended a number of these meetings. At these meetings, however, he failed to perform the duties of superintendence and management which he had undertaken. At such meetings there was no inquiry or investigation made, or information required and obtained, in reference to the advances of the bank's funds which were from time to time applied for, and were in course of being made at the head office and at the branches, or in reference to the circumstances and credit of persons applying for and obtaining advances, and the security to be obtained therefor. With the knowledge of the said William Baird, Mr Donald Smith, the manager of the bank, was allowed, without control, systematically to make advances at his own discretion, and that without security, or upon such security as he thought fit. Subsequently to June 1848 the said William Baird attended no meeting of the board, and during the whole period from June 1846 to June 1852 he did not attend any meeting of any committee of the directors." (Cond. 30) "The other members of the board in office with the said William Baird also grossly neglected their duties during the said period, and failed to superintend and control the bank's business and affairs, and particularly the advances of the bank's funds. The ordinary weekly meetings of the board of directors were held at the head office of the bank in Glasgow on Tuesdays at three o'clock, and were of short duration. The various members of the ordinary board of directors in office with the said William Baird attended, with more or less frequency, a number of these weekly meetings, held during the said period. Meetings of committees were also held during the same period at irregular and distant intervals, and were attended by certain of the directors other than the said William Baird. The ordinary directors, however, including the said William Baird, did not at the weekly meetings of the board, or at the committee meetings so held, superintend, direct, or control the bank's business and affairs or the advances of the bank's funds. *They did not* consider or judge of the

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applications made for advances of the bank's funds; they did not examine or judge of the bills given in for discount; they did not make inquiry as to the character, or credit, or commercial standing of persons receiving advances from the bank or of the obligants on bills discounted by the bank, and they did not see that such inquiry was made by others, nor had they information before them in regard thereto. With the knowledge of all the members of the ordinary board of directors, including the said William Baird, the manager of the bank was allowed systematically, without control, and without previous communication with the directors, or with any committee of their number, to employ the bank's funds at his own discretion, in making advances of such amounts, and on such security, or without security, as he thought fit. In like manner there was no superintendence or control by the directors of advances made at the bank's branches such as the contract required, although information as to the advances then made, and in the course of being made, was from time to time communicated by the bank's agents to the manager. This information was not communicated to the directors, who did not require such information to be laid before them, and did not investigate, check, or control these advances. The manager was left to act according to his own will and pleasure with regard to the advances made at the branches and the instructions given to the agents at the branches; and he made, or allowed advances there, with or without security, as he thought fit. Under this general system, and in this way, the advances after-mentioned in articles 32 to 39 inclusive were made." (Cond. 31) "The members of the said ordinary board during the said period did not, at said weekly meetings or otherwise, require from the manager information as to the persons to whom, or the security upon which, the bank's funds had been advanced by him. Of the advances made on current accounts, amounting at the head office alone to about £1,500,000, they had no statement or account laid before them. Of the bills under discount at the head office amounting at June 1852 to above £2,400,000, they had no statement or account submitted to them shewing the amount under discount to different customers of the bank, nor had they before them the information necessary to enable them to judge of the propriety of making further and continued discounts to customers to whom they were already largely in advance on bills discounted. The books of the bank were readily accessible, and would have shewn to whom the bank's funds had been advanced, and the amounts advanced to each customer, and the security, if any, taken therefor, and the members of the board knew this. But they, including the said William Baird, grossly and culpably neglected to examine these books, or to require that abstracts thereof, containing the information necessary to enable them to judge of the propriety of the actings of the manager in making advances at the head office, or in making or allowing advances at the branches, should be furnished to them. They, including the said William Baird, through gross neglect, remained in culpable ignorance of the actings of the manager of the bank in reference to the advances of the bank's funds; and notwithstanding their being aware that advances of the bank's funds were being constantly applied for and made to a very large amount, they suffered the advances to be given at the will and pleasure of the manager, for whose guidance no rules or limits of advances were prescribed, and who was left uncontrolled in all his operations. The said William Baird was aware that during the said period the business of the bank was carried on on the system above set forth, and that the advances of the bank's funds were made systematically without superintendence or control by the directors."

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Advances on Current Accounts.—(Cond. 32) "During the period from th June 1846 to 23d June 1852 advances of the bank's funds were made, der the system above explained, to a number of persons and companies, the head office and at the branches, without supervision and control on e part of the said William Baird and the other directors, and with a gross d reckless disregard of ordinary prudence, and of the ordinary rules and actice of banking; and the bank has thereby sustained serious loss. ch advances were made simply on cheques or drafts on the bank by the rties receiving the money. (1) A number of these parties, not partners the bank, without having provided any security other than their own rsonal obligations for repayment of the advances obtained (constituted y their cheques or drafts), were allowed to operate on current accounts hich were opened in their names in the books of the bank, in which ccounts were entered to their debit the amount of the advances made on their drafts, and to their credit any payments which they made from time to time. These accounts, in most instances, contained a large number of operations, but in all shewed balances due to the bank varying in amount. In many instances the accounts commenced with an entry to the debit of the party on an opening advance made by the bank, and thereafter further increasing advances, without security, were from time to time given. In others, the party originally deposited funds on an open account, and for a time the balance remained due by the bank; but these parties, after drawing out the amount of their deposits, were allowed, without security, to draw sums from the bank, and the advances thus made in many instances gradually increased to a large amount. (2) In the same way parties who were partners of the bank, and whose shares were regarded as security for advances, or who had provided other securities also, were allowed, under the system pursued, to draw large additional sums on their cheques or drafts after the utmost market value of their stock, and of any such securities, had been exhausted by prior advances, and that without providing any security for such sums. (3) And, in like manner, parties who were not partners of the bank, and who had originally provided securities of a value which was plainly exhausted by the advances made to them, were thereafter allowed to draw large sums on their own cheques or drafts, and on similar current accounts, without providing any security for such sums. The advances made as aforesaid in each of the three cases above mentioned were not of the nature of casual or temporary over-drafts made for a limited time and for some special purpose, but were made as a system, on operative cash accounts, with balances fluctuating in amount, but uniformly and for years exhibiting large and increasing sums due to the bank. Although, in most instances, no prescribed amount was named up to which it was agreed the party might draw, as in an ordinary cash-credit account, yet practically the persons and companies in whose names current accounts were opened and kept as above mentioned passed cheques and drafts, and operated on these accounts as if cash-credit accounts had been granted in terms of the contract of copartnery, without a prescribed limit having been fixed. The provisions of the contract of copartnery with reference to cash-credits or accounts were systematically disregarded."

(Cond. 33) "During the said period, and under the system above set orth, advances, without security for repayment thereof, were made to the ersons and companies mentioned in the schedule A hereunto annexed, nd that of the amounts, or not less than the amounts, respectively therein et forth.* The particulars of these advances, with the dates of advance,

* Schedule A set forth the names of thirty debtors of the bank, giving, with

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are contained in the current accounts, of the nature above referred to kept in the names of these parties in the books of the bank for said period, and to which, *brevitatis causa*, reference is here made. In said schedule the three different classes of cases above mentioned are separated and distinguished, and such of the persons obtaining these advances as were partners of the bank, or had given any securities to the bank, are therein specified." (Cond. 34) "The advances mentioned in the preceding article have in great part proved irrecoverable, and have been lost to the bank. The portions of said advances which have proved irrecoverable and have been lost are also set forth in the said schedule A. At the close of the said period, ending at 23d June 1852, the said advances, to the extent set forth in said schedule, were irrecoverable."

[With reference to the averments in the last two articles, the defenders stated—(Stat. 21) "The manner in which the pursuers bring out an estimate of the loss alleged by them to have arisen during the years from 24th June 1848 to 23d June 1852, upon the accounts of the persons or firms mentioned in schedule A, is as follows:—The loss ultimately arising upon each of these accounts at the stoppage of the bank is distributed out of the period during which the corresponding account was in operation, according to the number of years and in proportion to the respective amounts alleged to have been advanced in each year. The proportions of ultimate loss so calculated are alleged to be the loss incurred on advances to the said persons or firms during the several years respectively. The schedule A annexed to the revised condescendence is framed on this principle. If the pursuers do not admit this, they are called upon to specify the modes by which the accounts of the said losses have been brought out and estimated." And the pursuers answered,—(Ans. 21) "Admitted only that the recoveries on account of the debts due by the different debtors mentioned in schedule A are placed generally to the credit of the accounts of these debtors, so as to extinguish to the extent of such recoveries the total amount of these debts. The unrecovered balances have been lost to the bank, and the sums under the head 'irrecoverable' in said schedule are the portions of the advances mentioned in said schedule made between 24th June 1846 and 23d June 1852, which remain due after crediting so much of the total recoveries as effeirs to the advances. Thus, for instance if unsecured advances, say of £20,000, were made before 24th June 1846 and between 24th June 1846 and 23d June 1852, farther and additional unsecured and illegal advances were made to the extent of £20,000, and a still farther unsecured additional advance of the same amount was made subsequently, and before the stoppage of the bank, so that at that date a total debt of £60,000 was due; the recoveries, so far as not derived from securities, are applied to reduce the total debts,—that is, equally distributed over the whole advances, so that, in the case supposed, one-third of the total recoveries is credited to the advance of £20,000 made during the period between 1846 and 1852, and the irrecoverable and unrecovered

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reference to each of their accounts, in separate columns—(1) Balance at 24th June 1846; (2) Balance at 23d June 1852, or at earlier date when account became dormant; (3) Advances made betwixt 24th June 1846 and 23d June 1852; (4) Value of shares of the bank and other securities so far as not applicable to balance at 24th June 1846; (5) Balance of unsecured advances; (6) Irrecoverable. The total amounts brought out under each of these columns were as follow:—(1) £58,532, 7s. 1d.; (2) £269,557, 14s. 1d.; (3) £211,025, 7s.; (4) £26,059, 17s. 4d.; (5) £184,965, 9s. 8d.; (6) £132,670, 3s. 2d.

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ice is entered under the head 'irrecoverable' in the schedule. To other effect denied."]

counts of Bills.—(Cond. 35) "Under the system of management e bank pursued as above explained, the manager of the bank was red, without control, to judge as to the propriety of making advances ay of discount of bills presented to the bank, and advances were e by him in this way with great recklessness and gross imprudence; the result was, that serious loss and damage was sustained by the t. In particular, during the period between 24th June 1846 and 23d e 1852 such advances of very large amount were made, to the loss damage of the bank, to five firms carrying on business in Glasgow, ely, D. and J. Macdonald and Co., &c. The amount under discount hese five firms respectively, at 24th June 1846 and at 23d June 1852 pectively, was as follows:—

	1846.	1852.	Increase of Discount.
& J. Macdonald & Co.,	£19,866 9 6	£110,216 17 2	£90,350 7 8
. . . . .	. . . . .	. . . . .	. . . . .
	£47,820 0 11	£341,829 14 10	£294,009 13 11

ring the said period, between 24th June 1846 and 23d June 1852, en the said William Baird held office, fresh advances by way of disnts were thus made to these five firms, to the extent of £294,009, . 11d. The same system continued down to the period when the bank pped payment. The amount of discounts having been still further reased, it was found in November 1857, when the discounts ceased, t the bank was under advance to these five firms to the extent of ,476,891, 16s. 11d., or thereby, which nearly equalled the whole adnced capital stock of the bank. Of that amount there was lost to the nk not less than £805,096, 2s. 2d. Although, after June 1852, the counts were continued, and new bills were discounted to replace the ls falling due from time to time, the total amount of discounts was ver diminished, but, on the contrary, was largely increased. The total vance made prior to 23d June 1852 was thus not really repaid. A ge portion of the bills discounted to Macdonald and Co., J. and W. allace, and William Smith and Co. was retired with money provided by ese firms, who obtained the funds from the bank by discounting new ls, which were accommodation bills, not representing real transactions, d were drawn for the purpose of meeting and replacing the old bills, d farther additional advances were made down to the stoppage of the nk. The amount advanced during the said period, by way of discount, the said five firms was, at the close of the said period, irrecoverable to extent of not less than the ultimate loss after mentioned; and, had bank then ceased its advances the said firms must have thereupon pped payment. As soon as the bank intimated that these discounts st cease these five firms stopped payment, and announced themselves be bankrupt. Of the foresaid increased advance on discounts, amount- to £294,009, 13s. 11d., there has been lost to the bank, after crediting recoveries which the liquidators have been able, or expect to make, a of not less than £151,574, 11s. 8d. These five firms became bankt in the end of 1857."

With reference to the bills the defenders averred,—(Stat. 23) "It ears from the books and papers of the bank now in possession of the suers that the whole of the said bills were retired." (Stat. 24) "The le of the said bills are entered in the said books and papers as paid. counter statement is denied." (Ans. 23 and 24) "The books and ers of the bank are referred to. *And it is* admitted that the books

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contain credit entries of apparent payments of, or on account of, the great proportion of the said bills; but this admission is made subject to the statement and qualification that the sums credited in these entries were not truly repayments to the bank by the debtors of the sums which had been advanced by the bank on the discount of the said bills, but were merely the proceeds of new bills discounted by the bank to the said firms for the purpose of replacing the bills falling due. From time to time, as the bills referred to in the condescendence to which these firms were parties fell due, they provided themselves with the means of meeting these bills by bringing new bills to the bank for discount and discounting the same; or if the bank had not discounted these new bills, and so themselves furnished the means of retiring the bills of these firms falling due, the bills so falling due would have been dishonoured, and loss thereon to the amount of not less than the sum sued for on this account would certainly have been sustained. *Quoad ultra* denied." (Stat 25) "The whole of the said bills were given up by the said bank, and were given up as the same were respectively retired. At the time when the bank stopped payment they held no bill to which the said firms or any of them were parties, which was discounted between 24th June 1846 and 23d June 1852." (Ans. 25) "Admitted that the bills here referred to were given up on being replaced by other bills, under the system explained in the condescendence. *Quoad ultra* denied."]

Policies of Insurance. — (Cond. 38) "During the said period, between 24th June 1846 and 23d June 1852, under the system of management of the bank's business above explained, illegal and unauthorised advances of the bank's funds were made in the payment of premiums of insurance, and considerable loss and damage was thereby caused to the bank. . . ." (Cond. 40) "These policies were opened by the manager of the bank in the knowledge that none of the parties whose lives were insured were able or liable to pay the premiums of insurance. The bank undertook the payment thereof, and that without obtaining any security, or any obligation either expressed or implied by any person whatever, for repayment thereof. The insurances were simply a speculation on the lives of Scarth, Scott, and Cranstoun. Such transactions on the part of the bank, in the absence of security of any kind, real or personal, for repayment of the premiums, were illegal, reckless, grossly imprudent, and contrary to any known rules or practice of bankers. During the period down to June 1852 advances of the bank's funds, by annual payments of premiums on the said policies, were made to the amount of £23,854, 1s. 8d. The policies were kept up until the stoppage of the bank without the knowledge of the shareholders, and were surrendered by the liquidators of the bank, who found, after inquiry, that to keep them up longer would only have occasioned farther loss. The amounts advanced, as above mentioned, during the period between 24th June 1846 and 23d June 1852, and the losses sustained by the bank in consequence thereof, are as follows," &c. "This loss of £15,491, 12s. 8d. was truly incurred at 23d June 1852, and would have been ascertained had the policies been then realised, either by sale or surrender."

(Cond. 41) "The loss and damage sustained by the bank, in respect of the advances made as above set forth, during the period from 24th June 1846 to 23d June 1852, amounted, as at 23d June 1852, to not less than £299,700, or thereby." (Cond. 43) "At the period of the stoppage of the bank the losses which the company had sustained, in addition to the loss of the entire capital, amounted to £1,500,000 or thereby. To meet these losses the liquidators of the bank were compelled to make large calls on the shareholders. On the 8th of February 1858 they made a call of £25

er share, payable by two equal instalments on 1st March and 1st June 858. On the 4th October 1858 they made a further call of £100 per hare, payable on 1st November 1858. The said calls have been paid to e extent of £1,989,707, 6s. 2d."

The pursuers argued;—Directors of a bank were liable for loss caused y gross negligence.[1] No part of the case could be disposed of on the parial investigation made by the accountant. The pursuers were entitled to ound on the accounts as they stood at 1852, when Mr Baird ceased to be a director. It was for the defenders to shew that the loss then occasioned by his negligence had been wiped off. The bank, however, undertook to prove that nothing further could have been recovered in 1852 than was subsequently recovered and credited. The case of Devayne[2] did not apply —(1) because the monies paid in to the credit of the accounts were specially appropriated, being paid to meet obligations becoming due a day or two after the payments; and (2) because they were not the monies of the debtor, but of the bank, obtained through discounting bills which ought not to have been discounted. If the principle of Devayne was held to apply, it would simply come to this, that a director was safe, however reckless or negligent, if he only saw that an equally reckless and negligent director succeeded him. It was not for the pursuers to state the mode of fixing the damage. It was for the Court to direct the jury on that point.[3] All that the pursuers required to state they had done. The defender was grossly negligent. By his negligence the monies of the bank were spent when they ought not, and loss ensued.

The defenders argued;—The Court must deal with the action as if the bank was the sole pursuer. The liquidators had no right which the bank would not have had.[4] From 1852 no higher liability could attach to Mr Baird than that of a cautioner for the persons to whom the advances were made, and his case was that the principal debtors were freed by payment. The balances were brought out daily, and at a certain date were wiped off. Again, the directors were simple mandataries, and there was no higher obligation on mandataries who were *socii* than on those who were not. The action was for breach of the contract of mandate, not of *societas*. The change of the debt or the debtor therefore operated as a discharge, and the discharge to the other directors discharged Mr Baird. That point was not previously decided. It was specially reserved. In cases of negligence there was relief between co-defenders, and Mr Baird's relief having been taken away, he was free. Mr Baird was disqualified from being a director by the terms of the contract. He was never legally a director, having always resided more than ten miles from Glasgow. He could not therefore be sued as a director,—at all events, not subsequently to 1848, having then ceased to be legally a director by not having attended a meeting of directors for six months. The pursuers' statements were irrelevant on all the three branches sued on. They said it was enough for them to state that loss had been sustained in 1852; it was for Mr Baird to shew that this loss was subsequently paid up. That was not so. It was for them to state and prove the loss at the date of the action. At farthest, Mr Baird could only be liable for

[1] Turquand v. Marshall, Feb. 11, 1869, 4 Ch. App. 376; Joint Stock Discount Co. v. Brown, July 5, 1869, 8 Eq. Cases, 381; Gray v. Lewis, Feb. 17, 1868, 8 Eq. Cases, 526.

[2] Devayne v. Noble, July 15, 1866, 1 Merivale, 608.

[3] Campbell v. Clason, Dec. 20, 1838, 1 D. 270; Balmanno v. Macnee, Feb. 24, 1826, 2 W. and S. 7.

[4] Jamieson v. Waterhouse, May 24, 1870, *ante*, vol. viii., H. L. 88.

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one-sixth of the loss, the bank having discharged five out of six directors. If the bank now obtained decree in terms of the conclusions of the present summons they would make a profit, having already obtained payment of so much of the loss from the other directors. *Advances on current accounts.*—There was one of these features in each of the accounts—(1) The conversion of a debit balance of 1852 into a credit, though again turned to a debit before the stoppage of the bank; (2) The reduction of the debit balance of 1852, though again increased before the stoppage of the bank; or, (3) The increase of the debit balance of 1852, without its ever having been brought below that balance, but larger payments in whole having been made than the sum due in 1852. In any of these circumstances Mr Baird was free.[1] *Discounts of bills.*—The accountant had not implemented the remit as to these. He had not brought out that the bills due at the stoppage of the bank were renewals of those in 1852. At all events there was novation. *Policies of insurance.*—The only averment was, that Mr Baird allowed the manager to do what he pleased. It was not averred that the bank or the manager was speculating in life policies. The policies having been surrendered by the liquidators without communicating with Mr Baird, he was relieved from any claim for loss alleged to have been incurred through them.

At advising,—

LORD JUSTICE-CLERK.—I shall preface my remarks on this anxious and important case by a short summary of the previous procedure.

The Western Bank stopped payment in 1857, and has since been registered and wound up under the Winding-up Acts. All its debts have been paid, although at great loss to the shareholders; and the present action is the second which has been raised at the instance of the liquidators against persons who had held the office of directors of the bank to make good the losses, or part of them, which the bank sustained.

The proceedings against William Baird, whose representatives are now the defenders in this suit, commenced by an action raised in 1859 by the liquidators of the bank against him and other parties who had been directors of the bank, founded on charges rested on alternative allegations of joint fraud and joint negligence on the part of these directors in the conduct of the affairs of the bank, and concluding against them for sums said to have been lost through their delinquency, to a very large amount. In the progress of that action, after some important legal questions had been the subject of decision or observation by the Court, certain of the defenders compromised the action by payment of a considerable sum, and they were assoilzied. When the case came to be pressed against the only two defenders who remained in the process—viz. William Baird and his brother James Baird—after opinions on the relevancy of the action had been delivered by your Lordships of the Second Division, the case was abandoned under the provisions of the Act of Parliament, and the present action was brought against William Baird, who had been a director from June 1846 to June 1852, and a separate action against James Baird, who was a director from 1852 to 1856. Although these proceedings terminated in no practical result, and although the legal questions involved in the present case are presented in a form in some respects materially different from that which they assumed in the former action, the views elicited from the bench in that case are in many respects exceedingly important in the judgment we are now to pronounce, and may save me the necessity of lengthened exposition.

The present action is directed against William Baird alone. Its object is to recover from him certain sums of money, very distinctly specified, which are

[1] Devayne v. Noble, *supra;* Speirs v. Houston, May 22, 1829, 3 W. and S. 392; Christie v. Royal Bank, April 6, 1841, 2 Rob. App. 212; Lang v. Brown, Dec. 2, 1859, 22 D. 113; Pemberton v. Oakes, Nov. 20, 1827, 4 Russel, 168.

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o have been improperly advanced from the bank's funds during the period June 1846 to June 1852. The allegations of fraud have been abandoned, he present suit is laid entirely on the alternative allegation that these sums lost either through the gross negligence of William Baird himself individ-y, or through the gross negligence of himself and of his other co-directors, discharge of the duties of the office.

e sums which are concluded for are classed under three branches:—Sums ced to customers on open account; sums advanced by way of discount on of exchange; and sums expended in the payment of premiums on policies surance, opened by the bank on the lives of certain of their debtors. The nt concluded for under the first head is £132,670, 3s. 2d.; under the d head £151,574, 11s. 8d.; and under the third head £15,491, 12s. 8d. needless to say that, whether as regards the importance of the legal princi-involved, or the pecuniary interests at stake, the case is of the deepest im-nce, and deserves, as it has received, most anxious consideration.

his action was raised in 1863. The first occasion on which it came before Division of the Court was on a question relative to the obligation of the suers to produce the books of the company, which contained the accounts on ch the pursuers founded. The Lord Ordinary found that they were not ed to produce them; but the Court altered his judgment, and the books e ordered to be produced. Your Lordships, and the Lord Justice-General o then presided in this Division, held that the books were founded on in the rd "as absolutely essential to the pursuers' case." The books, accordingly, e produced, and the case having been sent back to the Lord Ordinary, he, on 1st of December 1865, pronounced an interlocutor, in which he sustained title to sue, repelled a defence founded on the compromise and discharge h the other directors, found the action relevant in so far as regarded the alle-ion of gross neglect of duty on the part of William Baird, along with similar ligence on the part of the other directors, but assoilzied him as regarded the gations founded on his own individual negligence.

This interlocutor came by reclaiming note before this Division of the Court, l the judgment then pronounced must be carefully attended to. In the first ce, the Court sustained the title of the pursuers, adhering to the judgment of Lord Ordinary in that respect. It is not unimportant to observe the views law on which the title was thus sustained. A similar question had arisen in former action. It was maintained on the part of the defenders in that case t the claim was not a company debt, and therefore could not be insisted in the liquidators, but was one which individual shareholders alone could sue

This contention was founded on the judgment of the Court in the case Tulloch and Davidson of the Aberdeen Bank (June 3, 1858, 20 D. 1045). the Court held that the claim was in its nature and substance simply a debt to the company, and that the liquidators accordingly, as representing and ing in place of the going concern, were entitled to recover it. The Lord linary decided the question of title in the present action on the authority of decision, and the Court adhered to his judgment in that respect.

It is therefore fixed in this case, and is a material element as regards some portant points involved in it, that the title on which the summons is rested hat of the company itself, and that the debt sued for is a debt due to the ik.

The second point decided by the interlocutor in question related to the second a in law stated for the defenders upon the record. This plea was founded on compromise entered into with the other directors, and the discharge granted them by the liquidator. The defenders pleaded that they were liberated by se proceedings. The same plea had been raised and repelled under the former ion, but the Court recalled the Lord Ordinary's interlocutor *in hoc statu*, ex-ining that in the subsequent progress of the case circumstances might emerge ich might entitle the defenders to raise the question again. Their judgment ordingly was, "Find that the compromises, discharges, and decreet of absol-r referred to in the second plea in law for the defenders do not preclude the suers from insisting in their claim against the defenders, as stated in the

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summons and record; therefore repel the second plea for the defenders in b its branches, in so far as it is stated *in limine* as a bar to the action." So argument was addressed to us on the merits of this plea, on which I do n propose to express any opinion, but this,—that no circumstances have occurr in the process since that judgment was pronounced which can affect the groun on which it proceeded. I am therefore precluded by the previous judgm from considering its merits.

After thus disposing of these two pleas which were stated in bar of the acti the Court remitted to Mr Charles Pearson in terms of the judgment under whi the report now before us was prepared. The judgment was one before answ The Court was desirous, before farther considering the relevancy of the actio of seeing the accounts referred to, and learning how far they squared with t allegations contained in the record. But in the opinions which the Cou delivered in pronouncing the judgment two very important matters were su stantially settled. In the first place, the Court differed from the Lord Ordinar judgment as to the distinction which he drew between the individual negligen of William Baird and his joint negligence along with the other directors, a indicated an opinion that they were not prepared at that time to hold any pa of the record as irrelevant. I shall have occasion to advert to this when de ing more specially with the question of relevancy. The Court farther intimat that they did not consider this as an action of damages, but as a suit brought recover specific sums of money alleged to have been improperly advanced by th manager, and to have been lost to the bank by the delinquency of the director and it was mainly in that view they made the remit to the accountant to repo upon the particulars specified in their judgment.

This judgment was appealed to the House of Lords, but after full argume the appeal was dismissed as incompetent, and we have now the report of th accountant prepared in terms of the remit. It is only right to say that it is very careful, elaborate, and able report, and the materials with which th accountant has furnished us, voluminous as they are, have proved of the utmo assistance in our consideration of the case. We are therefore now to consid what course we are to follow in disposing of the action,—whether we are to se it to proof on all the three branches of the claim, or whether in all or any them the action is irrelevant.

Before proceeding to deliver my opinion on these points I may as well dispo of some other pleas which have been stated on the record as exclusive of t action. The third is to the following effect:—"The late William Baird w never legally elected a director of the bank, nor entitled to hold office as su during any part of the period libelled, and his representatives are not respo sible for any transactions except those of which he was personally cognisant, a in which he took part;" and the fourth plea is—"The said William Baird w not responsible for any transactions which took place subsequently to May 184 nor for any losses which arose on those transactions."

In so far as these pleas are founded on the proposition that William Bai could only be liable for transactions in which he took part, I do not deal wi them at this stage. But it was explained to us at the debate that the defend maintained that William Baird never was entitled to act as a director, becau he had his permanent residence more than ten miles from Glasgow, and w therefore disqualified from holding office by the express provisions of the co tract of copartnery. It was also maintained that as he had absolutely ceased act in any respect from the month of June 1848 he had forfeited his seat at t board of direction from the lapse of six months from that date, and that t directors were entitled to have declared his seat vacant, and to have elect another in his room.

The contract contains such provisions, but I am of opinion that the defend can take no benefit by them. If William Baird accepted office, and undertoo to discharge its duties, whether he was qualified or not, he was bound to di charge the duty which he undertook. If he found that he could not discharg these duties he had it in his power to retire. But he was not entitled to hol himself out to the shareholders as willing to fulfil the functions of the offic

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and as undertaking their discharge, and thereby give the weight of his credit and authority to the bank, and at the same time entirely refrain from acting, and shelter himself under his own disqualification. Whatever effect that plea might have had if maintained by the bank against him, it could not be available when pleaded by himself. I am prepared therefore to repel the third and fourth pleas in so far as founded on the alleged disqualification of William Baird. The fifth plea also founded on the 31st section of the company's contract will fall to be repelled, seeing that the provisions of that section can form no defence against gross negligence in the performance of duty.

Having thus cleared the way for the material questions which we have to decide I now proceed to consider these important claims.

I. The alleged advances to customers on open account.

These alleged advances are collected under schedule A, appended to the summons. The schedule contains no detail or specification beyond the names of the customers, the amount due by them in 1846, the amount advanced between 1846 and 1852, the amount due in June 1852, and the amount which is said to have proved ultimately irrecoverable. Although these accounts are massed together under schedule A, they consist of two classes, which are materially distinct from each other. The first class consists of accounts in which the debtors had become insolvent, and in which the loss was ascertained prior to the termination of William Baird's period of direction. The second class consists of accounts which were carried on by the bank after 1852, and on which the balance was only ascertained to be irrecoverable at or about the period when the bank stopped payment in 1857. I shall consider these two classes of accounts separately.

As to the first class. It is necessary, in the first instance, to consider what the allegations are which the record contains in regard to the gross negligence of William Baird, and to what extent these allegations, if true, will infer liability for the sums in question.

It is impossible to over-estimate the importance of the question thus raised. Considering the condition of the persons who generally occupy such positions in joint stock companies, and the immense value of the interests entrusted to them, no question could enter more deeply into the ordinary conduct of commercial affairs. It arises here substantially for the first time under circumstances which admit of a direct decision on the principle. It was very largely discussed under the prior action which was abandoned, and the views of the Court in the last advising of that action are exceedingly valuable and instructive. But they are complicated by the fact that they related to a record originally framed mainly to raise a question of fraud. Similar questions have been made the subject of some important observations in the English Courts, as in the case of Turquand, in the 4th vol. of the Law Reports, Equity series, and the case of Brown in the 8th vol. of the Law Reports, as well as in the very recent case of Overend, Gurney, and Company, in the current volume of the same reports. But in none of these cases did the question arise under circumstances which admitted of any general decision upon the principle. In Turquand's case there was plainly no ground for the contention of gross negligence. The second is not without some importance, as being the case of a single transaction for which it was sought to make an absent director responsible. The director escaped, but he was found not entitled to his costs in consequence of his negligence. The case of Overend, Gurney, and Company is chiefly important from the opinion of the Lord Chancellor, who refers to views which he had expressed in the case of Turquand, and makes some observations upon the doctrine of gross negligence, which are not without weight. But the general question as to how far the director of a joint stock company—such as the Western Bank—is liable for mere omission to discharge his duty, or what amount or kind of omission will be held to be *crassa negligentia*, have never as yet been authoritatively determined.

This record contains no allegation or suggestion of corrupt motive or fraudulent intent, neither is there any allegation of conspiracy, or concert, or joint action with the other members of the direction. These things are not only not in the action, but are excluded from it.

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It may be said, not without force, that the duty undertaken by the directors of joint stock companies, such as the Western Bank, is subject to some qualifications which may not be always incident to offices of agency or trust. Such officials are generally chosen from their commercial position, their habits of business, and the amount of credit which their name will command. They are generally persons who have their time occupied by avocations of their own. When the shareholders elected William Baird as a director of the Western Bank they could not have expected him to make himself conversant with all the details of the management, or the items of all the accounts kept at the head-office and the numerous branches of so vast a concern. The ordinary conduct of the bank was placed in the hands of a professional manager, to whose integrity, as well as to whose skill, the directors were entitled in great measure to trust.

But, on the other hand, it is impossible for a Court of law to assume that such an appointment is a mere name. The duties which are prescribed by the contract must be performed by the directors. If these are not very specific, their scope and object at least are sufficiently intelligible, and if a director grossly neglects the discharge of them he must be liable in the consequences, as agents or trustees are who grossly neglect the interests of those for whose benefit they are appointed. Whatever the duties are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend to a large extent on the circumstances. It is enough to say that gross negligence in the performance of such a duty, the want of reasonable and ordinary fidelity and care, will infer liability for loss thereby occasioned.

The gross negligence alleged against William Baird in this record is set out in the 29th, 30th, and 31st articles of the condescendence. I need not read them, but their substance is this: The general ground of complaint is that William Baird, along with his co-directors, grossly neglected to superintend and control the manager in granting credit on open accounts. That is the general charge brought against them, and, as far as it goes, it is a charge not of action, but of inaction. There are, besides, two allegations of knowledge on the part of William Baird and his associates which are material. They are said, in the first place, to have known that the bank was in embarrassed circumstances owing to improper credit having been given by the manager; and, in the second place, to have known that the manager was in the habit of allowing advances on open account at his pleasure and without control. It is at the same time said that they were in culpable ignorance of what these advances were, and that they never at any time made the arrangements which the contract empowered them, and which it was their duty to make, to regulate the powers of the manager in this respect. The specific statement against William Baird personally is, that for two years he attended the meetings of the directors and the committees, but entirely failed to discharge his duty in superintending the manager, and that for the last four years he kept aloof from the bank altogether and did no duty whatever. Divested of much superfluity this is the substance of the allegations on record. It is admitted that in 1852 he ceased to be either a director or a shareholder.

I cannot say that these allegations are in themselves irrelevant. If William Baird knew that the bank was in embarrassed circumstances, owing to improper advances by the manager, and knew also that the manager systematically gave advances without control by the directors, and if he failed to take any steps to put matters upon a more safe or proper footing, he did grossly neglect his duty, whatever the result of that neglect may have been. In the same way, for the four years in which he did nothing, he certainly entirely neglected his duty; but whether that amounted to gross neglect, may depend upon the circumstances in which it took place.

A question was much agitated under the former action, as to whether it was necessary to the relevancy of the action that the neglect libelled should be joint with the other directors. I doubt if neglect can be accurately said to be joint, where it is not the consequence of previous concert. But in the question of

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s, as the consequence of negligence, it seems clear that no individual neglect the part of one director could have led to damage, unless all the other ectors had also neglected or at least failed to discharge their duty. It would refore be necessary for the pursuer to prove his averments that no director d fulfilled his duty before he can trace the loss, which he alleges as the ult, to the neglect of any one of them. If one director had performed his ty, according to the hypothesis of the action, no loss could have been sus-ned. In regard to that period during which William Baird absented himself m the direction it may be material whether he had reason to know or believe at the other directors neglected their duty. I read the averments on record regard to his knowledge as applying to the whole period.

But on these open accounts there still remains the question whether any case sufficiently alleged on record to infer that the advances in question were un-rranted on the part of the manager, who is said to have made them. On this tter the record is not satisfactory. It only specifies balances of account. It does not, as I conceive it ought to have done, take up each account individually, and explain wherein the unauthorised advances consisted, but only avers that the accounts in 1852 shew a certain balance which was unauthorised. In the former action similar statements in regard to the open accounts were considered so doubtful and unsatisfactory that the Court were not prepared to sustain them as relevant.

An attempt is made in the 26th article of the record to represent the per-mitting of overdrafts on open accounts, excepting in special circumstances, as of itself equivalent to granting cash credits without security, and so in violation of the contract, and contrary to the rules of sound banking. In regard to that matter I have only to refer to the opinion of Lord Cowan on that part of the statement in the former case in which he explained very clearly that overdrafts on open account, when kept within their legitimate limits, were among the most usual, as they were among the most profitable, branches of banking business. I concur in that opinion. But, on the other hand, advances on open account must be within the limits which the nature of the account, the position of the customer, and the amount of the advance indicate. An open account must not be made the vehicle of or the excuse for dead loans without security, nor can the advances on it with propriety go to an amount manifestly beyond the posi-tion of the customer or the objects of the account. I should have found great difficulty in dealing with these allegations had they come up for judgment with-out the accounts to which they relate. But these accounts have now been reported *in extenso* by the accountant. I have studied them attentively, and I am relieved of all difficulty on this head. In regard to the greater number of them they are *prima facie* consistent with the statement on the record. I by no means intend to prejudge questions which may arise when the facts have been ascertained, but I am of opinion that many of them disclose advances which are not legitimate on open account or under the contract, and that this appears on the very face of the accounts. If, under the colour of an advance on open account, continuous drafts are made without any payments to credit over a long period, or if the accounts are manipulated so as to conceal the true balance, or if large drafts are made in single sums without any counterpart, in such cases it will be difficult to maintain that these form legitimate operations merely because they appear in an open account. I forbear, however, to say more in the present state of the proceedings.

On the whole matter, therefore, on this branch of the claim, I am of opinion hat the record contains statements which ought to be sent to proof. In regard o the accounts which are to be the subject of this proof, they will embrace all hose which terminated at, or prior to, June 1852, although I do not intend the marks which I have made to be applicable to all of them, but see no sufficient ason to exempt any of them from the course which I propose. I think we ould also include one or two of the accounts which, although not absolutely rminated in June 1852, had no substantial operations on them after that date. The pursuers will have to consider whether it will not be incumbent on them prove their allegations in regard to each of these accounts, and not only to

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substantiate their averments of gross negligence, and the knowledge alleged o the part of the directors, but also to prove in each instance that the the advanc complained of were unwarranted, and that reasonable and ordinary care on th part of the directors would have prevented the loss which was sustained. An pleas in regard to the individual accounts which may be maintained by th defenders are of course in no degree prejudged.

The second branch, however, of these open accounts raises a different an more difficult question. These accounts were carried on to the failure of th bank, and the demand under the record, although apparently, as in the precedin claim, for a loss incurred when Mr Baird left the direction, is in reality for loss incurred, or at least ascertained, five years afterwards.

The record on this subject does not disclose the true nature of the facts, b we must read the accounts, as they stand in the books, as an essential part the statement of the pursuers, and from them, as appears from the appendix t the report of the accountant, we gather the facts which are truly alleged, an the relevancy of which we are to determine. Many of the customers whos balances in 1852 are in question remained ostensibly solvent until 1857. Thei accounts were carried on by the bank, and the balances entered in the books a good assets year by year. In almost every instance the credit given was in creased, and in some largely increased, and the debtors, for the most part, faile when the bank failed, many of them paying considerable sums. The clai which is now made is in each instance for the balance which was due in 185 diminished by a proportional amount of the ultimate recoveries, ascertained b applying the amount per pound of dividend, paid on the whole ultimate debt to reduce proportionally the balance of 1852.

It must, however, be evident that a result arrived at by such a process is, a a statement of a loss incurred in 1852, entirely imperfect. As far as it is a averment of fact it amounts to no more than this, that in the liquidation of th debtor's estate after the stoppage of the bank, the liquidator claimed for th whole debt then due, and recovered a sum which amounted to a certain pe centage of that debt. But this fact does not exclude, on the contrary is con sistent with, the entire solvency of the debtor, and the entire safety of the deb to the bank, in 1852. The record says that the debt for which the pursue sue "proved irrecoverable" to the extent specified. But the pursuers do not s that the debtor was insolvent, or that the debt was irrecoverable in 1852, offer to establish this by proof. All that is said is that these debtors we "unworthy of credit to the extent" sued for, an averment which falls far sho of saying that the amount was lost to the bank in 1852.

An instance or two will illustrate the anomalous position in which the reco stands in this respect. John Monteith owed in 1852 £8000. In 1857 we fin from the report that he owed £68,000. In 1852 Buchanan and Lockhart owe £18,000. In 1857 they owed £28,000. They paid £22,000, being more b £4000 than the whole debt due in 1852. John Moffat owed in 185 £247. In 1857 he owed £2337, or about ten times the amount of h debt in 1852. He paid £750, or three times the amount of his debt in 185 The balance due on the aggregate of these accounts exceeds that of 1852 b more than £100,000. Yet in these and the other instances the balance sued f is brought out by ascertaining the amount per pound which the debtor ult mately paid on the whole debt, and deducting that percentage from the balanc due in 1852.

All this is quite irrelevant as an allegation of a specific loss suffered in 185 if it be a necessary part of the case of the pursuers, as stated, that the debt wa irrecoverable in 1852. This radical defect in the allegation of loss, however, i more an objection to the structure of the record than to the substance of th claim itself. If it be otherwise well-founded the bank was entitled in 1857 t have claimed from William Baird the whole of the outstanding balance of 185 leaving him to recover what he could from the customer, whom they were no bound to discuss. William Baird's obligation was in no sense subsidiary, bu was original, arising from the misappropriation of the funds of the bank. I William Baird had in 1857 ranked for his relief on the estate of the insolven

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stomer he would no doubt have drawn exactly the dividend which is now dited by the bank,—and no more. But this, had it been the case plainly ted in this record, would have inevitably raised the important question ether the bank was entitled to delay their claim until then; and whether the urse of dealing with these customers during the interval had not excluded it. am of opinion that the bank, after taking over these accounts as good assets in 52, continuing to deal with the customers as solvent traders, and increasing eir credit, were not entitled, and the liquidator who represents the bank is not w entitled, to come back on William Baird with this demand. The claim, ch as it is, is one in which the bank is the creditor. The bank might have ade it in 1852. If the bank had not stopped it might have been made by the irectors in 1857. It is a claim of a kind which any bank, as a going concern, ight make against any former director on similar grounds. Its nature is in no spect altered by the insolvency or stoppage of the creditor. The liquidator ow represents, as the directors would then have represented, the bank,—entitled to sue on the same grounds, and of course liable to the same exceptions. William Baird, since 1852, has had no relation to the bank excepting that of a third party against whom the bank alleged a claim, and whatever he could have pleaded against the bank he can plead against the pursuer. The latter, indeed, represents the shareholders, but exactly in the same sense and to the same effect as that in which, while the bank was solvent, the directors represented them. Both must be held as representing the company, and only through the company, the shareholders; a claim which the bank, as a going concern, would be precluded from making could not acquire any vitality from the bank going into liquidation.

If, therefore, the bank in 1857 had brought this claim against William Baird I think it could not have been sustained. The directors stood in the position of being the agents or mandataries of the bank, for their own interest and that of the society, composed of shareholders, acting by the management provided by the contract. If an agent by gross negligence allows the money of his principal to be advanced to customers contrary to his instructions he will be liable for any loss thereby occasioned. But if the principal, whether he be an individual or a collective body acting through a management provided by contract, in full knowledge of the facts, take the agent's accounts off his hands, adopt the balances as legitimately incurred, and continue to trade with the customer, it is too late, when a crisis occurs, and the customer fails, to fall back on the agent. Things are no longer entire. The commercial position of the customer has been changed by the act of the principal, and it would be inequitable to require the agent to enter into the question whether the debt was, when his agency ceased, one which the debtor could have paid. The case would of course be different if the principal were in ignorance of, or without the means of knowing, the grounds of the claim. But that the bank, and those who acted for them, knew the grounds of this claim, is necessarily implied in the statement on which this action is maintained.

On this ground, therefore, I have come to the conclusion that this part of the case must fail, on the statement of it in the record, taking the accounts themselves as an essential part of it.

It has been pleaded for the defenders that these balances in 1852 have been paid up and extinguished by subsequent payments into the accounts, and that although the aggregate balance was never reduced all the entries to credit must be held as appropriated to the earliest balance, on the principle established in the well-known decisions in the cases of Clayton and Devaynes, and in the series of judgments by which they have been followed. If the views I have already expressed are well-founded I need not resolve this rather difficult question, and, indeed, its solution seems very much to depend on the same principle. As between these customers and the bank these balances have been innovated again and again. The balance on which the bank drew a dividend in 1857 was not composed to any extent of the balance of 1852, which, as between the debtors and creditors in many of the accounts, had unquestionably been paid. I can give no weight to the plea which was forcibly pressed on us that all these pay-

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ments were appropriated to future drafts. I do not find that they were so t any extent, but, on the contrary, the form of the amount implies the reverse That a payment into the account is made by the customer in anticipation o future drafts is only what takes place in most merchants' bank accounts, an cannot of itself affect the appropriation which the form of the account in la implies.

The doubt which arises is, whether in this question with the delinquen director, who is no party to the account, the bank are now bound so to appl these payments. The nature of their demand involves a challenge of the for of the account, and the debit entries and balances in it. They maintain tha these advances were not legitimate transactions with the bank, and that the are now entitled to strike them out of the account, and throw them back on th director who made them. If they have not adopted the account, and are entitle to repudiate it, the principle of Devayne's case can have no application. If the have adopted, and are bound by it, no further question remains. But I reserv my opinion on this matter.

II. The Bills of Exchange.—The claim under this head is for the balance o five discount accounts as they stood in June 1852. The total of this balance, afte deducting the amount due in 1848, when Mr Baird became a director, is said t have been no less a sum than £292,000; and after crediting the amount of th alleged recoveries the sum now sued for is £151,000.

Had the accounts terminated in 1852 I should not have doubted that farthe investigation would have been necessary. The amount of the advances them selves raises a *prima facie* case of reckless dealing; and the averments regardin the position of the customers, and the general course of dealing between them and the bank, although not so precise as could be wished, are very strong, an would in my opinion have compelled us to send the case to proof. The accountan reports that the total discounts during the period in question amounted t £1,200,000. On the question of negligence the case does not quite rest on th same footing as that on which the open accounts stand, because it cannot be sai that advances by way of discount are prohibited by the bank contract; an therefore the propriety or impropriety of the advances to a large extent woul come to depend, in this part of the case, on the position of the customer and th amount of the advance. But looking to these accounts I should have had n hesitation at all in saying that they raised a *prima facie* case which woul have entitled the pursuers to go to proof upon it. But we have now a ver complete analysis from the accountant of the whole of these bill transaction down to the stoppage of the bank. The information thus given, along wit that disclosed on the record, raises important considerations.

It appears that these five firms continued, down to 1857, to deal with th bank as solvent customers. All the bills which were current in 1852 were re tired. The credit given to them by way of discount was enormously increased so that when the bank stopped the aggregate balance was £1,476,000, or nearl five times the amount due in 1852. I gather by deducting the outstanding de ficit stated on the record from the balance of 1857 that of this sum the liqui dator has recovered no less than £673,000—more than twice the amount du in 1852, although on the same principle as that followed on the open account only £141,000, or little more than a fifth part, is credited in reduction of th balance due in 1852.

The observations which I have already made on the principle followed i calculating the loss on the open accounts applies with still more force to thi branch of the claim. There is certainly no presumption that debtors who pai nearly £700,000 in 1857 could only have paid one-fifth of that sum in 1851 and indeed there is no allegation to that effect, or offer to prove it. The onl matter of fact on this head which can be held to be averred is the proportio which the debtors' assets in 1857 bore to the balance they then owed. The re is a mere arithmetical process,—which seems to me to be entirely fallacious, i the amount of loss in 1852 is to be measured by the debtors' capacity at the time to pay.

It is said on the record that although the bills which were taken by Willia

Baird and his associates for these advances were retired this was done by the subsequent directors renewing the bills from time to time without any fresh payment, and that this could not amount to repayment of the money or fresh advance. The accountant has given us in an appendix a very exhaustive analysis of all these bills, from which it appears that a considerable proportion are shewn from the books to have been renewed, but that a considerable proportion also were retired by payment, as far as the books indicate. He says "a latitude of eight days has been allowed on either side of the exact date when the bill or renewal became payable, that is, a bill due or at maturity on, say the 10th day of a month, is held to have been renewed in whole or in part by a bill with similar drawers, acceptors, and indorsers entered in the list of bills discounted to the respective firms within a period from the 2d to the 18th of the month." Beyond that period the bills are held not to be renewals. He reports that in both cases this list may be fallacious in detail, and that it would be necessary to examine the books of the firms in question to ascertain the fact with accuracy, but that with hardly an exception he has found evidence of the payment of all the bills contained in the list.

If our opinion depended on the principle thus assumed, or on the proportion of bills actually retired by payment, it might have been necessary to have investigated these matters farther, although, for myself, I should have been satisfied to adopt the views of the accountant as conclusive on both points. But my opinion on this part of the claim is founded on the more general principle which I have already explained. The bank, after William Baird ceased to be a director, have dealt with these customers, and trusted them to an enormous amount. In so far as the balance of 1852 was kept alive by renewals they have traded on it, and made profit by the discounts paid and charged on the renewed bills. But they have done much more. The balance of £340,000, which was outstanding in 1852, grew in five years to the sum of £1,400,000, and the bank must have got the benefit, such as it was, of the discounts on several millions of money, in the turning over of so large an amount; for the system disclosed in these transactions, hazardous as it was to the bank and ruinous to the customer, was one, while it lasted, attended by considerable profit. I can see no principle of justice on which, at the termination of such a period of speculation, during which the balance of 1852 became entirely absorbed and merged in operations of such magnitude, the bank can be permitted to revive this claim, after the position, the assets, and the liabilities of the customers had undergone changes so material.

Holding this opinion, I think we should give effect to it at this stage of the proceedings I see no ground for further inquiry, which could only put the parties to additional and very great expense without affecting the result. In regard to both these branches of the action I am of opinion, taking the accounts themselves as an essential part of the pursuers' case, that there is, first, no relevant specification of loss, as the result of the gross negligence libelled; and secondly and mainly, that the state of the accounts, and the course of dealing which it discloses, exclude the claims.

III. The Policies of Insurance.—My remarks on this head may be very short. The amount sued for consists of sums paid as premiums of insurance under policies opened by the bank on the lives of sundry debtors. This is a matter very different from those I have hitherto dealt with. These insurance transactions seem to have been practised by the bank from a very early period of its history, and the accountant has reported on them very fully. It appears that as far as they consisted in taking assignations from debtors to subsisting policies of insurance in security of debts on the whole they resulted in a considerable gain to the bank; but in so far as they were opened by the bank itself, without collateral security for payment of the premium, they seem to have resulted in a loss.

Opening such policies is certainly not ordinary banking business. But it is a different question whether there may not be circumstances in which the course might not be prudent and desirable. Your Lordships, on a former occasion, expressed yourselves much to that effect. I think the case on this branch re-

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solves into an allegation of error in judgment, and rash or indiscreet administration, very similar to the illustrations put in some of the cases I have referred to. But as it appears that since the stoppage of the bank, the liquidator, without communication with William Baird, has sold these policies, I am of opinion that he has lost his recourse, even if otherwise it had been open to him.

I propose, therefore, that we should sustain the action as regards the open accounts which terminated in 1852, according to a schedule which I have prepared, to the effect of farther inquiry, and dismiss it *quoad ultra*. In regard to the mode of proof, I am very clear that this is a case in no respect fitted for a jury. Each of these accounts forms a separate subject of inquiry, and questions may arise under each of them as to the particulars to which I have referred, and as to the details of the accounting, which are specially within the province of a Court of law. I think in regard to that branch of the claim we should order a proof before answer.

LORD COWAN.—I need scarcely say that this case, in all its bearings, has been the subject of deliberate consideration by all the members of the Court. After the able and elaborate argument at the close of last session, the record and voluminous papers, including the accountant's report and relative appendices, to the effect of which that argument was directed, have been carefully and anxiously gone over by myself, as I believe they have by all your Lordships. The views that suggested themselves to us severally, have, both verbally and in written notes or memoranda, been made the subject of repeated consultation. It was satisfactory to me to find that the results at which I have arrived, and which I was prepared to have explained fully in a separate opinion, were in accordance with those at which your Lordship had arrived, and which you have embodied in the elaborate opinion now delivered. That opinion I have had the opportunity of considering; and as, in its main features, and to all substantial effects, it gives full expression to the grounds of judgment on which I consider our decision ought to proceed, it is as unnecessary, as it would be to waste the time of the Court, to do more than to state my entire concurrence with it in all essential respects.

This course I am the more inclined to follow on the present occasion because of having at former advisings, not under this record only and in this action, but in the action against the present defender and his brother James Baird, which did not issue in any judgment—fully stated the legal principles which appeared to me applicable to some of the leading questions which lie at the base of the defenders' liability, and to which and other questions your Lordship has adverted at the outset of your opinion. From the views then stated, and those explained by the then Lord Justice-Clerk (the present Lord President), in delivering the opinion of the Court, and which views, I observe, were founded on at the bar, and referred to, if not adopted by the Lord Chancellor in the case of Turquand, January and February 1869 (4 Chancery Appeals, 376, Law Reports), I have seen, on reconsideration, no reason in any respect to depart. To them, as the case now stands, I consider that we are now giving practical effect, except in so far as the report of the accountant enables us in certain important matters, and to a large extent, to dispose of the claims made in the action on the special grounds which you have fully explained. I may, however, say that I entirely reserve my opinion with regard to the application of the principle which ruled the case of Devanyes and Others. From the grounds of judgment which we are prepared to adopt it is unnecessary to enter on this branch of the argument, or to say whether its application is or is not attended with doubt or difficulty.

I am of opinion that judgment ought to be pronounced to the effect and in the manner suggested by your Lordship.

LORD BENHOLME.—The very able and elaborate opinion with which your Lordship has favoured us has been the subject of repeated and most anxious consideration by us all, and I do not think I can add anything to it, especially as your Lordship was kind enough to allow us to state the points on which we

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ad any doubt or difference, and shewed yourself very ready and able to put an ad to these doubts. I concur in the judgment.

LORD NEAVES.—I concur in the judgment proposed to be pronounced, and ave very little to add, because your Lordship has gone over the grounds on hich it is founded; but there are one or two remarks which I should like to ake in reference to some special views which were urged upon us. This is a laim against Mr William Baird upon a personal ground of liability, which may e described as arising *quasi ex delicto*, and therefore I think that he is not a *correus debendi*, and that the views which might prevail with reference to the ase of a cautioner do not afford him any protection. He became a personal debtor in consequence of his alleged negligence, but he can only be liable if loss has resulted, for it is loss alone that makes him liable, and the loss is explained in this record not as a general claim of damage or reparation to be assessed by a jury, but special amounts of debt incurred by improper advances, just in the same way as is common in cases of this kind where a man of business is made liable for a special debt lost by his negligence, either through a bad security, or from not using proper diligence. There might have been a claim possibly for general damage, but that is not the claim made here. It is a claim for pounds, shillings, and pence, arising upon an arithmetical calculation, and it is a claim of debt which is alleged to bear interest,—which is not of the nature of general damage. That being the case, the question is whether any of that loss has been wiped away by what has taken place since Mr W. Baird's directorate ceased. Those matters which were then open, and as to which no ulterior transactions took place, your Lordship has proposed to be admitted to proof, and in that I fully concur, but the others are excluded. I think it cannot be doubted that the debt, as regards the current open accounts, and the discounted bills as they stood in 1852, have to all appearance, at least, been extinguished and obliterated by the large transactions which took place with the same debtors in the subsequent years, and the only way of attempting to get rid of that is by saying that these debtors did not pay anything in reality, but only gave pieces of paper which were of no value, and were not payment in extinction of the debt due. But the true state of matters is manifest by the enormous amount to which the old debt was increased in the course of the following five years. Now, is it possible for the bank, as a corporation, having taken up these debtors and dealt with them in that way, turning over new bills, making advances, and making profit upon discounts (for that is a very profitable business if it is well conducted), to come back at this distance of time upon Mr W. Baird for the original bills which have been over and over again sopited and extinguished, not by anything like express renewals, nor on the footing of renewals, but in the course of an extensive discount business carried on by the directors systematically upon the credit of these other parties. That is out of the question so far as the bank is concerned, and it is the same thing as if the bank itself had brought this claim. The only ground on which that was sought to be got over was this, that during these five years the shareholders knew nothing about this, because they were excluded from seeing anything that took place. They pocket the dividends arising from this great source of profit, but they say they are not answerable although they carried on this business, because the subsequent directors also kept them in the dark, and they knew nothing about it. I think that cannot be listened to here, because the creditor of Mr William Baird seems to be the bank as a corporation, and it cannot be held that the bank as a company could be ignorant of its own affairs. It had its own administration and organisation, and by that means it knew as a company what was going on, or must be held to have done so. As to the individual shareholders, we should need a very different record from this to enable us to take their case into consideration. Who are the shareholders that were kept in ignorance? Were they shareholders during Mr William Baird's time? We know nothing about it. Were they shareholders even during these five years? We know nothing about that either. It is not at all unlikely that a number of shareholders, who were the original constituents of Mr William Baird, feathered their nests pretty well while things

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were going on in a flourishing way, and that those who now suffer are those that came in at the end of the day. But that is not the question which we are dealing with here, and is not the ground of liability that here arises. The claim is by the company as represented by the liquidator, and the ignorance of the individual shareholders is nothing to the purpose in that respect. If they have been betrayed by their subsequent directors they may have their remedy against them, but I do not think it is possible to hold that they are not responsible for the company, as a company entitled to carry on its own affairs, and having the means of doing so, and deliberately going into transactions calculated to be very profitable with the very persons to whom it is said they were advancing improperly. We have here a taking up and homologation of prior proceedings; and in a question of their liability it is quite a sufficient answer to shew that any apparent loss that might have arisen in 1852 was wiped out by the entire substitution of different liabilities in 1857; and, consequently, that the liability of Mr William Baird has ceased.

With regard to the form of the interlocutor the defenders argued;—The defenders are entitled to absolvitor. This is not a mere discussion on relevancy; the facts as appearing from the accountant's report disclose that no claim exists. A claim may have existed but it has been extinguished.

The pursuers argued;—The defenders are only entitled to have the action dismissed. The action has been disposed of on the relevancy of the pursuers' statements, and where that is so the uniform practice is dismissal. The books have been part and parcel of the pursuers' statements and must be held to be incorporated with them.

LORD JUSTICE-CLERK.—I think we are not here deciding the proper merits of this case. We are deciding that the action as stated is not relevant, as being excluded by the facts which appear on the face of it. Therefore I think we should dismiss the action. In regard to the expenses, I think it is premature to come to any decision whatever. The points that have been decided on the one side and the other are very various. The success upon them has been varying also; but before we know whether the pursuers are to prevail in any part of the case it is premature to consider the question of expenses. The accountant's report will be exceedingly important when the case goes to proof. There are many matters to which I have not alluded brought up in the documents appended to the report which must be of considerable moment. Into these matters it is unnecessary to go now; but I think it would be premature to deal with the question of expenses at this stage.

The other Judges concurred.

THE following interlocutor was pronounced on 15th November 1872:—"Repel the 3d and 4th pleas in law stated for the defenders, so far as founded on the alleged disqualification of the defender William Baird to be elected or to continue to be a director of the Western Bank: Repel also the 5th plea stated for the defenders: Before answer, in regard to so much of the action as relates to the accounts of the parties named in the schedule appended to this interlocutor, allow both parties a proof of their respective averments relative thereto: Appoint the proof to be taken by Lord Cowan at such time and place as he may fix *Quoad ultra* dismiss the action, and decern; and reserve all questions of expenses."

MORTON, NEILSON, & SMART, W.S.—WEBSTER & WILL, S.S.C.—Agents.

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Dennistoun v. Thomson.

ALEXANDER DENNISTOUN, Pursuer.—*Lord-Adv. Young—Watson—Campbell.*
JAMES THOMSON, Defender.—*Sol.-Gen. Clark—Asher.*

Property—Implied Contract—Conterminous Proprietors.—A, the proprietor of building ground in a burgh held in burgage, disponed in burgage to B, a purchaser, two adjacent lots, No. 3 and No. 4. Lot No. 3 was described as bounded on the north by "the central line of R Street" (an unformed street), "to measure 60 feet in breadth from building line to building line," and lot No. 4 as bounded on the north by other ground belonging to the seller, "on a line coinciding in range with the central line of R Street."

The disposition contained an express obligation on the purchaser as to the completion of the new streets which formed the east and west boundaries of lot 3, but no obligation was expressed with reference to R Street.

Some years after, A and B entered into an agreement that they should mutually furnish ground for the formation of R Street eastwards along the northern boundary of lot 4, as delineated in a plan which shewed R Street extending along the northern boundary of lot 3; the purchaser subsequently acquired from the seller two additional lots of ground bounded by R Street, one on the east and the other on the west of lot 3, by a disposition which declared that both parties should have right to the whole new streets therein mentioned bounding the subjects disponed.

Held, in a question between persons who represented A and B, that B's representative was under an implied obligation to leave space for the formation of R Street on lot 3.

Free St Mark's v. Taylor's Trustees, Jan. 26, 1869, *ante*, vol. vii. 415, commented on.

1ST DIVISION. Lord Gifford. M.

THIS action, raised by Alexander Dennistoun of Golfhill, concluded for declarator that James Thomson, proprietor of certain portions of the lands of Annfield, Bellfield, and Slatefield, lying between Duke Street and Gallowgate, Glasgow, was bound under his titles (1) to open up and form on the said lands certain streets, Sword Street and an unnamed street, and to open up and form a street to be called Reid or Reidvale Street, intersecting Annfield Street, Sword Street, and the unnamed street, in a line delineated on a plan, and that to the full width of 60 feet, so far as said street was wholly situated on defender's lands (lot No. 4 and other lots), and to the extent of half the width, so far as it formed the boundary thereof (*i. e.* of lot No. 3). There were also conclusions with regard to the causewaying said streets, the removal of obstructions, &c. The lands were held in burgage.

It is unnecessary to refer to Sword Street and the unnamed street. By a disposition dated in February and March 1854 the Western Bank of Scotland (the pursuer's author), with consent of Reid's Trustees, disponed to John Thomson, potter in Glasgow, the defender's father, two plots of the lands of Annfield, Bellfield, and Slatefield, viz.—

(1) Lot No. 3, containing 17,234 square yards, bounded on the east partly by the central line of Sword Street, to measure 50 feet in breadth from building line to building line; . . . . . on the north by the central line of Reid Street, to measure 60 feet in breadth from building line to building line, along which it extends 255 feet, or thereby; on the west by the central line of Annfield Street, to measure 60 feet in breadth from building line to building line. . . . . .

(2) Lot 4, containing 4060 square yards, bounded on the north by other ground belonging to the said trustees, along which it extends 255 feet 6 inches or thereby, on a line coinciding in range with the central line of Reid Street; on the east, ... on the south, ... and on the west by the central line of Sword Street.

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The disposition further bore,—"But these presents are granted, and the subjects hereby disponed are conveyed to the said John Thomson and his foresaids, with and under the following further restrictions, privileges, and obligations, viz.—. . . . . that the said John Thomson and his foresaids shall be bound, jointly with us or our successors, or the trustees of the said John Reid, to open up and form the street to be called Annfield Street, to the extent of 60 yards from Gallowgate Street, by the term of Martinmas 1854, and to open up and form the whole of the said street fronting the said ground hereby disponed northwards within the space of five years from 19th May 1852; that the said John Thomson and his foresaids shall be bound, within five years from the term of Martinmas 1852, in the event of us or our foresaids, or the trustees of the said deceased John Reid, also agreeing to do so, or sooner if found to be of advantage to us or our foresaids, or the said trustees and him, to open up the said street called Sword Street northwards so far as it fronts the said ground hereby conveyed; that the said John Thomson and his foresaid shall be bound, when they come to erect buildings, &c. . . . . which said conditions, provisions, restrictions, and obligations hereinbefore inserted are hereby declared to be real liens and burdens affecting the subjects herein before conveyed, and as such shall be inserted in the instrument of sasine to follow hereon, and in all the future transmissions and investitures of the said subjects, otherwise the same, and all following thereon, shall be null and void."

In April 1860 the Western Bank and its liquidators entered into a agreement with the said John Thomson, the defender's father, which bore—"Whereas the said first parties (the Western Bank) have got prepared by Mr Thomas Kyle, land-surveyor in Glasgow, and have exhibited to the said second party (John Thomson), a plan of the lands of Annfield and Bellfield, belonging to them, and of lands adjoining now belonging to the said second party and others, situated, &c. . . . . and whereas, in the formation of Reid Street, as delineated on said plan, eastward from the central line of Sword Street, also delineated thereon, so far as said portion of Reid Street extends along property" (lot 4) "belonging to the said second party, there will be embraced within the south half of said Reid Street an angular portion of ground belonging to the said second party, and also an angular portion of ground belonging to the said first parties, which said portions of street," &c. The deed then set forth that the parties had agreed to give up for the formation of Reid Street along the northern boundary of No. 4 the pieces of ground required from their respective properties without any price being paid by the one to the other. The plan referred to shewed Reid Street running from street further west, eastward along the northern boundary of lot 3, crossing Sword Street, and continuing eastward over lot 4.

By disposition dated in December 1860 the Western Bank disponed the said John Thomson the other lots of ground, one to the east and the other to the west of lot 3, which were described as bounded by the centre line of Reid Street. The deed bore to be granted "under the declaration" "that the said John Thomson and his foresaids shall have the full right and privilege of the several streets before mentioned, bounding the several subjects hereinbefore disponed, and which several streets, of the width and extents foresaid, shall be left open and unbuilt upon, and be public for the use and behoof of us and our said disponee respectively, and all others having right thereto in all time coming."

This declaration was declared to be a real burden, and appointed to be inserted in all future conveyances.

In 1864 Alexander Dennistoun, the pursuer, purchased from the

Western Bank, with consent of the trustees of the late John Reid of Whitehill, other parts of the lands of Annfield, Bellfield, and Slatefield, in all about 74,000 square yards, subject to all the obligations of the bank with respect to the lands.

In November 1870 Mr Dennistoun raised the present action for the purpose of having Reid Street or Reed Street and other streets formed.

The pursuer pleaded, *inter alia;*—(3) The defender and his predecessor having failed to implement the obligations incumbent upon them, in regard to the opening up and formation of said streets, the pursuers are entitled to have decree ordaining the defender to implement the same, as concluded for.

The defender pleaded, *inter alia;*—(4) The action cannot be maintained, in respect that the writs libelled do not contain any obligation applicable to the streets in question.

A proof was led, and the Lord Ordinary afterwards pronounced this interlocutor:—"*Tertio*, Finds and declares that the defender, under and in virtue of the writs and title-deeds of his property mentioned on record, is bound and obliged to open up, form, causeway, &c., a portion of the street or line of street called or to be called Reid Street or Reidvale Street, said portion being wholly upon the lands of the defender, &c.: *Quarto*, Finds and declares that the defender, under and in virtue of the writs and title-deeds of his property mentioned on record, is bound and obliged to open up, and leave open, unoccupied, and unenclosed, certain portions of the street or line of street called or to be called Reid Street or Reidvale Street, leading from Bellgrove Street eastward, and that in addition to the portion of street referred to in the third or preceding finding, and that in so far as the said street or line of street to be called Reid Street or Reidvale Street is upon the lands of the said defender, that is, to the extent of 30 feet in width, being half the width of the said street, and that in the line shewn and delineated upon the said plan, No. 7 of process; and to the extent and effect mentioned in the preceding declaratory findings, finds and declares in terms of the declaratory conclusions of the original and of the supplementary summons: But finds that the defender is not under his titles bound to form or to causeway any portion of the said streets, excepting that portion of Reid Street or Reidvale Street mentioned in the third finding above written: Farther, decerns and ordains the defender to open up, and leave open, unoccupied, and unenclosed, and also to form, causeway, and pave the various streets or portions of streets mentioned respectively in the preceding findings, and that in terms of the said findings in all respects, and also to make and form the common sewer in manner mentioned in the third finding above written, and ordains him instantly to remove all palings or obstructions of every kind at present existing on any portion of the site of the said streets, and decerns."*

* "NOTE.—This is a very important case, both in reference to the interests of the parties to the litigation, and in reference to the rights and obligations which arise when lands are given off to be built upon, and described as bounded by intended or projected streets.

"The Lord Ordinary was favoured with an able and instructive argument as to how far building stipulations or feuing plans are binding upon singular successors, and in what circumstances feuing plans or conditions of feu, or the formation of streets, are made and constituted real burdens upon property, or binding upon singular successors.

"In the view which the Lord Ordinary takes of the present case, however, it is unnecessary to consider the interesting and difficult questions regarding real burdens or obligations laid upon singular successors, for he is of opinion that none of the parties to the present action can be regarded as singular successors, but that

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The defender reclaimed, and argued;—He was not bound to open the streets in question, and even if he were, the pursuer had no title to en-

the question arises between the pursuer, Mr Dennistoun, and those holding through him on the one hand, and the defender on the other, just as it would have arisen between the Western Bank, from whom Mr Dennistoun derives right, and Mr John Thomson, the defender's father, who was the original contracting party with the Western Bank. The defender, it is admitted, represents his father, to whom he has succeeded under certain family settlements and arrangements, and the Lord Ordinary holds that the pursuer, Mr Dennistoun, is, so far as the lands are concerned, under all the obligations which the Western Bank undertook to Mr Thomson; for although Mr Dennistoun is a purchaser from the Western Bank, and in one sense a singular successor to them, yet the conveyance in his favour is expressly granted 'without prejudice to all obligations upon us or our predecessors contained in conveyances granted by us or them of portions of the said lands of Bellfield and Annfield.' It is also granted without prejudice to obligations in reference to Sword Street contained in an instrument of sasine in favour of John Reid, dated and registered 26th December 1838, and it contains various stipulations intended for the benefit of Thomson as to buildings to be erected by Mr Dennistoun. In reality, therefore, Mr Dennistoun comes exactly in the place of the Western Bank, and is subject to all pleas and exemptions which would have been competent against the bank. Even if this had not been so, however, still, as the defender represents his father, and as Mr Dennistoun is undoubtedly vested in the whole rights of the Western Bank, it is thought Mr Dennistoun could enforce all the personal obligations which John Thomson undertook to the bank and their successors. It would not be in the defender's mouth to plead that, although he was well and firmly bound to the bank, he is not bound to the bank's disponee, to whom the bank has made over all its rights.

"The Lord Ordinary thinks, therefore, that the present questions are really questions of contract between two contracting parties, and that the case is not embarrassed by the niceties attending the constitution of real burdens. The true question simply is, what was the contract,—what did the parties undertake to do or to abstain from doing in reference to their respective properties?

"Even if the question had been with singular successors, however, the Lord Ordinary thinks that to some extent servitudes of road have been validly created, for he is disposed to think that if a street of a particular width is stipulated for that implies a roadway or a servitude of road of the specified width, and as road is one of the known servitudes it may be constituted by grant without entering the records. In point of fact, however, the roads or streets mentioned in the title do enter the records, and are specially mentioned as real burdens in all the infeftments.

"Viewing the questions as narrowed, therefore, to pure questions of contract, the Lord Ordinary will shortly explain the grounds upon which he has reached the conclusions expressed in the preceding interlocutor.

"The conclusions of the summons relate to three streets, all of which are at present begun, partially opened and partially laid out. The three streets are—(1) Sword Street, or rather the upper or northern portion of Sword Street, extending from Duke Street to the line of Reid Street or Reidvale Street; (2) Reid Street or Reidvale, extending from Bellgrove Street on the west, eastward till it enters what is wholly the pursuer's land; and (3) an unnamed street running parallel, or nearly parallel, with Sword Street, and being the next street eastward from Sword Street, and extending from Duke Street to Reidvale Street. This street is at present only open at its northern end, and there it seems to be called Bellfield Place.

"As the defender's position in reference to these three streets, or the portions thereof which bound or intersect his property, is or may be different, it may be convenient to take them separately, and to see what obligations the defender, or rather his father, John Thomson, has undertaken in reference to each of them.

"(1) The portion of Sword Street from Duke Street to Reidvale Street. . . .

"(2) The unnamed street east from Sword Street, and running parallel therewith. . . .

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e the obligation. A mere description by a bounding line called a et involves no obligation not to build up to the bounding line.[1] A plan

'(3) The portion of Reidvale Street interjected between the line of Sword eet and the unnamed street,"—(*i.e.*, along lot 4).

"This piece of street stands in a different position from the others. It is olly upon the ground of the defender, and the title-deeds contain special ulations in regard to it.

"It appears that the projected line of Reid or Reidvale Street required for its mation, at the portion in question, a small triangle of ground wholly belonging to the bank, a similar triangle of ground belonging to John Thomson, and a ipe of ground belonging to the bank. Having in view their mutual rights d interests, all parties entered into a minute of agreement, dated in April 860, whereby the bank on the one hand, and Thomson on the other, agreed nditionally to contribute their respective triangles of ground for the formation f Reid Street. The condition was in the event of the bank selling out their nds agreeably to Kyle's feuing-plan. Nine months afterwards the bank did ll out its lands to Thomson himself, agreeably to Kyle's feuing-plan. This is lear upon the proof, and upon the comparison of Kyle's original feuing-plan ith the partial plan signed relative to the agreement and disposition. Therepon the agreement of April 1860 was carried out and embodied in the disposion of December 1860, and the deed contains special obligations in reference to he bit of Reid Street now under consideration.

"By the deed of December 1860, then, the bank's triangle, as well as various ther bits of ground, are conveyed out and out to John Thomson. It is the econd subject conveyed, containing 403⅝ square yards; and then follows the pecial declaration and obligation, 'Declaring always, as it is hereby specially rovided and declared, that the said proposed street, to be called Reid Street, hall be formed along the subjects belonging to the said John Thomson, as hown upon the foresaid plan or sketch signed as relative hereto, and the same hall be to that extent of the breadth of 60 feet, including the foot pavement on ach side; that the north half of the said street to the extent foresaid shall be ormed from the compartment of ground above conveyed in the first place, hile the south half thereof shall be formed of the triangular piece of ground bove conveyed in the second place, and of a triangular portion of the foreaid lands belonging to the said John Thomson: And declaring farther, that he said John Thomson and his foresaids shall be bound and obliged, at their wn expense, to form and causeway the said street, and to pave the same, and lso to form, make, and maintain a common sewer in said street, so far as exending along the subjects before conveyed.'

"Now, the Lord Ordinary does not see any grounds on which the late John homson or the defender as representing him can decline fulfilling this express bligation. It is quite explicit. The deed and the signed plan make it quite nambiguous, and the whole expense is carefully laid upon Mr Thomson. The ank had a most vital interest in making and enforcing such an obligation, for ey retained as their own property the four large and important building lots blocks of streets lying to the west of the portion of Reid Street now in quesn. This whole ground, extending to upwards of six acres, now belongs to the nsuer, and if this bit of Reid Street is not to be formed, he will be entirely t from Reid Street altogether, and have no access to the Gallowgate except und by Duke Street. Both right and interest, therefore, are clear and paramount, d the Lord Ordinary thinks that the defender is bound to specific implement.

"It was just to secure the peculiar interest which the bank retained, and ich now belongs to the pursuer, that this portion of Reid Street is made ferent from all the rest, for the expense of formation, causewaying, and paving expressly laid upon Mr Thomson and his foresaids. All is to be done at 'their n expense.'

"At the sametime, making all the streets open as real liens and burdens

[1] Tailors of Aberdeen v. Coutts, Dec. 20, 1834, 13 S. 266—aff. Aug. 3, 1840, 1 b. 296; Gordon v. New Club, March 2, 1818, 6 Pat. 351; Bell's Prin. 979, 992.

No. 20. referred to in a feu-contract is only binding for the particular purpose for which it is referred to, and here the plan was merely for the purpose of

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applies to this piece of Reid Street as well as to the rest. The obligation to form and causeway is a superadded obligation, superadded for good and obvious reasons.

"In reference to this portion of Reid Street, therefore, the pursuer has been entirely successful, and the Lord Ordinary has given him decree as concluded for.

"(4) The remaining portions of Reid Street, so far as fronting the defender's property,"—(*i.e.*, lot 3).

"The obligations as to these portions of Reid Street depend partly on the disposition of 1854, partly on the disposition of 1858, and partly on the disposition of 1860, already so fully referred to. Strong arguments are also derived from the earlier titles, and particularly from the sasines in favour of Reid and his trustees, which are made binding on the defender.

"It is unnecessary to go over the ground again. The Lord Ordinary thinks that under his own titles the defender is bound to leave half of Reid Street or Reidvale Street, so far as it is opposite his property, open and unenclosed. But here again the pursuer's conclusions are too broad, for the Lord Ordinary cannot discover any obligation on Thomson binding him to form or causeway. In short excepting only the little bit of Reid Street above dealt with, and which is in an exceptional and peculiar position, Thomson's obligations are really those of the owner of a servient tenement—they consist *patiendo non faciendo*.

"It only remains to notice one or two points on which the defender specially relied.

"He maintained that none of the plans were made parts of the title, but that any reference to them was merely for description. This is not so. The plan, No. 109, is expressly made part of and signed as relative to the disposition of 1860, and it goes a long way in the pursuer's favour. It may be true that Kyle's original and general feuing plan is not made part of the title, for it embraces subjects belonging to third parties who never consented thereto, but portions of it seem to be made conditions of the grants when particular streets are made mutual between adjoining feuing blocks. It is also to be kept in view, as favouring the pursuer's argument, that the whole ground is building ground, which can only be utilised by being laid out in streets and covered with buildings. It is just in reference to such land that such mutual obligations and contracts might be expected.

"The defender urged that as the whole ground was burgage there could be no tie or connection between the lots, as there is when the whole are held of a common superior. This is true, but there is no incompetency in the owner of burgage lots selling them out and imposing obligations on the purchaser, either in favour of himself or in favour of his successors; and these obligations, if aptly expressed, as they seem to be in the present case, will be enforced.

"The defender urged that, under a portion of his half of Reid Street, there was clay, said to be very valuable, which he wished to work out before opening up Reid Street. If it were a mere question of a few months, or even a year or two, there might be some reason in this, but when it is considered that, as to one part of Reid Street, the defender and his father have been under obligation to open it for twenty years, and as to the remainder for twelve years, the defender can hardly say that the pursuer is precipitate in enforcing it. Even yet, if a specific motion had been made for a few months' delay the pursuer intimated willingness to consent, the natural level of the ground being made up again. A very few weeks or months would work out all the clay under half the street. But the defender has not yet begun to work it. The clay will not serve as an indefinite suspension of his obligation.

"Lastly, the defender contended that the City of Glasgow Union Railway having been constructed through a portion of the lands embraced in Mr Kyle's old general feuing plan, the whole feuing plan and the whole obligations in any of the titles at once flew off and came to an end. This is far too violent a proposition. The railway only went through a part of the ground, and although at

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ntification. If the defender is merely subject to a servitude, he is not und to do anything. If there is an implied obligation to make a street e pursuer is not entitled to enforce that agreement.[1]

The pursuer argued;—Each party was entitled to enforce the similar urdens laid upon both by their common author. While a description of nds as bounded by the centre of an intended street does not imply an bligation to make that street, such an obligation was here involved in he terms of the various deeds.

At advising,—

Lord Ardmillan.—There is no doubt that, in point of fact, the defender's roperty is bounded in one part by Sword Street, and in another part by the treet known as the unnamed street; and I do not think that the defender's obligation to open up and keep open Sword Street and the said unnamed street can e successfully disputed. In regard to Sword Street, indeed, I understood that o argument against the obligation was maintained by the defender's counsel. n regard to the unnamed street along the eastern line of the defender's property, arked No. 7 on the plan, I do not think there can be any doubt. The same ule must apply.

It is to be observed that both parties derive the rights from a common author, nd that the formation of streets, involving, of course, the erection of houses ith access thereto, was contemplated from the first as the leading object for hich the creation and distribution of feus was effected. This is, in my view, an nportant consideration. In judging of prædial, and particularly of urban servitudes and obligations, it is necessary to consider the object for the promotion f which the laying out of the ground and the arrangement of the feus was undertaken. I retain the opinion which, concurring particularly with Lord Deas, have more than once expressed, to the effect that restrictions on the use of roperty cannot be easily implied, nor enforced without clear and strong reasons, or without a legitimate interest to sustain the plea for restriction. But in such case as the present, where the formation of streets and the furnishing of access o houses was the leading object of the feuing arrangements, the interest to enforce an obligation to give access by opening a street is obvious, and the obligation to open the street in conformity with the intention and understanding of

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hat part the general feuing plan was interfered with, it is impossible to maintain that in other portions of the ground the feuing plan cannot be carried out. he railway does not interfere with those portions of street embraced in the conclusions of the present action. These streets when completed will be substantially the same as originally intended, the only alteration being a slight deviation f Reid Street wholly on the pursuer's ground. The portions of street now rdered to be opened up are not altered one inch by the railway, and the only rejudice which the defender can allege from the railway is, that for a small pace along Reid Street his breadth for building is something narrowed. But he defender has received compensation from the railway company for this injury, nd it would be most unjust if, in addition to the compensation which he has covered, he were to be released from his whole obligations to the pursuer.

"The pursuer's conclusion for damages was not seriously insisted in. It rather pears that no substantial damage has been sustained, the prices of building ound having greatly risen. But even were it otherwise the question of right s a fair question to try, and the pursuer has failed, excepting to a small tent, to fasten upon the defender any obligation to form or to causeway the eets.

"The Lord Ordinary has modified the pursuer's expenses, because he has been uccessful in his attempt to compel the defender to form and to causeway, and s formed throughout an important part of the pursuer's demand."

Gould v. M'Corquodale, Nov. 24, 1869, *ante*, vol. viii. 165; M'Gibbon v. akin, Jan. 19, 1871, *ante*, vol. ix. 423; Alexander v. Stobo, March 3, 1871, e, vol. ix. 599; Trustees of Free St Mark's v. Taylor's Trustees, Jan. 26, 1869, e, vol. vii. 415; Barr v. Robertson, July 12, 1854, 16 D. 1049.

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parties is supported by the reasonable and equitable considerations which cannot be overlooked in such a matter. A right of access or of road is of the nature of a servitude known and understood, and an obligation to give such a right of access or road is, under the circumstances of this case, natural and appropriate. Both parties—disponer and disponee—are bound to secure access by opening and keeping open the streets. It may be called a conventional servitude. It is a mutual obligation for the protection of the rights and interests of both parties, and it is such an obligation as might be reasonably and naturally expected. The case is thus quite different from the case of restriction on the use and enjoyment of property, as, for instance, preventing the building of a porch, the building in a back-green, or the raising the height of a house.

Now, in the two instances to which I have adverted, viz. the opening up of Sword Street and of the unnamed street, I think it clear that there is a right in the pursuer to enforce the obligation, and a sufficient interest to sustain his demand, and a distinct obligation on the defender to open up and leave open these two streets.

On this point I agree with the Lord Ordinary, and I have nothing to add. In so far as the Lord Ordinary has found and declared that the defender is bound to open up and leave open these two streets to the extent specified in the interlocutor I am for adhering to his judgment.

I also agree with the Lord Ordinary that the defender is bound by the agreement, dated in April 1860, between the Western Bank and Reid's trustees on the one hand, and the defender's father Mr John Thomson, whom the defender represents, on the other hand. By that agreement Mr Thomson (and now the defender) entered into specific obligations in regard to the portion of ground situated between the letter C on the plan and the east margin of No. 7, where it unites with No. 9 on the plan, otherwise described as "eastward from the central line of Sword Street delineated thereon." Along that portion of ground the two parties, viz. the Western Bank and Reid's trustees on the one hand, and Mr Thomson on the other hand, mutually agree and oblige themselves that Reid Street shall be formed along the subjects (lot No. 4) belonging to Mr Thomson to the breadth of 60 feet; that the north half shall be formed from lands belonging to the first party, and the south half formed of the angular portions of ground belonging to the two parties respectively. It is also by that agreement provided that each party shall be at one-half of the expence of forming and causeweying the said street, and paving the same to the extent foresaid. I have no doubt that the defender is bound by these obligations, and I think that the Lord Ordinary has justly recognised and rightly enforced them.

The remaining question relates to the obligation of the defender to open up, and leave open, the line of street called or to be called Reid Street or Reidvale Street, leading from Bellgrove Street eastward to the central line of Sword Street (*i.e.*, where it formed the northern boundary of lot 3), near the point C, which I have already mentioned.

This is really the only question of difficulty now before us. After what has been already stated I shall not occupy your time by explaining the grounds on which I have arrived at the same conclusion as the Lord Ordinary. It is, on the one hand, true that we have here no question between superior and vassal. It is also true that we have here no question with a singular successor. The defender represents the party originally bound by the obligations which the pursuer seeks to enforce; and the pursuer, to whom the whole remaining space was conveyed, is in the right and interest to enforce the obligation.

If the disposition in favour of Mr Thomson in 1854 had stood alone, and we had no aid from other deeds in its construction, I should have felt some difficulty in distinguishing this case from the case of the Trustees of Free St Mark's Church v. Taylor, 26th January 1869; although the two cases are, in regard to the exact terms of the titles, and particularly the manner in which, and the purpose for which, the plan is referred to, not in precisely the same condition. But I do not pause to explain that distinction, for I do not think that justice is done to the defender's case by confining our attention to the words of the title in 1854. It is certain that even in that title the boundary of the defender's pro-

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ated to be on the east by "the central line of Sword Street;" on the 'the central line of Reid Street;" and on the west by "the central nfield Street." These streets are all named—named in the title, and the plans of the day. Whether formed or not, they were all, within edge and intention of the parties, real and existing lines of street quite stood, and the ground is stated to be delineated on a plan made out s Kyle, land-surveyor, and signed by Reid's trustees as relative to the a. Accordingly we have the plan. It is not a general feuing plan, plan with elevations, but being intended as relative to this disposi- a plan in which the "central line of Reid Street" is specially de- It appears to me that the main object of referring to that plan, and it by reference into the title, was to explain and fix down, as the of the subject conveyed, the central line of Reid Street.

sposed to think that when the central line of a street is the boundary wo properties each proprietor owns the one-half of the street, but both s have a common interest in the street, in so far as necessary to secure , and to advance the objects, contemplated in the feuing arrangements. ing of a street, and the giving of access by a street, along the line id described as Reid Street, was the intention and purpose of the this deed, well known and understood to be so; and I think that y had a right to claim that access, and to enforce the opening up of t.

I have already said, I do not confine my attention to the title of 1854. at the agreement in April 1860 supplies additional confirmation of which I have taken of that title of 1854. It is impossible to read the t of 1860 without perceiving that the existence of Reid Street in the eated on the plan there referred to (not the same plan, but exhibiting line of street) was taken for granted, and that the formation of Reid m the western extremity of it up to the central line of Sword Street, ned and agreed on, inasmuch as the further extension of Reid Street was provided for by mutual arrangement. Accordingly I read the t of 1860 as aiding my construction of the title of 1854.

ve have the disposition by the Western Bank and Reid's trustees to Thomson in December 1860. By this disposition an additional piece was conveyed to Mr Thomson, and the minute of agreement of April pecially referred to. Mr Kyle's plan is mentioned as delineating the e proposed streets, and the agreement is stated to be "for the forma- eid Street, as delineated on said plan, eastward from the central line of reet." After narrating this agreement a large piece of ground—as I . 7 on the plan—is conveyed to Mr Thomson under reference to a plan yle, and the boundaries are given, one of which is, "on the west by al line of Sword Street, measuring 50 feet in breadth;" on the east central line of a proposed street, to measure 50 feet in breadth," that is known as the unnamed street; and "on the south by the central line osed street to be called Reid Street, to measure 60 feet in breadth." t portion of street bounding No. 7 on the south, and described as a street to be called Reid Street, is undoubtedly the portion falling within ment of 1860, which was just a proposed extension eastward of the own as Reid Street, which had been delineated in the plans, and re- in the previous deeds.

g these three deeds together, viz., the disposition of 1854, the agree- April 1860, and the disposition of December 1860, and construing them d with reference to the plans, and to the undoubted fact that the for- f streets, and the giving of access by streets, was the original purpose tion of the whole arrangements, I come to the conclusion that this case uishable from the case of Free St Mark's Church; and then, in regard ntral line of Reid Street, as well as in regard to the central line of reet, and of the unnamed street, the defender is under obligation so to his own property as to secure the access by street, which has been all ended, in which access by street the owners of the said streets on both

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sides, deriving their right from a common author, have a common interest which they are entitled to protect.

If the obligation exists, as I think it does, then there can be no doubt that the pursuer has right and interest to enforce it; and it is equally clear that the defender, not a singular successor, but representing the disponee, who is in the position of a contracting party, is the person who must be liable in that obligation to open up and keep open all the streets in question.

In so far as regards the space at the east end of Reid Street, and forming the south boundary of No. 7, the words of the agreement are clear, and the defender has been rightly ordained by the Lord Ordinary not only to open up, but to form and causeway that part of the street.

In regard to the other streets to which the agreement does not apply, the Lord Ordinary has only found the defender bound to open them up and keep them open. In thus limiting his judgment I understand that he has not pronounced any opinion in regard to the formation and causewaying of streets, apart from the specific obligation in the titles; and taking that view of the question I concur in holding that there are no sufficient grounds for ordaining the defender at once and immediately to form and causeway these streets. There are no definite words of obligation to that effect anywhere, except in the agreement, which relates to one part of one of the streets only. There is no time specified or pointed at for the formation and causewaying of the streets, and I am not surprised that the Lord Ordinary has refrained from giving a decernitur at present to that effect. For my own part, I think that it is sufficient at present to say that Mr Thomson is not taken bound by his titles to form and causeway the streets at present.

Lord Deas.—I agree with the remark made by the Lord Advocate to the effect that the general rule that a proprietor may make any use of his property he thinks right, except in so far as he is under express limitations by his titles applies only in a qualified manner to such a matter as this—the formation of a street. I think, with regard to that, there is a great deal in the argument that it is a sort of mutual contract, in which you are to look mainly to what appears to have been the intention of the parties. Taking that view of it, I have no hesitation in coming to the conclusion arrived at by Lord Ardmillan, and so entirely upon the grounds which he has stated in reference to the deeds that I do not think it at all necessary to go into particulars. I agree likewise in the construction he puts on the Lord Ordinary's interlocutor as not determining the question whether the party here, who is objecting to the formation of the street, shall or shall not be found liable, at the proper time, to assist in causewaying the street. I think that also,—and indeed peculiarly,—will be a matter to be decided according to the construction of the contract and the fair meaning of the parties. The Solicitor-General very adroitly took advantage of what he represented as a concession by the Lord Advocate, that the whole question was a question of servitude—the servitude right of one property over another property. But although the doctrine of servitude was very properly contended for as involved in the case, it did not appear to me that it was contended for in such a way as to exclude the different question,—what was the fair meaning of the parties in this contract. The two things are not inconsistent. I quite concur that there is no express obligation to form the street at present; but as to what questions may arise afterwards it is not necessary to pronounce an opinion. With this explanation or variation I entirely concur in the interlocutor of the Lord Ordinary.

Lord President.—As regards the main part of this case I think it is free from any doubt, and I concur entirely in the grounds of judgment stated by the Lord Ordinary. The mutual rights of the neighbours here seem to me to be secured by the very express clauses in the deeds, and I can hardly conceive any case more complete in that respect. The only difficulty has been in disposing of that part of Reid Street, or Reidvale Street, which lies to the north of the properties No. 3 belonging to the defender. That was acquired along with No

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ler a disposition dated 27th January 1854, and the terms of that deed in nce to Reid Street are very peculiar. Lot No. 3 is described as being led "on the north by the central line of Reid Street, to measure 60 feet in th from building line to building line, along which it extends 255 feet or by." The property is bounded on two other sides by two other streets,— ield Street and Sword Street. Then the property No. 4, which immediately as No. 3 upon the east, is described as being "bounded on the north by ground belonging to the said trustees, along which it extends 255 feet hes or thereby, on a line coinciding in range with the central line of Reid t." Now, there is a marked distinction undoubtedly between the de- tion in the case of No. 3 and that in No. 4. It may be much more easily red in regard to No. 3 that it was intended to impose upon the disponee an ation to leave 30 feet of his property for the formation of Reid Street than uld in the case of No. 4, because, as far as No. 4 is concerned, there are no ls to indicate any intention whatever to prolong Reid Street beyond the line o. 3, the line of northern boundary in No. 4 being "other ground belonging he said trustees" "on a line coinciding in range with the central line of l Street,"—that is to say, the line which forms the northern boundary of 4 is a continuation eastward of the straight line which forms the northern dary of No. 3. The disposition is in other respects peculiar, because the r two streets which are mentioned as boundaries of No. 3 are made the ect of very express provision at the conclusion of the deed, and the obliga- is expressly imposed upon the disponee to open up and form these streets in a certain limited time in so far as the area of the street is upon the *solum* operty conveyed. The mention of these streets, and the obligation expressly sed upon the disponee in regard to these two streets, while no correspond- bligation is imposed in regard to Reid Street, create a very general difficulty e case. On the other hand, there is this circumstance favourable to the con- on of the pursuer in the action, that Reid Street, at the time when this dis- ion was granted, was to a certain extent an existing street. Nearly up to No. d between the west boundary of No. 3 and Bellgrove Street (a street farther), it appears that Reid Street was then an existing street, whether actually swayed and used I do not know, but it certainly was built upon to a certain nt. These are the peculiarities of the case, which it would have been sary to consider a great deal more seriously and elaborately if the case had d entirely on the disposition of 1854, and if it had been so I confess I ld have had very great difficulty indeed in deciding in favour of the pur- here, because of the decision of this Court in the case of Free St Mark's v. or, which I hold not only to be a binding judgment upon us, but to be dgment entirely sound in itself, and in the principle of which I entirely ur; but fortunately for the pursuer the case does not depend upon the dis- ion of 1854 alone. The same parties who stood in the relation of seller purchaser in the transaction of 1854 proceeded in a subsequent period, 1860, al with other parts of the property belonging to the disponers. In 1860, with a view to the further acquisition of property by the defender's father Thomson, there was a minute of agreement entered into, dated in April of year, in which an arrangement was made for the extension of Reid Street g that line, or rather along a line substituted for that line, which is called e disposition of 1854 "a line coinciding in range with the central line of Street." Now, the object of this agreement was to ensure that Reid Street, e breadth of 60 feet, should be carried eastward between the two properties d No. 4 and No. 7. That was the object of both parties to this agreement. this purpose a special arrangement was made, and the line of direction of treet was varied, for instead of being a mere projection in a straight line of Street as opposite No. 3, it turned up to the north to a certain extent, and terchange of ground, or rather a contribution of two triangular pieces of d, was made by the parties respectively in order to enable this divergence e street to be carried through. Now, when the parties in April 1860 were carefully providing for the extension of Reid Street between No. 4 and ,—that is to say, to the eastward of No. 3,—and when Reid Street had

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also been previously formed to the westward of No. 3, it seems to me impossible to contend that the defender or his father were after that in a position to maintain that Reid Street should not be formed as it passes No. 3, and should not be formed of the same breadth as it is both to the west of it, and, as provided in the agreement of 1860, to the east of it. It may be represented perhaps that this agreement of 1860 construes the disposition of 1854, and I think a great deal might be said in support of that view, that it construes the disposition of 1854 so as to impose an obligation on Mr Thomson, as the disponee in that deed, to submit to have 30 feet in width taken off his property No. 3 for Reid Street. But whether that is the true view of it or not I hold it at least to be very clear that, taking the disposition of 1854, the agreement of April 1860, and the subsequent disposition of December 1860, by which last deed Mr Thomson acquired the property No. 7,—taking all these together, the defender is undoubtedly placed under an obligation to permit 30 feet of his property No. 3 to be occupied by the area of a street. Upon these grounds I concur with your Lordships in the result at which you have arrived. As to the formation and causewaying of the streets, the Lord Ordinary has found "that the defender is not under his title bound to form or to causeway any portion of the said street excepting that portion of Reid Street or Reidvale Street" mentioned in the third finding, being the portion which passes between No. 4 and No. 7, and which is regulated by the agreement of April 1860. I rather apprehend that the Lord Ordinary meant here to do no more than to find that the titles do not contain any obligation which can be enforced against the defender to causeway these streets. What his obligation otherwise may be is a totally different question. But perhaps there may be some little ambiguity in the mode in which that finding is expressed, "that he is not in his title bound to form or to causeway," and it would tend to remove that ambiguity if, in place of the expression "is not in his titles bound," we were to express it, "is not taken bound by his titles" to form and causeway. With that variation I should be prepared to adhere to the whole interlocutor, as your Lordships find.

THIS interlocutor was pronounced:—"Vary the said interlocutor in so far as to substitute in the last finding for the words 'not under his titles bound' the words 'not taken bound by his titles': *Quoad ultra* adhere to the said interlocutor, and refuse the reclaiming note: Find the pursuer entitled to expenses since the date of the said interlocutor; allow an account," &c.

HAMILTON, KINNEAR, & BEATSON, W.S.—J. & A. PEDDIE, W.S.—Agents.

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FIELD AND ALLAN, Pursuers and Reclaimers.—*Marshall—Lees.*
JOHN GORDON, Defender and Respondent.—*Thoms—Hunter.*
ALEXANDER AIMERS, Defender.

Retention—Payment by Instalments.—Where work was contracted to be done for a price payable by instalments during its progress, and at the sight of an architect, who was appointed arbiter in case of dispute between employer and contractors, and an instalment had been sent, for behoof of a contractor, to the architect, who returned it to the employer, with a request that he would send it direct to the contractor, *held* that the employer had no right to retain the instalment so sent in extinction of a claim of damages for non-fulfilment of the work, and that it was liable to arrestment in his hands by a creditor of the contractor.

2D DIVISION. Lord Jerviswoode. R.

A MINUTE of agreement, dated 3d and 6th February 1871, was entered into between Messrs Skene and Peacock, W.S., as agents for and on behalf of John Gordon, Esq. of Cluny, on the one hand, and Alexander Aimers, plumber, Kelso, on the other, whereby the latter contracted to perform the slater and joiner work required in certain repairs and improvements

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ch the former proposed to make on the farm of Belville, in Berwick-
e, all as described and set forth in plans and specifications prepared
William Dickison, architect, Kelso. Payment for the said work was
e made "by instalments, to be fixed according to the progress of the
k by the said William Dickison," to whose satisfaction the said work
s to be executed; and it was provided that if Aimers became bankrupt
insolvent, or unable for any cause to implement his obligations under
agreement, the said John Gordon might enter into possession of the
rks, and complete the same at the contractor's expense, or might, in his
n option, declare the agreement null and void, and make the contractor
ble for any loss or damage which might be sustained from his failure
implement the agreement. All disputes or differences that might arise
to the meaning or intent of the agreement, plans, or specifications, were
ferred to the amicable decision of the said William Dickison, whose
ard was to be final and binding on all parties. The work was to be
ished on the 1st of November 1871, under a penalty of £10 for every
eek of delay, and the contract price was £310.

On 30th June, subsequent to this agreement, Aimers further contracted
r the slater, plumber, and plaster work of cottages proposed to be built
the same farm at the sum of £61, 16s.

Aimers proceeded with the work under these contracts, and obtained
yment from Mr Gordon's agents of three instalments of £50 each, in
ebruary, May, and July 1871 respectively, on their obtaining certificates
om Dickison that the work was going on well, and that these sums
ere within the value of the work actually done. About the 20th July
871, however, Aimers, having fallen into embarrassments, was imprisoned
r debt, and remained in jail for about three weeks, during which time
e works were suspended. On his release he returned to his work at
elville, and continued to execute it down to the end of November 1871,
hen he absconded.

Meanwhile Field and Allan, who were slate-merchants in Leith, had
pplied Aimers with slates, and had received in return his bill for £66,
s. 4d., dated 29th September 1871, and payable one month after date, in
enewal of one formerly current. On 29th August 1871 Field and Allan
rote to Dickison that they had made an arrangement with Aimers,
hereby they were authorised to draw the first £50 payable on his con-
act, and requesting the name and address of the proprietor of Belville
r his agent. To this Dickison replied on the 4th of September, promis-
ng to make them aware when Aimers obtained the draft. On the 10th of
October Field and Allan further wrote to Dickison that Aimers had agreed
hat Dickison should retain in his hands any instalments due till they
mounted to £66, 1s. 4d., and then hand them over to the pursuers; to
hich Dickison replied:—"In reference to your note about Aimers' bill, I
m sorry to say that . . . I am not in a position for a few days to grant an
rder. It may be a fortnight yet before he has money; but you may rest
ssured that as soon as he gets it you shall have it." On 13th November
ickison sent to Messrs Skene and Peacock a certificate to the effect that
imers was entitled to £92 for work done at that date, which sum was
cordingly sent to Dickison in the form of a cheque on the 15th.

Meantime the bill due by Aimers to Field and Allan had not been paid,
d they raised action for payment thereof before the Sheriff of Roxburgh,
d on 16th November used arrestments in the hands of Dickison of
sum of £85, and on 20th November further arrested the sum of £100
the hands of Mr Gordon. Between these two dates Mr Dickison, who
l not cashed the cheque, returned it to Messrs Skene and Peacock, writ-
to them that "if you are free from any arrestment you might send

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the order to Mr Aimers himself, and I could instruct him what payments to make." Their reply was that the money must remain with them, subject to any right Messrs Field and Allan might have to make it furthcoming from him.

On 27th November 1871 Field and Allan obtained a decree in absence in the action above-mentioned, decerning and ordaining the said Alexander Aimers to make payment of the sum of £66, 1s. 4d. contained in the foresaid bill, together with interest at the rate of five per centum per annum from the date the said bill became payable till paid, and £2, 4s. 4d. of expenses.

In these circumstances the present action of furthcoming was brought, concluding that the defender, John Gordon, arrestee, should be decerned and ordained to make payment of the said arrested sum of £100, or at least of the above sums of money contained in the decree in absence against the other defender Aimers, besides £2, 3s. 6d., being the expenses of the arrestment.

The pursuers pleaded resting owing.

The defender, Gordon, pleaded;—(1) The defender not being indebted to the principal debtor, and the pursuers' arrestment not having attached any funds of his in the hands of the defender, the latter should be assoilzied, with expenses. (2) Any debt which may have been due by Mr Gordon to Aimers is extinguished by the liabilities and expenses incurred and to be incurred by Mr Gordon in completing the works, and the damages sustained by him, actual or pactional, through the non-completion by Aimers of his contracts. (3) The defender, Mr Gordon, is entitled to retain any balance that may be now or ultimately due to Aimers to meet said liabilities, expenses, and damages, and cannot be called upon at present to count and reckon with and pay over any sum to the pursuers.

The Lord Ordinary pronounced this interlocutor:—"Having heard counsel, and made avizandum, and considered the proof, debate thereon, productions, and whole process,—Finds as matter of fact (1st) that the defender, Mr Aimers, failed to complete his part of the contracts between him and the defender and arrestee, Mr Gordon, which are set forth on the record, and whereby he undertook to execute certain slater and plumber work on the farm-steading of Belville, on Mr Gordon's estate of Belchester, and the slater and plumber work of certain cottages which were to be erected on the farm of Belville; (2d) that Mr Gordon has consequently been obliged to employ other parties to complete the slater and plumber work so undertaken to be performed by Mr Aimers; and (3d) that the pursuers have failed to establish that any sum was, at the date of the arrestment founded on in the summons, or is now, due by Mr Gordon to Mr Aimers: Therefore, and with reference to the preceding findings, dismisses the action, and decerns: Finds the said defender and arrestee entitled to expenses, of which allows an account to be lodged," &c.

The pursuers reclaimed, and argued;—The sum of £92 certified by Dickison was really due at the date of the arrestment. Under the minute of agreement the defender Gordon had no right of retention,[1] and the return of the cheque to his agents was only subject to the rights of the pursuers.

Argued for the defenders;—This was a case to which the doctrine of retention applied.[2]

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[1] Gibson v. Wills, Dec. 2, 1826, 5 Sh. 69; Bell's Prin. sec. 1410.

[2] Brodie v. Wilson, June 27, 1837, 15 Sh. 1195; More's Lect. i. 402; Kerr v. Dundee Gas-Light Co., Jan. 18, 1861, 23 D. 343; Johnston v. Robertson, March 1, 1861, 23 D. 646.

t advising,— No. 21.

ORD JUSTICE-CLERK.—The facts of this case are simple enough. We have Nov. 23, 187
contract for work to be performed between the defender, on the one hand, Field & Allan
certain tradesmen on the other, under which the former, in case of bank- v. Gordon.
cy, insolvency, or failure to implement the agreement on the part of the
r, is authorised to enter into possession of the works and complete the con-
. On the other hand, the contractors are to be paid by instalments, and
e are to be fixed by William Dickison, the architect superintending the
ks. Further, any disputes arising with regard to the completion of the work
o be referred to the amicable decision of Dickison, who therefore held an
pendent position, so far as this contract was concerned. This case refers to
of the instalments. A certain amount of work had been done by Aimers, for
ch Dickison gave his certificate. The employer recognised it, and the money
ch it certified to be due was paid to Dickison in the form of a cheque, for
purpose of being paid to Aimers. It turns out that Dickison had had some
munications with the pursuers, who were creditors of Aimers, and not only
they been authorised by their debtor to receive the next instalment, but
kison had undertaken they should receive it, and had encouraged them to
te further supplies of slates on the faith of it. What took place afterwards
filled me with the greatest surprise. While the cheque was still in Dickison's
ds the pursuers used an arrestment in his hands on the dependence of an
ion at their instance against Aimers. Dickison, instead of paying over the
ney to the pursuers, sent the cheque back to the employer's agents, with a
uest that the money might be sent direct to Aimers. The agents very pro-
ly wrote back that the money must remain with them, subject to any right
ers Field and Allan might have to make it furthcoming. I think it clear
t Dickison was bound, by his own undertaking, to pay the money to the
suers, and also that Mr Gordon's agents received the cheque back on the
e footing as that on which Dickison had received and held it. A second
stment has been used by Field and Allan in Mr Gordon's hands, and this
ess of furthcoming has been brought. In defence there is no attempt to say
t the instalment was not due. In these circumstances the defence is twofold,
ther is inconsistent. The defender, Gordon, says, in the first place, "that
never got back the money, for Skene and Peacock did not in that matter act
him;" and, in the second place, "that he did get it back, and that he is
tled to retain it in extinction of a claim against the common debtor for non-
lment of his contract," which is preferable to the arrestment in his hands
ch is now founded upon. The defender was, however, bound to take one or
r of these views, and in fact now takes the latter. And the only question
hether he has any claim of retention. I think he has not, for he put the
ey out of his hands when the cheque was sent to Dickison, and never
ved it back excepting on a footing which bound him, or his agents, to hold
bject to the pursuers' claims. It is not necessary for us to decide any
act question in regard to the effect of arrestment in a contract like this, in
h the price is payable by instalments. This contract differs, as regards the
s of the employer, from an ordinary mutual contract in which the price is
ble when the work is completed; on the other hand, an obligation to pay
stalments does not constitute a series of separate contracts; and I am not
ied that if, before an instalment, already due, has been paid, the contractors
ne bankrupt, the employer could not retain the sum, to indemnify himself
ay loss arising from the non-completion of the work. It may be that in
a case the arresting creditor of the contractor could only use his debtor's
s, and would only attach them subject to the employer's plea of retention.
ther the debtor's continuing obligation to complete the contract in such a
would have that effect we need not decide. These questions do not arise

In this case the money was beyond the defender's control. Skene and
ock received it back as the defender's agents, but held it subject to the
ers' rights against Dickison. The second arrestment therefore validly
ned it in their hands, on the special footing on which they held it, and the
ce of retention must be repelled. The pursuers are entitled to decree.

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Lord Cowan.—It seems to me that the circumstances of this case exclude the plea of retention altogether. The position of Dickison in the contract admits of no doubt. He is selected as the person at whose sight the work is to be performed, and by whom the instalments coming due are to be fixed. I apprehend that it is quite clear that the certificate or order for payment fixed and settled that Aimers was entitled to have a certain sum paid for work already performed. It makes no matter in my mind whether Dickison was servant of Mr Gordon or servant of Mr Aimers. As regards the matter in question he was sole judge under the contract. Thus, as regards his attempt to gain some advantage to himself in disregard of the previous agreement with Field and Allan, that their bill should lie over, on the understanding that he should intimate to them the issue of the next certificate: When he tried to repudiate this, and to get the money into his own hands, and to pay himself in the first place, he did that which no Court can sanction.

Your Lordship has explained the position of the money in the hands of Messrs Skene and Peacock, who acted for Mr Gordon. The money was in truth in their hands earmarked as belonging to Aimers. It is said that the arrestment of the 10th November was inept for the purpose of attaching the fund. But what room is there to plead retention when the arrestee himself acknowledges that he holds for the arrester, to whom the money had been in fact paid over? That arrestment was a very proper step to guard against diligence by other creditors, but cannot be permitted to give a right of retention which could not otherwise have been pleaded.

Lord Benholme.—I confess I have felt in this case somewhat more difficulty than has been expressed by your Lordships. There is a large class of contracts entered into between proprietors and tradesmen the basis of which is payment by instalments. They are often considerable in amount, and embrace a tract of time. In such cases it is of the last importance to the tradesmen that they should be supplied from time to time with the means of enabling them to go on with their part of the undertaking. There can be no doubt that as the work progresses the landlord gets something added to his estate. It was so in this case with Colonel Gordon, and as he got value added to his estate he became bound to make payment of certain instalments. It appears to me that whenever the architect had given his certificate that so much work was done, Colonel Gordon, on the one hand, had had his estate increased by so much, and on the other was under the distinct obligation to pay over to the contractor the sum certified to enable him to go on with the work. If he withheld the money he might thereby embarrass his contractor, and be himself the cause of his ultimate bankruptcy during the progress of the contract undertaken.

That is the principle which distinguishes all such contracts from ordinary mutual contracts when there are no such stipulations as to instalments. A mutual is an indivisible contract—a *unum quid*—not divisible into parts. That is the general principle which underlies the judgment in the case of Johnston quoted to us. But I think that the Lord Ordinary's interlocutor plainly bears on the face of it an indication of the point where he has gone wrong. It is in the matter of fact. He says that Mr Aimers failed to complete his part of the contract, and that therefore Mr Gordon had to employ other parties to complete the work, and consequently that the pursuers have failed to establish that any sum was at the date of the arrestment founded on due by Mr Gordon to Aimers. That, I take it, is a finding that at the date of the action there was no sum due by Mr Gordon. If that is right, then the Lord Ordinary's interlocutor is justified. But it was not so in my opinion. The third finding is not well founded, for I think the pursuers have not failed to prove that any sum was due, but on the contract I think they have proved it very clearly. If the Lord Ordinary is mistaken, his whole judgment falls to the ground. For it will not do to say that in consequence of the contractor's subsequent difficulties the contract could not be gone on with, and that therefore damages are due to the defender. That has nothing to do with the performance of their obligation by the parties up to the date of the arrestments. If Mr Gordon had paid in virtue of the architect's

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ification, then Field and Allan would in all probability have supplied just it was wanted to complete the work, namely, more material.

t appears to me that this case is in itself very clear, and that it has been over- with extraneous matter which has caused us all the difficulty. Gordon had his hand money due to Aimers, which must be held to have been either d to him at the time, or to have been held by Gordon or his agents for his oof, and must now be made furthcoming to his arresting creditors.

Lord Neaves.—I think there can be no doubt as to the decision of the case, I I concur generally in the remarks of your Lordship and Lord Benholme on subject of contracts, with, however, a certain reservation. I am not prepared ay that a sum may not be due as an instalment under a contract of this nd, and yet be retainable.

In the present case there is no doubt that the sum was *prima facie* due, and ght to have been paid. But in certain circumstances an employer might be titled to say, "I see that there is something wrong, and I am not bound to y." An arrester or assignee is, I conceive, in the same position as the original ntractors, and the employer might be entitled to say, "I foresee the bankruptcy the principal coming, and I must protect myself." But I think the nature of e present case renders it unnecessary to define the circumstances in which such es of retention could be sustained. The money here was appropriated to the ntractor. The employer had set aside the sum and sent it to his agent to be id to Aimers. There was nothing at the time to justify retention, and the nployer had no intention of retaining it. But then comes the very question- ble conduct of Dickison, the bearing of which Messrs Skene and Peacock saw ry well from the beginning. It can in nowise raise up again a right of reten- on in Mr Gordon. The money was clearly appropriated to Aimers, and his esting creditors must now get it.

The Court accordingly recalled "the interlocutor complained of, and decerned in terms of the conclusions of the summons."

David Hunter, S.S.C.—W. F. Skene & Peacock, W.S.—Agents.

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Nov. 26, 1872.
Lord Advocate v. Sinclair.

The Lord Advocate, Petitioner and Respondent.—*Sol.-Gen. Clark—Ivory.*

James Sinclair, Respondent and Appellant.—*Millar—Marshall.*

Property—Straightening Marches—Act 1669, *c.* 17.—The procedure laid down in Act 1669, c. 17 (anent enclosing of ground), whereby the Sheriff may be required to visit the marches, is imperative, and cannot be supplied by a remit to a man of skill, even of consent.

Property—Straightening Marches—Act 1669, *c.* 17.—The Act does not apply, (1) where there is in existence a natural boundary of steep cliffs, involving little danger of trespass; nor (2) where the expense of erecting the fence would be disproportionate to the value of the pieces of ground to be benefited.

2d Division. Sheriff of Caithness, Orkney, and Shetland. I.

The lands of Holbornhead, in Caithness, belonging to James Sinclair, Esq. of Forss, are at one part separated from the sea by the lands of Scrabster, belonging to the Crown, which there consist of a long narrow strip of land lying between Scrabster Bay and a line of cliffs about 120 feet high, and at some places very steep. The present boundary line between the two properties runs along the face of these cliffs, and is very irregular in form.

The Lord Advocate, as acting on Her Majesty's behalf, and on behalf of the Commissioners of Woods, Forests, and Land Revenues, brought this petition before the Sheriff-substitute of Caithness against Mr Sinclair, proceeding on the narrative of the two Scotch Acts 1661, c. 41, and 1669,

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c. 17, as ratified by 1685, c. 39,* praying the Sheriff to remit "to M George Brown, tacksman of Watten, or such other person or persons a your Lordship may appoint, to report upon the proper line of march be tween the lands of Scrabster and Holbornhead respectively, where no already fenced, and upon an estimate of the just value of the parts to b adjudged respectively from the one heritor to the other, and to decern i favour of the party from whom shall be taken land of more value tha the other, for any excess of value which may be found to be taken fro such party; and thereafter to find that the most suitable fence to b erected on the whole line is a strong wire fence, or such other fence a may be reported by the said George Brown or the other person or perso to be named by your Lordship, and to ordain the same, or such othe fence as your Lordship may find to be most suitable, to be erected at th mutual expense of the parties, and for that purpose to authorise contract to be entered into under your Lordship's sanction, and thereafter to de cern against the respondent for one-half of the whole expense of such erection, and incidental thereto, and to find the respondent liable in th expenses of process," &c.

The remit was granted by the Sheriff-substitute, and Mr Brown visited the ground and prepared a report to the effect that as the present lin was very crooked, and passed over ground so steep and broken that n fence thereon could be durable and satisfactory, he would recommend a excambion of pieces of ground of equal value to be made, and a straighte line to be drawn on which should be placed at one part a stone dyk and at the rest a wire fence.

To this form of procedure the respondent made no exception, but to th report he objected, *inter alia*, (3) that the extent of march proposed to b fenced inferred a cost totally out of proportion to the value of the lan to be fenced; and (4) that the report proposed to leave with the respond ent, at least at one point, a piece of ground so narrow and so surrounde by the proposed new fence and by an existing old one as to be useless.

The Sheriff-substitute issued the following interlocutor:—"19th Feb-

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* Act 1661, c. 41, *inter alia*, "Statuts and ordaines that wher inclosours fall to be upon the border of any person's inheritance, the next adjacent heritor shall be at equall paines and charges in building, ditching, and planting that dyk which parteth their inheritance, and recommends to all lords, shirreffs, and bailies of regalities, stewarts of stewartries, and justices of peace, bailies of burroughs, and other judges whatsoever, to see this Act put in execution, and to grant processe at the instance of the partie damnified and prejudged, and to see them repaired after the form and tenor of this Act above written in all points."

Act 1669, c. 17, provides,—"That whenever any person intends to enclose by a dyke or ditch upon the march betwixt his lands and the lands belonging to other heritors contiguous thereunto, it shall be leisome to him to require the next sheriffs or bailies of regalities, stewarts of stewartries, justices of peace, or other judges ordinary, to visit the marches alongst which the said dyke or ditch is to be drawn, who are hereby authorised when the said marches are uneven or otherwise incapable of ditch or dyke, to adjudge such parts of the one or other heritor's grounds as occasion the inconveniency betwixt them from the one heritor in favours of the other, so as may be least to the prejudice of either party, and the dyke or ditch to be made to be in all time thereafter the common march betwixt them, and the parts so adjudged, respective from the one to the other, being estimat to the just avail and compensed *pro tanto*, to decern what remains uncompensed of the price to the party to whom the same is wanting; and it is hereby declared that the parts thus adjudged *hinc inde* shall remain and abide with the lands or tenandries to which they are respective adjudged, as parts and pendicles thereof in all time coming."

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ary 1872.—Repels the objections stated by the respondent to the report o. 9: Approves of the line of boundary laid down in the report, and lative plan and certificate, and of the proposed interchange of portions ground, as specified in said certificate and report, and of the estimate sulting in equalisation of value: Farther, approves of the description d character of fence to be erected, and ordains the same to be erected thwith: Appoints the petitioner to lodge draft of the requisite con-acts for the execution thereof, after being approved of by the Court, reparatory to the completion of the work: Reserves all questions of xpenses," &c.

Mr Sinclair appealed to the Sheriff, who, on 22d February 1872, pro-ounced the following interlocutor:—"22d February 1872.—Dismisses id appeal, and adheres to the interlocutor submitted to review: And virtue of the Act 1669, c. 17, the Sheriff hereby adjudicates such parts f the ground of Her Majesty, being 3 roods and 12½ poles, as occasion e inconveniency betwixt the Crown lands and those of the respondent, belong to the respondent, and such parts of the ground of the respond-nt, being 1 acre 1 rood and 22 poles, as occasion the inconveniency be-wixt his lands and the Crown's lands to belong to Her Majesty, and the yke and fence to be made to be in all times thereafter the common arch betwixt them, and decerns; reserving all questions of expenses." *

On the case returning to the Sheriff-substitute he pronounced this in-erlocutor:—"31st May 1872.—Approves of the advertisements of the ffers of John Orrock and Donald Mackay mentioned in said minute, and f the drafts of the contracts with them: Authorises the said contracts to e extended and executed, and the necessary works to be completed in erms thereof: *Quoad ultra* reserves consideration of the cause," &c.

The respondent appealed.

Argued for him;—Looking to the nature of the ground the Act of 1669 does not apply. The expense of the fence, being about £70 or £80, s too great, in comparison with the value of the patches of ground which t is to separate, the said value being about two guineas a-year. The etition was incompetent (1) as not being for the mutual advantage of the arties;[1] and (2) as craving a remit to a man of skill instead of a visita-ion by the Sheriff, as appointed by the Act.

Argued for petitioner;—The objection of the respondent all along has ot been to the competency of the petition, nor to any fence being erected t all, but to the particular fence. The visitation of the Sheriff was dis-ensed with by consent of parties, and was not of the essence of the Act.

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* "NOTE.— . . . . The 3d objection is vague, and in one view is an nswer or defence to the application, which should have been stated long ere ow. But it was explained that it had reference to the value of the braes along hich the fence is to be constructed, to the exclusion of the valuable arable nd on the top. The land deriving the benefit of the new fence the Sheriff onsiders to be the arable land, and hence this objection fails.

"As regards the last (4th) objection, the road shewn on the plan (which the own says is public, and the respondent says is of another character), explains hy the reporter did not feel warranted in doing anything to interfere with ghts not in question in this process.

"It is proper to mention, with reference to the requirements of the Act 1669, at it was stated at the debate that in respect of the Sheriff-substitute's know-lge of the locality his visiting the proposed march had been dispensed with both parties. The Sheriff happens also to know the ground."

[1] Earl of Cassilis v. Paterson, Feb. 28, 1809, F. C.; Earl of Peterborough v. rioch, 1784, M. 10,497; Penman v. Douglas, 1739, M. 10,481.

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Lord Cowan.—The Crown has thought fit, founding upon the statut are referred to in the application, to present this petition to the Sheriff ness for straightening of marches. I think it is material to observe, firs what the terms of these statutes are. The first is that of 1661, which " where inclosures fall to be upon the borders of any person's inherita next adjacent heritor shall be at equal pains and charges in building, and planting that dyke which parteth their inheritance, and recommen Lords, Sheriffs, and so forth, to see this Act put in execution. The sec which was passed in 1669, provides that whenever any person inte inclose by a dyke or ditch upon the march betwixt his lands and t belonging to other heritors contiguous thereunto," it shall be leisome t require the next Sheriffs or other officers " to *visit* the marches " along the said dyke or ditch is to be drawn, who are hereby authorised, when marches are uneven or otherwise incapable of ditch or dyke, to adjud parts of the one or other heritor's grounds as occasion the inconveniency them, from the one heritor in favour of the other. I have great diff thinking that this is a case which falls within these statutes at all. wish to lay down positively that this is not a case falling, in some of its within the statutes. At the same time, I think this is a case of a very able nature—it has more the appearance of an attempt to have an boundary run along the whole of the march between these two properti there is a natural boundary sketched by the hills, clearly marked out, t of a proper straightening of marches. If it had been stated that at p parts there was danger of trespass on account of the want of inclosures have been competent to have asked a dyke or ditch to be made; but not been said to be the case, except in one small part of this property the south of the boundary. But apart from that, although I think it sideration that one cannot keep out of view in judging how we are to d this application, I think the prayer is inconsistent with the statute. think that under an application of this kind—at least I can find no auth it—it should be an application to the Sheriff to remit to a particular pa and report upon the boundaries and upon the values of the several por ground which should be exchanged with a view to the adjustment of a march. Such a process has for its object rather a forced excambion as these two parties of particular portions of their estates, and this is not th or purpose of either of the statutes. The proper application under the s that the Sheriff or Judge-Ordinary shall visit the ground, and in presen parties consider what particular parts ought to be given to the one an other, and what dyke or ditch it was necessary to have in order to prev passing from one side to the other of the march. Now, here the appli not to visit, and in point of fact the Sheriff never did visit these p because the Sheriff-substitute says he was acquainted with the district i of general way, just as we are all acquainted, I suppose, with districts w have traversed or occasionally seen; and the Sheriff-principal says he same kind of general knowledge. In these circumstances, the parties h pensed with that which I apprehend to be at the basis of every appli this kind. It is well known that prior to the statutes under which thi cation is made the way in which boundaries were marked out and t prevented was by a perambulation of the march by the Sheriff, with accompanying him, who adjudicated upon the line of march that oug fixed as the true boundary; and I am not aware that there ever was a straightening of marches otherwise carried through, where the parties consenting, than by the Sheriff visiting the ground under a legal perami That has now been superseded by the statutory procedure; but, unless e dispensed with by the parties the statute plainly requires that there sh a visitation of the ground on the part of the Sheriff as the first step in a of this kind—and for this good reason, that when he goes to the grou has the parties there, he can judge for himself, and determine whethe

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ny need for an extended march-wall of the expense that is proposed
e incurred, or whether at some particular parts of the march there may
sufficient natural fence to dispense with that altogether. In the
that were delivered in the case of Strang v. Steuart (March 31, 1864,
ii. 1015—aff. Feb. 15, 1866, *ante*, vol iv. H. L., 5), these principles
rly laid down. The original jurisdiction was recognised to be in the
hose judgment, after inspection as to the boundaries, will be held con-
nless it be shewn that justice will not be done by adopting the line
e Sheriff has thought necessary. Here a different course has been fol-
I will not say that Mr Sinclair is devoid of fault in not taking the pro-
ce, because he seems to have gone along with the Crown to some extent
ing of the manner in which the case has been treated; but ultimately
to this, that a most expensive wall or march dyke is recommended by
ter, which is to cost about £70 or £80. And then, when you look at
f dyke which the reporter has said to be the proper boundary, you find
Sinclair justly contends for—that he has put the dyke in such a posi-
eally to leave between it and the old wall which encloses Mr Sinclair's
a mere triangular piece of ground that would be of no use at all. I
proposed line is also open to the objection which has been alleged,
its effect will be to cut off unnecessarily a good deal of ground on the
e of Mr Sinclair's estate.

the whole, and without going into this case further than is necessary
w it should be disposed of, my opinion is this, that this was a wrong
m from the first, but that Mr Sinclair was wrong in not having objected
l then, in the second place, looking at the pieces of ground that are pro-
be exchanged, the expense of this wall is so great that we are entitled,
e authority of the decisions to which reference was made, to consider
it is a march that ought to receive judicial sanction. Giving effect to
iples which I think led the Court in other cases of this kind, I am of
hat we should dismiss this application altogether; and with reference
es your Lordships will say what ought to be done. The parties will
come to see the good sense and reason of uniting together, and leaving
ebody or other to regulate in a more sensible way the march between
properties.

BENHOLME concurred.

NEAVES.—I concur. This is a matter of delicacy, because while these
useful Acts on the one hand, they are also capable of being made
y oppressive on the other. To compel a man with a small property to
xpensive fences may often be ruin to him; and, on the other hand, a
h a small property may cause great annoyance by nimiously seeking
s and fences to be made in this way, when there is no real reason for
do not say that there may not be cases where it is possible to employ
assist the Sheriff in what he does; but I think we should keep to the
the statute in the first place, which authorises the party who wants to
nd to get ground made accessible and uniform for the purpose to do
statute directs, and that is to require the Sheriff to visit the ground, so
it. He may afterwards take advice of any kind, but he ought if pos-
isit the ground, as it is only in that way that we can get a judgment
o the weight which ought always to be given to it. We cannot look
round ourselves, and can only get vague descriptions of it, but the
report of his visitation ought to be the record of the true state of things,
ll then have its due use and authority. Here we are perfectly helpless
spect, and all we have to guide us is the report of Mr Brown, who was
d, I think, by the pursuer, his name being put into the petition. I do
: that is a proper way of proceeding, In this case, also, there appear to
is for holding that this is a boundary where it is nimious to require a
ke to be erected. There are places where there are natural boundaries
nder that unnecessary; and although the mere extent of a boundary

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will not supersede the necessity for an enclosure where there may be danger of trespassing, this is not a case in which there is any reasonable ground for expecting that result in any injurious degree. I will not say how far an enclosure may not be right at some points here, but I think the parties can arrange that themselves without putting in operation these old statutes, which appear to have been designed for a totally different matter, and intended to be carried out in a different way from that which has been adopted here. The Sheriff is said to have known these properties, as he had been previously there. That does not signify, if he did not apply his mind to the special question at issue between the parties. On these grounds I think we should refuse the application.

LORD JUSTICE-CLERK.—I am entirely of the same opinion. I quite agree that the Sheriff, in following out the statute, if it applied, ought to have gone himself to the ground, and to have acted upon his own judicial persuasions; but I am inclined to think that, apart from that altogether, this application ought never to have been presented, and ought not now to be entertained. I have no notion that the provisions of the statute could apply to a rocky strip of ground along the sea shore such as this, or that the expense that is proposed for the erection of this fence is at all legitimate. I find that the prayer of the petition is to this effect—after praying that the respective portions of ground which are found to belong to either party should be adjudged respectively from one heritor to the other, it then proceeds in this way,—"and thereafter to find that the most suitable fence to be erected on the whole line is a strong wire fence, or such other fence as may be reported by the said George Brown, or the other person or persons to be named by your Lordship." Now, this strong wire fence is to be erected for the purpose of clearing the boundary between patches of ground, the value of which amounts altogether to two guineas a-year, and the expense of it, according to the estimates, is to be between £70 and £80. I think that it is absolutely out of the question, and therefore I think we ought to dismiss this application.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, alter the judgment, and dismiss the application, and decern: Find the appellant entitled to expenses in this Court," &c.

DONALD BEITH, W.S.—G. L. SINCLAIR, W.S.—Agents.

No. 23.
Nov. 29, 1872.
Brodie v. Dyce.

BETSY PATERSON or BRODIE (Pursuer), Appellant.—*Guthrie Smith—Jameson.*
JAMES DYCE (Defender), Respondent.—*Fraser.*

Proof—Presumption—Pater est quem nuptiæ demonstrant—Husband and Wife—Parent and Child—Bastard.—In an action of filiation and aliment brought by a married woman against a man not her husband *held* that the presumption *pater est quem nuptiæ demonstrant* had been redargued, although there was possibility of access.

Question.—Whether it was competent to call the pursuer's husband as a witness to prove non-access.

1ST DIVISION.
Sheriff of Forfarshire.
M.

BETSY PATERSON or BRODIE, designing herself "wife of James Brodie, labourer, and whose place of abode has been unknown to the said Betsy Paterson for three years and upwards," brought this action of filiation and aliment against James Dyce. The defence was (1) a denial of all the averments in the summons; (2) an averment that the pursuer had had improper intercourse with a number of other men who were named (at or about the date of conception).

The Sheriff-substitute (Robertson)—after a proof in which it was stated by the pursuer that she had not cohabited with her husband after the first night; and by another witness, that he was still living in Dundee,

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had not spoken about his wife for three years—found that the de-
er was the "father of the pursuer's illegitimate child, born in May
l," and that he was liable in inlying expenses and aliment.
n appeal the Sheriff (Maitland Heriot), on December 30, 1871, in
sequence of what took place at the debate, recalled this interlocutor
ex statu, and appointed the pursuer to lodge a petition in terms of
ion 83 of the Act of Sederunt 10th July 1839, stating the facts she
posed to prove, and the witnesses by whom they were to be proved,
remitted back to the Sheriff-substitute.*

The petitioner accordingly gave in a petition to be allowed further
of of her desertion by her husband Brodie immediately after the
emony of marriage on 12th December 1866, and that he had not
abited with her since; that she had received parochial relief for her-
f and her three children in consequence of the desertion of her husband
m the date of her marriage; and that search had been made for him
the inspectors of poor for various parishes. The petition also set
th that she had made numerous and extensive inquiries since the date
the last interlocutor, and had discovered that her husband was a patient
the Royal Infirmary of Dundee suffering from typhus fever. The de-
der having given in answers, the Sheriff-substitute allowed a proof of
s averments in the petition; but the Sheriff, on February 29, 1872, sus-
ined the appeal, finding "that the pursuer has not in said petition stated
shewn any such 'very weighty reasons' as to entitle her to any further
oof, therefore dismisses the said petition; and having resumed con-
leration of the record proof, and whole process, finds in point of fact
at the pursuer has failed to prove that the defender is the father of the
ild libelled: Therefore dismisses the summons, and assoilzies the de-
der from the whole conclusions thereof: Finds the defender entitled
) expenses," &c.†

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* "NOTE.—This is a very exceptional case. It seems to the Sheriff to be
most impossible to consider this case unless the pursuer's husband be examined.
he pursuer's procurators stated that they would endeavour to discover him, and
xamine him. It seems that justice cannot be done between the two parties to
his case unless the pursuer's husband be examined. See case of Scott, 25th
November 1864, 37 Jur. 64.

† "The Sheriff, as requested, gave the pursuer an opportunity of shewing
very weighty reasons' why she should yet be allowed to lead further proof,
nd in particular still to examine her husband.

"Having heard parties, and carefully examined the petition, No. 15 of pro-
ess, the Sheriff finds himself unable to hold that she has stated any such 'very
eighty reasons' as to entitle her to lead further proof.

"It is not even said that she had endeavoured and failed to find her husband
r examination before the proof was circumduced. It would rather seem that
he pursuer did not in time perceive the importance of examining her husband
) entitle her to succeed in her action. The defender, while he denied the state-
ents in the summons, averred that a number of men specified had had inter-
ourse with the pursuer, but not a word is said as to her own husband having
ad such intercourse, and not a question is put to the pursuer when examined
to this; and it is only after the proof is concluded that the plea is raised,
Pater est quem nuptiæ demonstrant,' but nothing of this kind is alleged in the
id petition. The statements in the petition, such as they are, seem to the
heriff to be irrelevant. No reason is stated why her husband was not examined
the proof formerly taken by the Sheriff-substitute.

"Then, on considering the proof as taken, the Sheriff finds that he cannot
ld that the pursuer has proved her case. Her husband, it appears from the
oof, has been living at Dundee, within a three hours' walk of Forfar, and
thin an hour by rail. For aught that appears, her husband may have come

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The pursuer appealed, and argued;—In order to rebut the presumption *pater est quem nuptiæ demonstrant* it was not necessary to prove that access by the husband was absolutely impossible. It was enough if it were shewn by ordinary evidence that in fact he had not access, and by the law of Scotland the denial of both parents that the child was theirs sufficed to exclude the presumption.[1]

The respondent (defender) argued;—As no weighty grounds for allowing additional proof had been submitted the Sheriff had no alternative but to allow full weight to the presumption. In such cases the evidence of the husband and wife was not admissible by the law of England, and even in Scotland it had been allowed only to prove facts that had occurred before the circumstances which had given rise to the action.[2]

At advising—

LORD PRESIDENT.—It is possible that the presumption may be rebutted without calling either the pursuer or her husband as witnesses; and in that case the Court would not be called upon to decide as to the competency of such evidence.

This interlocutor was pronounced on 17th July 1872:—"The Lords having heard counsel on the record and proof, Allow the pursuer (appellant) to lead additional proof by witnesses, other than the pursuer and her husband, for the purpose of shewing that the pursuer's husband had no access to the pursuer, so as to have connection with the pursuer, at such time as would account for the conception and birth of the child born on 9th May 1871; reserving for consideration, when the said additional evidence shall be before the Court, whether the pursuer and her husband, or either of them, ought to be examined as witnesses on the said question of access or non-access: Grant commission to the Sheriff-substitute of Forfarshire, at Dundee, to take the proof," &c.

The additional proof having been led and reported, the debate was resumed.

At advising—

LORD ARDMILLAN.—On the first question raised here, and the only question decided by the Sheriff-substitute, I have come to the same conclusion as the Sheriff-substitute. Apart from the question of presumed legitimacy, arising from the fact that the pursuer is a married woman, I cannot say that I think the case attended with much difficulty. If this had been one of the ordinary cases of filiation I could not have avoided the conclusion that the case is sufficiently

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to Forfar every Saturday night, and returned to his work in Dundee every Monday morning. In short, there is nothing whatever in the proof, as led, to elide the presumption, '*Pater est quem nuptiæ demonstrant.*'"

[1] Craig, ii. 18, 17, 20; Decret. ii. 19, 10—iv. 17, 3; Stair, iii. 3, 42; Bankton, i. 2, 3; Ersk. Inst., i. 6, 49; Princ., i. 7, 36; Mackay v. Mackay, Feb. 24, 1855, 17 D. 494; Jobson v. Reid, May 31, 1832, 10 S. 594; Beattie v. Baird, Jan. 15, 1863, *ante*, vol. i. 273; Walker v. Walker, Jan. 23, 1857, 19 D. 290; Dickson on Evid., ii. 999; Sandilands v. Nimmo, Feb. 14, 1855, 27 S. Jur. 178; Legge v. Edmonds, 25 L. J. Ch. 125; Morris v. Davies, 5 Cl. and Fin. 163; Atchley v. Sprigg, 33 L. J. Ch. 345; Banbury Peerage Case, in Weightman on Marriage and Legitimacy, 145 (London, 1871), and in Sir H. Nicolas on Adulterine Bastardy, 291; Gurney v. Gurney, 32 L. J. Ch. 463; Taylor on Evid. 838; Rex v. Sourton, 5 A. and E. 180; Plowes v. Bossy, 31 L. J. Ch. 681, 2 De. and Sm. 145.

[2] Taylor on Evid. 838; Rex v. Rooke, 1 Wilson, Q. B., 340; King v. Reading, 7 How. State Trials, p. 296; Cope v. Cope, 1 M. and Rob. 269; Legge v. Edmonds, 25 L. J. Ch. 125; R. v. Inhab. of Sourton, *cit.*; *In re* R—'s Trusts, 39 L. J. Ch. 192.

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ved against the defender. The pursuer's character is very bad. That fact es, on the one hand, detract considerably from her credibility, and renders noboration necessary; but, on the other hand, her notoriously bad character akes a visit to her at night by a married man a most suspicious fact, from hich scarcely any inference can be drawn except one unfavourable to the fender's moral propriety in the matter, and that is the inference contended for the pursuer. The defender is a married man, and his visits to the pursuer, der the circumstances appearing on the proof, are only susceptible of one conruction. No other reasonable explanation has been given. She was willing d ready for illicit intercourse, and he, knowing her character, visited her under spicious circumstances, when she was sure to tempt, and he, excited by liquor, as most likely to yield. The testimony of the pursuer, if believed, is direct d clear, and I am compelled to come to the conclusion that, in the evidence of e other witnesses, there is sufficient corroboration of that testimony. The heriff-substitute is of that opinion, and I think he gives good reasons for it.

But the peculiarity of this case arises from the fact that the pursuer is a marid woman. She is the wife of a James Brodie, a labourer, who has for about ree years been working in or near Dundee. The pursuer, when examined as witness in the filiation process, gives a very bad account of herself, for she ys—"I have been twice married. I have three illegitimate children by difrent men, one before I was married, and two after. I was married to my prent husband (that is, James Brodie) four years ago. We never lived together cept the first night."

Now, the question is, whether, by force of the maxim *Pater est quem uptiæ demonstrant*, this child, born on 9th May 1871, is the legitimate son of mes Brodie? If he is, then of course the pursuer, notwithstanding the idence led in this cause, can have no claim against the defender. The maxim at the husband of the mother shall be presumed the father of the child is ll settled and most reasonable. It is generally enough for a child alleging gitimacy to prove that he has been born during the marriage. The law will ow for him the inference of legitimacy. But it is now quite settled that the esumption of legitimacy thus created is not absolute. It may be rebutted. he proof of impossibility of access has long been held sufficient to destroy the esumption. At one time it was supposed that access could not be considered possible unless the sea rolled between the two spouses. But that idea has ow passed away. The great changes which have taken place, and the extraidinary increase in the facility of locomotion, have rendered the limitation of possible access to the case of separation by the sea quite absurd. Crossing e sea is by no means impossible or difficult. It is now much easier to pass om Calais to Dover than to travel from Wick to Edinburgh, or from Kirkdbright to Aberdeen. The admission of other evidence of impossibility of cess than that of separation by the sea is now settled. There are many cases oth in England and in Scotland, which were very judiciously presented to us y Mr Jameson, leaving no room to doubt on this point.

But it is necessary to go further than this, and I do not hesitate to do so. I ink it is now recognised as sound law that the fact that access or intercourse s physically possible is not of itself sufficient to fix the status of legitimacy. he cases must be very rare indeed where access or intercourse is proved to have en physically impossible. I do not think that necessary. I do not think it asonable to expect it. If the result of a careful consideration of all the facts d circumstances proved be that the Court is satisfied that there actually was t access or intercourse at or about the period when the child must have been ocreated, and if the Court is also satisfied that another man had access and d intercourse with the wife at that time, then the presumption from the maxim *ater est quem nuptiæ demonstrant* cannot receive effect in the face of such idence. The presumption is rebutted by such evidence as is sufficient to isfy the judicial mind that the husband could not be the father of the child. there be clear evidence to the satisfaction of the Court that *de facto* a husband d not intercourse with his wife, and could not be the father of his wife's ild, that child will be held illegitimate, though the utter impossibility of

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access be not established by the evidence. It may be physically possible, and yet in the circumstances, and according to the evidence, the possibility may be excluded. Nothing less than complete satisfactory evidence can be sufficient, but if there be such evidence, then, on the face of it, the presumption cannot receive effect. There is plenty of authority for this in the more recent decisions, both in Scotland and in England. It is the opinion of Lord Curriehill, as Lord Ordinary in the case of Mackay v. Mackay, 24th February 1855, 17 D. 494, and that opinion is accepted as correct, and authoritatively approved by Lord President Colonsay, who expressly states it to be "sound law." Lord Ivory and Lord Deas expressed, in that case, the same opinion. I could, if it were necessary, quote other authorities to the same effect. It is enough to remind your Lordships of the opinion of Lord Stair, (Stair, iii. 3, 42), that "with us, absence is not necessarily beyond sea;" and he adds,—"with us it will be sufficient that his (the husband's) absence be special and circumstantiate, that there remaineth no doubt that he could not have been present." Professor Bell (Prin. 1626) states the question as one of general evidence.

Taking this view of the weight and nature of the presumption, I think that in this particular case there is really no doubt that James Brodie, the husband of this pursuer, had, in point of fact, no intercourse with her at or about the time when this child must have been procreated. Her own statement on oath to that effect is quite distinct. If there were any opposing evidence on the subject, then her conduct and her bad character would greatly impair the force of her testimony. But there is no opposing evidence, and the proof subsequently led is entirely to the same effect as her own statement.

I think it would not be incompetent, if it had been necessary, to examine the husband as a witness in this matter. But the evidence which we already have appears to me sufficient, and it is desirable to avoid further expense. The husband's time is accounted for, and the wife's time is accounted for, and, although the space which divided them did not exceed fifteen or sixteen miles, I think it is satisfactorily proved that they did not meet, and could not have had conjugal intercourse. The presumptions of fact in this case, as well as the testimony of the witnesses, and the uncontradicted oath of the wife herself, are all opposed to the presumption of law that the husband of the mother is father of the child. I need not enter into the details of the evidence, which has satisfied me that the husband and wife had no intercourse at or about the time when the child, born on 9th May 1871, must have been procreated. I think that the time of both the husband and the wife during that period is as well accounted for as could be expected. I can see no reason why they should have desired to meet during that period or at all. They had parted long before that. There had been no reconciliation. There was no love. There was no interest. There was no motive—not even the stimulant of animal passion, for he was living with another woman, and she was abandoning herself to a loose life without scruple. That they did not wish to meet is very obvious. That they should have met is most improbable. That they did not meet is proved to my satisfaction by the evidence before us, and by the oath of the woman herself.

On the whole matter, I am of opinion that, without requiring the additional evidence which the testimony of the husband would furnish, we have enough in the proof before us to lead to the conclusion, on sound and safe grounds, that at and about the period when the pursuer's child must have been procreated her husband, James Brodie, had no access to her, and no intercourse with her; and that the case of filiation must be disposed of without reference to James Brodie, and just as if the pursuer had been an unmarried woman.

So viewing the case, I concur in the opinion of the Sheriff-substitute that the pursuer has instructed sufficiently that the defender is the father of her child.

LORD DEAS.—The only doubt which I have had in this case has been whether it would not have been better to have examined the husband, and re-examined the wife. The wife was certainly asked about her marriage, on behalf of the defender, in the proof before the Sheriff-substitute, but she was not examined in the same way and for the same view with which she would be examined at this stage.

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agree with Lord Ardmillan that there is no incompetency, according to our law, in examining the husband or wife or both of them, reserving all questions of credibility. I am, however, also disposed to agree that in this case it is not necessary—that the proof as it stands is sufficient. I have come to this conclusion with the less reluctance because any judgment we now pronounce cannot prevent this child hereafter, if sufficient grounds should be shewn, from establishing his legitimacy.

The LORD PRESIDENT concurred.

THE COURT pronounced the following interlocutor:—"Recall all the interlocutors in the Sheriff-court subsequent to the interlocutor of 2d November 1871: Find that the defender (respondent) is the father of the pursuer's (appellant's) child, born on the 9th May 1871: Therefore decern against him in terms of the conclusions of the summons: Find the defender liable in expenses, both in this and the inferior Court; allow an account," &c.

MACRAE & FLETT, W.S.—JOHN GALLETLY, S.S.C.—Agents.

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WILLIAM MURRAY, Pursuer.—*Scott—Rhind.*
JOHN ALLAN AND OTHERS, Defenders.—*Shand—Maclean.*

Process — Reparation — Wrongous apprehension — Limitation of time for raising Action—Statutes—Summary Procedure Act, 1864, 27 *and* 28 *Vict. c.* 53, *sec.* 35—*Day Trespass Act*, 2 *and* 3 *Wm. IV. c.* 68, *sec.* 11.—A complaint, instituted under the Summary Procedure Act, charged a contravention of the Day Trespass Act (which authorises a Justice of Peace to grant warrant for the apprehension of a person accused, before service of the complaint, "if he shall have reason to suspect from information upon oath that the party is likely to abscond"), and set forth that the two persons accused were found trespassing in search of game and had refused to give their names or addresses. On a deposition on oath by one witness to the truth of these statements a Justice of the Peace, before the complaint had been served, issued a warrant for the apprehension of the accused, and they were accordingly apprehended. Five months after one of the accused raised an action of damages for wrongous apprehension against the complainers' law agent and two officers of police, on the ground that the Justice was not entitled under the Day Trespass Act to issue the warrant of apprehension before the complaint was served, without having information on oath that the accused was likely to abscond. *Held* that, although the proceedings had been irregular, there had not been such a deviation from the statute as to deprive the defenders of the protection of sec. 35 of the Summary Procedure Act, which requires that all actions arising out of proceedings under it shall be brought within two months, and therefore that the action fell to be dismissed.

1ST DIVISION. Lord Mure M.

A COMPLAINT by the trustees of the Earl of Fife, bearing to be under the Summary Procedure Act, 1864, charged William Murray and Gordon Smith, designed as "residing at Bridge of Dee, near Aberdeen," with a contravention of the Day Trespass Act, 2 and 3 Wm. IV. c. 68, in having, on 13th November 1871, unlawfully trespassed on the complainer's lands in pursuit of game "The said William Murray and Gordon Smith having each, or one or other of them, been required by the gamekeeper forthwith to quit the land whereon they both, or each or one or other of them, were so trespassing, and also to tell their or each or one or other or both or their or his christian name or names, surname or surnames, and place or places of abode, the said William Murray and Gordon Smith did both, or each or one or other of them, after being so required, refuse to tell their or his real name or names, and place or places of abode, or did each, or one or other or both of them, give such a general description

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of his or their place or places of abode as was illusory for the purpo discovery."

This complaint having been, before service on the accused, prese to James Rust, Esquire, a Justice of Peace, a deposition was taken by Justice on oath from one witness, who deponed "that what is conta in the foregoing complaint is true." Upon this the Justice granted rant for the apprehension of the accused.

On 13th May 1872 William Murray raised an action against J Allan, solicitor, Banff, the law-agent for the complainers, George Me superintendent of police at Banff, and William Knight, police const there, for damages for wrongful apprehension on the said warrant. pursuer set forth his apprehension, and alleged,—"The said war apprehension, and taking in custody were wrongful and illegal. By 11th section of the Day Trespass Act, 2 and 3 William IV. c. 68, enacted, that where any person shall be charged on the oath of a cre witness before a Justice of the Peace with any offence punishable by v of the Act, 'The Justice may summon the party charged to appear b himself, or any one or two Justices of the Peace, as the case may req at any time and place to be named in such summons, and if such shall not appear accordingly, then (upon proof of the due service o summons by delivering a copy thereof to the party, or by delivering copy at the party's usual place of abode to some inmate thereat, explaining the purport thereof to such inmate) the Justice or Justices either proceed to hear and determine the case in the absence of the p or may issue his or their warrant for apprehending and bringing party before him or them as the case may be, or the Justice before w the charge shall be made may, if he shall have reason to suspect, information upon oath, that the party is likely to abscond, issue warrant in the first instance, without any previous summons.' No mons preceded the aforesaid warrant or the aforesaid apprehension taking into custody. The said apprehension was the first intim which was received by the pursuer, or by any one on his behalf, t charge of trespass was made against him;" and "the pursuer believes avers that the said warrant did not bear to proceed and did not pro upon an information on oath that the pursuer was likely to abscon upon such an information on oath as is necessary, in terms of the a recited section, to entitle a Justice of the Peace to grant a warra apprehend without a previous summons. The pursuer had no inte of absconding or of refusing to appear in answer to a summons."

The pursuer pleaded;—(1) The apprehension of the pursuer and t him in custody, as set forth in the condescendence, were wrongful illegal, in respect that the warrant on which they took place was no preceded by a summons nor by an information on oath that the pu was likely to abscond. (4) The 35th section of the Summary Proce Act has no application to the present case, and it only applies to defe *ejusdem generis* with those particularly enumerated in it. (5) The sent action, in so far as it is founded on departure from the forms of cedure prescribed by the Day Trespass Act, is not one which is lim by that or any other statute.

The defenders pleaded;—(2) The damages claimed being in respe alleged illegality of proceedings against the pursuer, and these proceed having been taken under the Summary Procedure Act, 1864, and pursuer having allowed more than two months to elapse without ra his action, the action is barred by the 35th section of the said Act.

Section 35 of the Summary Procedure Act is as follows:—"E action or prosecution against any Sheriff, judge, or magistrate, or ag

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any clerk of Court, procurator-fiscal, or other person, on account of anything done in any case instituted under this Act, shall be commenced within two months after the cause of action shall have arisen, unless a shorter period is fixed by the special Act, and not afterwards."

The Lord Ordinary pronounced this interlocutor:—"Finds that this action is not excluded by the 35th section of the Summary Procedure Act, 1864; and, before further answer, appoints the case to be put to the roll, with a view to the adjustment of issues for the trial of the cause."*

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* "NOTE.—The provisions of the 35th section of the Summary Procedure Act, which require that actions of the present description should be commenced within two months after the cause of action shall have arisen, appear to the Lord Ordinary to be confined to things done in cases 'instituted under the Act.' Now, the matters here complained of relate to a warrant of immediate apprehension, which, as the Lord Ordinary reads the Act, is not made competent in all cases, but is, by the 6th section, authorised only where apprehension is otherwise competent. The question, therefore, whether the proceedings complained of were 'instituted under the Act' must, it is thought, be disposed of by the provisions of the Day Trespass Act, 2 and 3 William IV. c. 68, on which the complaint is founded. By the 11th section of that Act Justices are authorised to grant warrant for immediate apprehension only when there is 'reason to suspect, from information upon oath, that the party is likely to abscond.' But in the present case it does not appear that any such information was laid before the Justice. The warrant does not itself bear that there was, neither does the oath upon which the warrant purports to proceed; and in the statement upon which the application is rested it is not alleged that there was any intention on the part of the pursuer to abscond, or any apprehension in that respect upon the part of the petitioners. In these circumstances it appears to the Lord Ordinary that the warrant for the apprehension of the pursuer was an incompetent proceeding, inasmuch as it was not granted in compliance with the requirements of the Day Trespass Act.

"In the somewhat analogous case of the apprehension of a party as *in meditatione fugæ*, the application and relative deposition always bear that the creditor has reason to believe that the party means to leave the country; and where no such oath is taken the warrant cannot legally be granted—Robertson, 20th June 1812. Now, the Lord Ordinary sees no reason why, in a case of the present description, similar evidence that the provisions of the Day Trespass Act have been complied with should not be preserved *in gremio* of the warrant or in the proceedings. There is, however, not only no evidence *ex facie* of the proceedings in this case to the effect that the pursuer was likely to abscond; but it is not alleged on the part of the defenders in the record that any such information upon oath was laid before the Justice, while there is, on the other hand, a substantial allegation on the part of the pursuer that no such information upon oath was emitted upon the occasion. The Lord Ordinary has therefore come to the conclusion that the proceedings were not taken in compliance with the requirements of the Day Trespass Act, and were consequently not properly instituted in the sense of the 6th and 35th sections of the Summary Procedure Act.

"The question of relevancy cannot, in the view the Lord Ordinary takes of it, be at present satisfactorily disposed of, because,—although there may be cases in which an officer who merely executes an *ex facie* legal warrant, which is afterwards found to be illegal, has been held not to be liable in damages; and an agent may not in all cases be liable in damages for putting in force a warrant illegally obtained, if done by express directions from his employer,—there is in the present case a distinct allegation that both agent and officer were aware of the irregularity of the proceedings, and acted maliciously in obtaining and executing the warrant; and assuming this to be proved, the Lord Ordinary is not prepared to hold that they are not responsible. He has therefore, before answer on the question of relevancy, appointed issues to be given in with a view to their adjustment."

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The defenders reclaimed, and argued;—There was enough before the magistrate to entitle him to suspect that the pursuer was likely to abscond. But even if the proceedings were not strictly in accordance with the statutory regulations, there was no such flagrant departure from them or such irregularity as to deprive the defenders of the protection of the statute. There was enough on the face of the complaint to entitle the Justice to grant the warrant. Although a person is not justified merely because he thinks he is doing what the statute authorises, yet if he acts *in bona fide*, and has some ground in reason to connect his own act with the statutory provisions, he will be held to have acted under the statute, and will be entitled to claim its protection. If the proceeding in this case was not entirely in accordance with the statutory provisions, it deviated so slightly from these provisions that it must be held to have been a proceeding under the statute; and therefore, by the 35th section of the Summary Procedure Act, this action should have been raised within two months after the proceedings complained of.[1]

The pursuer replied;—It is not enough to bring a proceeding under the protection of the statute that it bears on its face to be so, or that the party bringing the complaint believes it to be under the statute. The magistrate had no such information upon oath as could be held to be a reasonable ground for suspecting that the pursuer was likely to abscond, and therefore the proceeding was entirely contrary to the provisions of the statute. Even if the grounds of the complaint had happened to have been such as to point to the likelihood of the party absconding, the magistrate would have had no right on that account to have granted the warrant; for what the statute required was a separate oath to the effect that the party was likely to abscond, and not merely a general oath to the verity of the grounds set forth in the complaint. On these grounds this could not be held to be a case instituted under the Summary Procedure Act, 1864, and therefore the defenders were barred from pleading the 35th section of that Act.[2]

LORD PRESIDENT.—This is an action to recover damages for the illegal apprehension of the pursuer upon an alleged warrant granted by a Justice of the Peace of Aberdeenshire, bearing to be under the Day Trespass Act. The 11th section of this Act provides that "the Justice may summon the party charged to appear before himself, or any one or two Justices of the Peace, as the case may require, at any time and place to be named in such summons, and if such party shall not appear accordingly, then (upon proof of the due service of the summons by delivering a copy thereof to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate) the Justice or Justices may either proceed to hear and determine the case in the absence of the party, or may issue his or their warrant for apprehending and bringing such party before him or them as the case may be, or the Justice before whom the charge shall be made may, if he shall have reason to suspect, from information upon oath, that the party is likely to abscond, issue such warrant, in the first instance, without any previous summons." Now, it is quite clear that in order to entitle a Justice to issue a warrant

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[1] Russell v. Lang, June 25, 1845, 7 D. 919; Melvin v. Wilson, May 22, 1847, 9 D. 1129; Scott v. Muir and Annan, Dec. 18, 1868, *ante*, vol. vii. 270; Knox and M'Arthur v. Montgomery, June 7, 1865, *ante*, vol. iii. 890; Cook v. Leonard, 1827, 6 Barn. and Cress. 351; Watt v. Ligertwood, May 24, 1870, *ante*, vol. vii. 77, H. L.; Scott v. Muir, 6 Scot. Law Rep. 206.

[2] Cann v. Clapperton, June 13, 1839, 10 Adol. and Ellis, 582; Richardson v. Williamson, June 1, 1832, 10 S. 607; Sandeman v. Breach, July 4, 1827, 7 Barn. and Cress. 96; Kitchen v. Shaw, May 5, 1837, 6 Adol. and Ellis, 729.

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without a previous summons he must have reason to suspect that the party is likely to abscond, and the information which leads to this suspicion must be before him upon oath. So, when a warrant is issued without these conditions being complied with, it is irregular, and is not granted under the Act; and this is what is urged by the pursuer. He avers that the warrant was not in compliance with the terms of the Act, and was therefore illegal.

It is further provided by the 17th section of the Day Trespass Act that "all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defender one calendar month at least before the commencement of the action." Now, the pursuer brought this action within one month, the time required after giving notice, and within the six months prescribed by the Day Trespass Act.

But he is met by the objection that the complaint was also brought under the Summary Procedure Act of 1864, which contains another and different limiting clause. The 35th section of that Act provides that "every action or prosecution against any Sheriff, judge, or magistrate, or against any clerk of Court, procurator-fiscal, or other person, on account of anything done in any case instituted under this Act, shall be commenced within two months after the cause of action shall have arisen, unless a shorter period is fixed by the special Act, and not afterwards." Now, this clause does not exempt any person from being accountable for wrong done under the Act, it merely limits the time during which the party aggrieved must take his remedy. In all cases like the present there would be no hardship in making the action be brought within two months, while it is extremely important that persons engaged in prosecutions should not have claims against them extending over an indefinite period. The provision is therefore of a beneficial character, and ought not to be subjected to a judaical interpretation. Giving full and fair effect to the provision, and having in view the object of the statute, we have to decide whether it applies to the case before us. The proceeding here is certainly instituted under the Summary Procedure Act. We are not left in doubt as to the meaning—"All proceedings for summary conviction for any offence, whether at common law or under any Act of Parliament, and all proceedings for the recovery of any penalty which may be sued for or recovered in a summary form, whether such proceedings are at the instance of a public or private prosecutor or complainer, may be instituted by way of complaint in one or other of the forms set forth in the schedule (A) to this Act annexed; and it shall not be necessary to mention in any complaint any Act of Parliament other than the Act declaring the offence for which a conviction is sought, or imposing the penalty or forfeiture which is claimed; and it shall be sufficient to refer to the Act or section of the Act founded on, without setting forth the enactment in words at length; and where it is necessary that any such complaint should be made upon oath of the complainer, or of a credible witness, such oath may be in the form of schedule (B) to this Act annexed." The form in schedule (A) is applicable to common law offences, and the form in schedule (B) to statutory offences. Here the prosecutor framed the complaint in terms of schedule (B), beginning with the important words "Under the Summary Procedure Act, 1864." But it is admitted that the first thing which was done was the irregularity of the Justice in issuing a warrant without any previous summons, and without having information upon oath that the party was likely to abscond. I assume that a wrong had been committed—that is, that there was here a miscarriage of justice, for which the pursuer would have been entitled to ask the verdict of a jury if the action had been brought in time. One might fancy cases brought under the Act, where the wrong was of such a nature that the limiting clause of the statute would not be held to apply at all. We have seen cases where the complaint had so little connection with the Act of Parliament that it would be a grievous wrong to apply the limiting clause. If a man, having obtained a warrant under the Act, proceeds illegally and by violence to apprehend the accused, and brings him before a Justice, the Act will not apply at all. People may go so absurdly and extravagantly wrong as to put themselves beyond

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the protection of the statute. Or, if he proceed to arrest and poind without an warrant, no one can doubt that he had no protection under the Act. In ord to plead the clause of the statute, the defender must shew that he was apparentl acting within its provisions. It is not easy to draw the line, but it is easy t describe extreme cases on either side. It is easy to imagine how the slip of pen might make the whole proceeding null and void. The question is to whi side of the line this case belongs. I have not much difficulty in saying that th case belongs to the latter class and not to the former. It is true that there w no separate oath from which the Justice might infer that the accused intend to abscond. But there was an oath to the verity of the complaint, which co tained statements of a peculiar kind. It states not only that the pursuers we illegally trespassing in pursuit of game, but also when they were required to t their names and places of abode they refused to tell their real names or plac of abode, or did give such a general description of his or their place or places abode as was illusory for the purpose of discovery." These facts make up pa of the statutory charge. But it appears to me that the statute contemplates separate oath that the deponent believes that the accused intended to abscon or an oath to facts on which such a belief is based. But can it be said here th the prosecutor has gone so extravagantly wrong as to put himself beyond th limiting clause of the statute? This was a very venial transgression of the Ac and I am therefore compelled to differ from the judgment of the Lord Ordinar and to hold that the action is excluded by the 35th section of the Summar Procedure Act.

Lord Deas.—This is a difficult and delicate question. We have here a pro ceeding instituted under the Summary Procedure Act and not under the Da Trespass Act. It is to the Summary Procedure Act that the protecting clau refers. Still we must look to what the Day Trespass Act requires in order t judge of the defenders' liability. The Day Trespass Act certainly meant to re quire that there should be an information before the Justice to enable him t judge whether the person was likely to abscond, and that information was to b upon oath. The proper course under the Act was that there should be an oat of credulity to that effect. The error committed was, that in place of requirin an oath of credulity the Justice seems to have inferred, from the whole circum stances, that the party was likely to abscond. The difficulty is that this infe ence was drawn from a statement which, although on oath, contains nothin more than a statement of what was essential to constitute the offence. There no doubt that this was an error. It is a difficult question whether it was suc an error as to take the proceedings out of the statute. I have always unde stood that the law laid down by Lord Denman and Mr Justice Williams i Cann v. Clapperton, June 13, 1839 (10 Adolphus and Ellis, 582), was correc and that mere good faith is not enough. There must be not only good faith, b grounds in reason for thinking that the statute had been complied with. O the whole, however, I am disposed to agree with your Lordship, that it was n so unreasonable for the Justice here to suppose that he was acting in complian with the statute as to deprive the proceedings of the benefit of the statutor protection.

Lord Ardmillan.—I am not able to take the same view as the Lord Ordina has taken of the question which has here arisen. This is an action of damag raised on the 13th May 1872, for an apprehension said to be unlawful on 15 November 1871. The proceeding in which the warrant for this apprehensi was issued commenced by a complaint which was and bears in terms to be und the Summary Procedure Act, at the instance of Lord Fife's Trustees. Th offence charged was under the "Day Trespass Act," and especially the 2d sectio and an oath of verity by a credible witness to the statements in the complai was produced to the Justice of Peace. On this the Justice granted warrant apprehend, which he is entitled to do under the 11th section of the Day Tr pass Act, "if he have reason to suspect, from information on oath, that the par is likely to abscond."

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It is pleaded for the pursuer Murray that the warrant is bad, and the apprehension unlawful, because the Justice had no information on oath from which he was entitled to suspect that Murray was likely to abscond. The statute (the Day Trespass Act) does not require a separate oath in addition to the oath of verity, nor is it necessary that the oath bear in express words that the party is about to abscond, or is likely to abscond. It is enough if the oath of verity contains statements from which the Justice, reading and construing it fairly, has "reason to suspect" that "the party is likely to abscond."

Now, in this case the statements in the complaint and to which the oath of verity applies, were such as might have led and did lead the Justice to suspect "that Murray was likely to abscond," and he issued his warrant accordingly. The oath is to the truth of the complaint, and the complaint bears that "the said William Murray and Gordon Smith did both, or each or one or other of them, after being so required, refuse to tell their or his real name or names and place or places of abode, or did each or one or other or both of them give such a general description of his or their place or places of abode as was illusory for the purpose of discovery." He may or may not have drawn a correct inference under the circumstances. I do not say that the Justice was altogether correct in the inference which he did draw. It would have been a wiser and better course to have insisted on a separate oath, or at least a more explicit statement, in regard to the expectation or probability of Murray's absconding. But there were within the complaint, and within the oath of verity, some grounds for expecting or suspecting such a step on his part, and the Justice, on considering these grounds, recognised their sufficiency and granted his warrant. For the wrong said to have been done by apprehension under that warrant this action of damages has been brought.

The 35th section of the Summary Procedure Act is in the following terms:—"Every action or prosecution against any Sheriff, judge, or magistrate, or against any clerk of Court, procurator-fiscal, or other person, on account of anything done in any case instituted under this Act, shall be commenced within two months after the cause of action shall have arisen, unless a shorter period is fixed by the special Act, and not afterwards." This section does not exclude redress, or protect a wrongdoer, or sanction injustice. But it limits the period within which any prosecution can be raised. If this section here applies it is obvious that this "action or prosecution" is too late, and must be dismissed accordingly, for the "case" in which the thing complained of was "done" was commenced by a complaint bearing to be "under the Summary Procedure Act," and greatly more than two months have elapsed since the "cause of this action" arose. The only question, as I think, is, whether the 35th section of the Act applies; and that question involves the other question, whether the case was "instituted under the Act." I have no doubt that it was so instituted. On the face of this complaint it bears so to be. It came before the Justice in the form of a proceeding under the Act, and unless his conduct in granting the warrant on his own view of the oath of verity took the case out of the statute, it was a warrant granted—a something done—in a case instituted under the Act. To an action of damages such as this the protection of the statute especially applies; and some Judges who have doubted of its application to a suspension or process of review, where there was clearly an irregularity, had no doubt that it applied to an action of damages.

To administer aright this clause of limitation of action requires careful discrimination on the part of the Court, and some questions of difficulty may arise.

On the one hand, it is manifest that the clause of limitation and of protection is not required where there has been no error or irregularity of procedure. It is designed to meet the case, and to protect from prosecution after a limited time, where there has been irregularity. Therefore, to say that this warrant for apprehension, being irregular, is for that reason beyond the reach of the limitation and protection of the Act, is just to exclude the clause of limitation in every case, except where it is not required.

On the other hand, a mere colourable proceeding under the statute will not be within the protection. Nor will a silly belief—a foolish imagination—that

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a proceeding is in pursuance of the statute, or that a case is instituted under th statute, entitle a wrongdoer to the statutory protection.

Between these two classes of cases the case now before us is presented.

Unless cut out of the definition of "a case instituted under the Act," by th unjust and oppressive nature of the inference from the oath of verity, this ca is within the clause of limitation, and the defenders are now protected from th action of damages by the lapse of the period to which such prosecutions a limited.

Now, I am of opinion that the Justice was not acting oppressively or unjustl or in a manner grossly unreasonable, in drawing the inference which he did fro the oath of verity, and in granting warrant for apprehension. I agree with yo Lordship in thinking that he erred, but erred innocently, and that he ha some reasonable grounds, though not quite correct or adequate grounds, for takin the view which he did of the oath of verity. This is just the case contemplate as within the protection.

I therefore apply the 35th section to the case to which, as an action of damage I think it especially appropriate.

The result is, that in my opinion the Lord Ordinary's interlocutor should l recalled, and the action dismissed.

THE COURT pronounced the following interlocutor:—"Recall th interlocutor: Sustain the second plea in law stated for the defen ders, and in respect thereof dismiss the action, and decern: Fin the pursuer liable in expenses; allow an account," &c.

WILLIAM OFFICER, S.S.C.—ALEX. MORISON, W.S.—Agents.

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Nov. 29, 1872. Macknight v. Oman's Trustee.

JAMES MACKNIGHT (Clerk to the Water of Leith Sewerage Commissioners), Pursuer.—*Watson—Hall.*

ANDREW PATERSON (Oman's Trustee), Defender.—*Sol.-Gen. Clark—M'Kechnie.*

Edinburgh and Leith Sewerage Act, 1864, *sec.* 47—*General Police and Improvement (Scotland) Act*, 1862, *sec.* 3—*Supplementary Assessment—Owner—Sequestration.*—The 47th section of the Edinburgh and Leith Sewerage Act 1864, enacts that "the owners of all lands, &c. any sewer, outfall, or drai from which shall, after construction of the said main and branch sewers an works, be connected with the same, shall be liable in payment to the commis sioners of a reasonable sum of money for the use of the said main or branc sewers;" and the 3d section of the General Police (Scotland) Act, 1862, incor porated therewith, declares that the word "owner" shall include joint owne &c., "or other person in the actual possession or receipt of the rents of ten ments," &c. *Held*, that a trustee in a sequestration was "owner" of the bank rupt's property in the sense of the 47th section, and that the commissioners wer not bound to claim in the sequestration an assessment which had been impose before the bankruptcy, the trustee being bound to pay it as a condition o his taking possession of the property, or drawing the rents.

2D DIVISION. Lord Jerviswoode. I.

BY sec. 47 of the Edinburgh and Leith Sewerage Act, 1864, it i enacted that "the owner of all lands, houses, or other property, an sewer, outfall, or drain from which shall, after construction of the sai main and branch sewers and works, be connected with the same, shall b liable in payment to the commissioners of a reasonable sum of mone for the use of the said main or branch sewers and works, which the com missioners are hereby authorised and required to fix and exact in respe of all such lands, houses, or other property; provided always that suc lands, houses, or other property shall not have been assessed for the ex pense of making such main or branch sewers or works; but if such land houses, or other property shall have been so assessed, and shall have bee built upon, enlarged, or altered after the assessment for making suc

main or branch sewers and works was imposed and levied, the owners thereof shall be liable in payment to the commissioners of such reasonable sum of money as aforesaid.'" And by sec. 73,—"The said assessment or assessments shall, with the legal interest thereof, from the time when the same shall be declared payable, together with all expenses incurred in the recovery thereof, continue burdens on the lands and heritages liable for the same, or in respect of which the same shall be payable, but that only for three years from the date when the same shall be respectively payable as against *bona fide* singular successors or heritable creditors; provided always that nothing herein contained shall affect the legal recourse of persons paying such assessment or assessments and interest against such as are primarily liable for the same, or affect the rights and remedies of superiors for the recovery of their feu-duties and casualties."

By sec. 3 of the General Police and Improvement (Scotland) Act, 1862, which is incorporated in the Edinburgh and Leith Sewerage Act, it is enacted that "the word 'owner'" shall "include joint owner, fiar, life-renter, feuar, or other person in the actual possession or receipt of the rents of tenements, lands, and heritages, of every tenure or description, and the factor, agent, or commissioner of such persons, or any of them, or any other person who shall intromit with or draw the rents." And by section 42 of the Valuation of Lands (Scotland) Act, 17 and 18 Vict. c. 91, also incorporated with the said Sewerage Act, it is enacted that "the word 'proprietor' shall apply to liferenters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages."

The commissioners, by certain resolutions, fixed 2s. 6d. per pound of rental as the reasonable sum to be paid by owners liable under the said 47th section for the use of the main or branch sewers and works, but under the proviso that where such owners were liable in respect of new buildings they should be entitled to deduct from the above sum the proportion of the original assessment for the expense of making the said main and branch sewers and works which they could instruct as having been paid from the ground before it was built upon. The original assessments imposed by the corporations of Edinburgh and Leith, upon owners of lands and heritages liable under section 68 of the said Act, for the expense of making the said main and branch sewers and works, amounted in whole to the like sum of 2s. 6d. per pound of rental; and assessments to this amount were levied from all such owners.

Oman, prior to his sequestration, was proprietor of certain subjects in Edinburgh containing sewers, which, since the construction of the main sewers, had been connected with them.

The commissioners, through their clerk, raised an action against Oman for the 2s. 6d. per pound in respect of the subjects belonging to him, under deduction of the original assessment paid for the ground, and on 24th November 1871 obtained decree for "1st, the sum of £35, 19s. 3d., in respect of premises situated in Drumdryan Street, Edinburgh, with interest thereon at five per centum per annum from 8th July 1869 until payment; 2d, the sum of £15, 19s. 8d., in respect of premises situated at Nos. 25, 27, 29, and 33 Brougham Street, Edinburgh, with interest thereon at five per centum per annum from 30th December 1870 until payment; and 3d, the sum of £7, 15s., in respect of premises situated at Nos. 7 and 9 West End Place, Edinburgh, with interest thereon at five per centum per annum from 18th February 1871 until payment."

On 9th November 1871 Oman had been sequestrated, and Mr Andrew Paterson was appointed his trustee, and on 9th December the commis-

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sioners served an additional notice on the defender for £44, being assessment on certain other subjects the property of Oman.

The commissioners now raised this action against Oman's trustee for the three sums contained in the decree, and the £44.

The defender stated,—(Stat. 4.) "On 13th January 1872 Mr M'Laren, the defender's agent, wrote to the pursuer that, before the defender could recognise the claim, the pursuer would require to lodge it with him, in terms of the Bankruptcy Act. The pursuer declined to do so, insisting in his right for payment in full, without any compliance with the provisions of the statute. Mr M'Laren subsequently wrote to the pursuer that the defender did not deny liability for the claim, but simply called upon him to lodge it in the usual way. Thereupon the pursuer raised the present action to compel the defender personally to make payment, without any compliance on the part of the pursuer with the provisions of the statute. The defender is merely realising the estate. He has as yet made up no statement of the claims of the creditors, neither has the statutory period arrived for his doing so, nor for making up, ranking, or paying any dividend. Farther, he has not as yet realised sufficient funds to meet the preferable claims; and, in particular, he has not had an opportunity of determining, as he is entitled to do, whether the claims of the pursuer are preferable or ordinary." (Stat. 6.) "The defender is willing to receive the pursuer's claim if lodged with him in terms of the said Bankruptcy Act, and, if it should appear well founded, to rank the same on the bankrupt estate in such a manner and to such an extent as may to him appear just."

The pursuer pleaded;—(1) The defender, as trustee on the sequestrated estates of John Oman, being owner and proprietor, within the meaning of "The Edinburgh and Leith Sewerage Act, 1864," of the properties and premises mentioned in the summons, is liable under section 47 of the said Act in payment of a reasonable sum in respect of the said premises for the use of the main or branch sewers and works belonging to the commissioners. (2) The reasonable sum so payable by the defender having been fixed by the commissioners in terms of the said Act the pursuer is entitled to decree, with expenses.

The defender pleaded;—(1) The action being for payment of a debt due by the bankrupt is incompetent. *Separatim*, the pursuer cannot proceed by way of action to recover from the defender any sum for which he has already obtained decree. (2) The defender, as trustee in the sequestration, being entitled, in the first instance, to adjudicate upon and rank the claims of all the creditors, cannot, in the circumstances, be sued personally or otherwise for payment of the pursuer's claims. (3) The defender being merely trustee on Mr Oman's sequestrated estate is not liable to be sued, personally or otherwise, for any assessments imposed upon the bankrupt or his estate in terms of "The Edinburgh and Leith Sewerage Act, 1864;" and the pursuer was bound to have lodged and proved his claim in the sequestration, in terms of the Bankruptcy (Scotland) Act, 1856. (4) Mr Oman's properties not being liable for the assessments sued for, the defender is, in the circumstances, entitled to absolvitor, with expenses. (5) The Court has no jurisdiction over the defender, at least in the first instance, as such trustee, in reference to any matter forming claims upon the bankrupt estate.

The Lord Ordinary (Jerviswoode) pronounced this interlocutor:—"Finds that, under a sound construction of the terms of 'The Edinburgh and Leith Sewerage Act, 1864,' founded on by the pursuer, the assessments imposed by virtue of said Act, in respect of the heritable subjects which belonged to John Oman, the bankrupt, and which now form part

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sequestrated estate, are, in so far as properly imposed, preferable affecting the said subjects themselves, as well as the owner or pro- r thereof, or other intromitter with the rents of the same: Further, that the defender, as trustee on said sequestrated estate, is owner roprietor of the said subjects within the meaning of the said Act, while it is not alleged by him that the heritable creditors have ed upon possession of the said subjects, or any of them, he is, as such r and proprietor, the party entitled to intromit with the said rents: fore sustains the first plea in law for the pursuer, and appoints the to be enrolled with a view to further procedure, and particularly ards the ascertainment of the matters of fact not admitted by the der on record, reserving meanwhile all questions of expenses."

e defender then tendered a minute admitting "(1) that he had n the rents of the properties mentioned in the record due at the of Whitsunday last, the rents for the preceding term having been n by Mr Robert Forman, chartered accountant, the judicial factor on man's estates, who accounted for the same to the defender after his intment as trustee; (2) that the premises mentioned in the record in sewers, outfalls, or drains which have been connected with the s made by the pursuers, in terms of their Act of Parliament, after truction of the same; and (3) that the sums concluded for are reason- as against the party liable to pay the same, and that no part thereof been paid to the pursuer;" and the Lord Ordinary pronounced this er interlocutor:—"The Lord Ordinary allows a minute for the de- er to be received at the bar; and in respect thereof, and of the find- in the preceding interlocutor of 12th June current, Finds that the uer was not bound to have lodged a claim with the trustee on Oman's estrated estate: Decerns against the defender in terms of the conclu- s of the libel: Finds him liable to the pursuer in expenses," &c.

he defender reclaimed.

e argued;—The claim must be made in the sequestration. If pre- ble, it would be ranked as such. It was not preferable. It was a debt due by Oman, and fell to be ranked with his other debts. The tee was not "owner" in terms of the statute. He was merely an er appointed for realising the estate. Section 73 declaring assess- ts to be "burdens on the lands" only applied to the original assess- t. This was a supplemental assessment.

he pursuer argued;—The assessment was payable by the owner. ion 73 declared it to attach to the lands, or rather to the ownership, to be payable under the limitation therein mentioned by the owner he time being. The Legislature intended a readily found person to able. It did not intend that the commissioners should have to hunt he *verus dominus*, who might be abroad and could not be discovered. commissioners were not bound to claim in the sequestration. The ey was due as a condition of the trustee taking possession, and he d not rank or divide till he obtained such possession. The assessment reasonable in amount.[1]

RD JUSTICE-CLERK.—This case has arisen out of a claim made by the clerk e Water of Leith Sewerage Commissioners against Mr Paterson, the trustee e sequestrated estate of Mr Oman, a builder. The action is brought under 17th section of the statute, in respect of four several sums, for three of which e was taken against the bankrupt himself; and with regard to the fourth, hich notice of its being due was given to the trustee himself after the estration. The defence stated by the trustee is, that in so far as the bankrupt

[1] Macknight v. Macgregor, Dec. 23, 1871, *ante*, vol. x. p. 289.

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had become liable the claim of the commissioners lies only against the s trated estate, and that they are only entitled to rank on the sequestrated making good a preferable claim if they have one. With regard to the sum, he substantially maintains the same defence, on the ground that, t the notice had not been given, the debt had emerged before sequestration. Lord Ordinary has found that the assessments imposed in virtue of the burgh and Leith Sewerage Act, in respect of the heritable subjects in qu are, in so far as properly imposed, preferable debts affecting the subjects selves, as well as the owner or proprietor, or other intromitter with the and that the defender, as trustee on the sequestrated estate, is owner an prietor of the subjects in question within the meaning of the said Act, and to payment of any sums due under the 47th section of the statute.

On the whole matter I am of opinion that in substance the interlocu right, though I do not entirely concur in the view that these payments ar ferable debts, or that they affect the subjects, so as to be in any way b upon them. My opinion is that they affect the trustee himself as ow terms of the 47th section and of the interpretation clause. My view do depend on any strict application of the proper assessment clauses. These c come towards the end of the Act, and extend from sections 68 to 81. The a body of rules for the imposition and payment of the necessary assess for the original construction of the works authorised by the Act, and th clear and precise. The machinery is as follows:—Commissioners having appointed, they are to fix the sewerage district dealt with by the Act, a define the portion lying within the Edinburgh and Leith municipal boun respectively. They are to determine the drainage works to be construct estimate and fix the sum required for their construction, and to apportio assessment to be levied between Edinburgh and Leith. The respective co tions are then authorised to levy assessments of such amount as shall be nec for paying the sums required, and that according to the yearly value of and heritages as established by the valuation-roll for the year. The liabil assessment is not limited to lands which derive advantage from the drain be executed, but land not used for building purposes is assessed at a lowe as is provided for by the 72d section. The 73d section, on which a great has been said, applies only to the assessments already mentioned. It pr that they shall remain burdens on the lands and heritages liable in the sa against singular successors, for a period of three years. Then section 76 c certain powers on the collector for the recovery of assessments. This an clauses adopted from the Police Act deal with the recovery of assessments. this code of rules stands quite clear of the provisions in the 47th section. the same time a consideration of them throws a good deal of light upo objects of the provisions of that last-mentioned section.

The object of section 47, which was most probably an interpolation aft Act had been framed, was to enable the commissioners to obtain a fair share cost of the drainage operations from the owners of agricultural and other su not built upon at the time the operations were performed or omitted in the a ment, but deriving benefit therefrom in consequence of subsequent buil Its provisions were, that the owners of all lands, houses, or other property sewer, &c. from which should be connected with the main or branch sewe structed under the Act, should be liable to the commissioners in a reaso sum of money, to be fixed by the said commissioners, for the use of said and branch sewers, &c., provided they have not already been assessed fo making of the said main or branch sewers, or had been assessed at the rate provided for in the assessment clauses.

In the case of Macknight v. Macgregors, referred to, it seems to have be cognised as the object of this clause that the commissioners had thereby po equalise the burden on the owners of houses built after the primary asses had been collected, and that on the owners of houses built before that date. to this point there is no difficulty. But here arises the question in the p case, namely, who is liable in the payment of that "reasonable sum," section 47, or, which is the same thing, who is owner in the sense of that se

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he interpretation clause the word "owner" is defined by a reference to neral Police and Improvement Act, 1862," as the "person in the actual ı or receipt of the rents of lands and heritages, &c., and the factor, commissioner of such persons, or any of them, or any other person who omit with or draw the rents,"—that is to say, the person in possession and profits, whether in his own right as owner or in some fiduciary

Now, it has been argued to us that it is only the owner at the time payment of this "reasonable sum" becomes due that is liable under section. If this payment were an annual charge, like an assessment e Poor-Law Act, the analogy of which was referred to, I think there a great deal in this argument; but whether it be the primary assess- his supplementary payment of a "reasonable sum," the payments under are not annual prestations. They are payments once for all for the use of the property for the future. I think the "owner" in possession he having the benefit of the works. He may have his relief against his s prior owners, or he may not; we are not concerned with that ques- ıt he has received the benefit, and there is no reason why the public hould suffer from there having been some other person in the position of ner" who might have been previously sued. Whoever receives the benefit ıeld liable in payment. Therefore, without invoking the aid of the asses- ea, I think that the trustee on the sequestrated estate, as the owner in he Act, is liable to the commissioners in payment of all the sums sued for. ht have been a question whether, using the analogy of the 73d section, e, as a singular successor, would remain liable after three years. That does not arise here. The trustee is owner under section 47, and it is al that his possession commenced after the ascertainment of the sums even after action had been raised against the bankrupt. The trustee is the rents, the subjects have received benefit, and therefore the trustee , and that as primary debtor.

BENHOLME.—I substantially agree, but my *media concludendi* are some- erent.

d section appears to me applicable to all assessments mentioned in the parts of the Act, and to the supplementary assessments made under the ion, as well as to the original assessment for making the sewers. The "the said assessment or assessments," and if these words are applicable reasonable sum of money" which can be charged under the 47th section, hing in the 73d section which limits them to the original assessment. to me unreasonable to hold that the 73d section does not apply to the ntary assessments, for the same reason which renders it just to limit ity for the general assessment to three years applies as strongly to the ntary assessments. They are both made for the same object, and why ity for the one should be limited and the other not is what I cannot see. the 73d section ascertains the quality of these impositions. They are ue "burdens on the lands and heritages" liable for the same. The urden" is there used in a special sense. It does not mean an heritable burden, but such a burden as runs with the lands and passes with their n. Whoever takes the lands is liable for the assessment, and I cannot see, ıy this special character should apply to the one set of assessments and not ier. Therefore, without saying that I altogether dissent from your Lord- w that this 73d section affords a strong analogy, I am inclined to stretch a d take the full benefit of the clause in settling the question now before us. owever this may be, there is a great deal in what your Lordship has whether the section is directly applicable to the supplementary assess- merely affords a strong analogy to guide us, the conclusion seems to me the person in possession of the lands takes them under the condition this assessment. That view exempts this claim from falling under the tion. The payment of the assessment is a condition of the trustee's on possession of the subject, so that he cannot sell or subdivide or dis- until he has made the payment.

No. 25. LORD COWAN was absent.

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LORD NEAVES.—I feel considerable difficulty as to the 73d section. I h not been able to make up my mind whether it applies or not. But whethe not, it seems to me clear that the pursuer's claim is well founded.

It is important to observe the nature and foundation of the claim. It is an assessment supplementary to the original assessment; and that considera is favourable to Lord Benholme's view, that the privileges of the original ass ment should be extended to the supplementary. Then a price is to be paid c for all for the benefit of these drainage works. It is not an annual assessm like a poor or police tax, for which the proprietor for the year can only be lia but it is a payment to be made once for all, giving a prospective and perpe right, and not arising from contract, but from circumstances and the natur the obligation. If it is not a continual obligation it is very difficult to se what time it can be held as incurred. The payment is to be made for the of the drains. Now, suppose the original proprietor never gets any use of th is he to be liable? I am not inclined to say that. It is more reasonable t the proprietor at the time the subjects get the use, and at which the com sioners realise the assessments, is liable. The intention of the Act is, th visible and accessible proprietor shall be liable; and the owner who for the t is enjoying the use is responsible. He can make his own bargain with th who come after him. The 73d section, although perhaps not literally applyi suggests that all the assessments laid on by the Act are burdens lying on lands, and are exigible from the party in possession for the time. On th grounds I think the trustee is liable.

I would not find, as the Lord Ordinary has done, that the payments are j ferable debts affecting the subjects. Even if they were, that would give a ri to sue the trustee. They are due by the trustee in virtue of his being owner

THE following interlocutor was pronounced:—"Recall the first fi ing of the Lord Ordinary's first interlocutor, and in lieu ther find that, under a sound construction of the terms of 'The Ed burgh and Leith Sewerage Act, 1864,' founded on by the pursu the assessments imposed by virtue of said Act in respect of heritable subjects which belonged to John Oman, the bankru and which now form part of his sequestrated estate, are debts c by and exigible from the owner or proprietor thereof, or other int mitters with the rents of the same: Further, find that the defenc as trustee on said sequestrated estate, is owner and proprietor the said subjects within the meaning of the said Act; and wh it is not alleged by him that the heritable creditors have ente into possession of the said subjects, or any of them, he is, as su owner and proprietor, the party entitled to intromit with s rents: *Quoad ultra* adhere to the interlocutor of the Lord Ordina Find the pursuer entitled to expenses, and remit," &c.

THOMAS M'LAREN, S.S.C.—JAMES MACKNIGHT, W.S.—Agents.

No. 26. Rev. PETER GARDINER AND OTHERS (Sillars' Trustees), Pursuers. WILLIAM JOHN STEWART, Real Raiser and Claimant.—*Sol.-Gen. Clark Muirhead.*

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Rev. JOHN GLEN AND OTHERS, Claimants.—*Horn—Orr Paterson.*

Trust-Deed, construction of—Heir-at-law—Next of Kin.—A testatrix direc her trustees to sell certain heritable property particularly described, and whole other means and estate, heritable and moveable, and after payment legacies, &c., to pay over the residue "to my heir-at-law, whom failing, to next of kin."

In a competition between cousins of testatrix claiming as her next of kin a

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ousin's child claiming as her heir-at-law, *held* (*rev.* judgment of Lord Ormidale), at by the term "heir-at-law" the testatrix did not mean to denote her heirs *in bilibus*, but her heir in heritage.

THIS was an action of multiplepoinding at the instance of the trustees the late Mrs Jean Glen or Grant, afterwards Sillars, wife of Thomas llars, residing in Ayr, the fund *in medio* being the residue of her estate. By trust-disposition, dated 15th May 1852, Mrs Sillars, then Mrs rant, a widow, assigned and disponed to her trustees certain heritable operty particularly described, and her whole other property, heritable d moveable, *inter alia*, for the following purposes:—In the second ace, "immediately after my decease my said trustees shall sell and dis- se of my whole heritable subjects hereinbefore specially conveyed, and y whole other means and estate, heritable and moveable, of every escription." In the third place, "so soon as my whole means and state shall have been realised as above directed, I hereby direct my said rustees to make payment of the following legacies." . . . . In the ourth place, "the whole residue of my estate, after paying all expenses ncurred by my said trustees in the execution of the trust hereby created, I direct my said trustees to invest in good heritable or personal securities, r in Government stock, or in the stock of joint stock companies, and ut of the annualrent or interest or dividends arising thereupon to pay n aliment of 6s. weekly to Mrs Jessie Campbell or Norman, my aunt, at present residing with me, during all the days and years of her life." In the last place, "should the said residue, or any part thereof, remain unappropriated for the said weekly alimony at the death of the said Mrs Jessie Campbell or Norman, I hereby direct my said trustees to pay over the same to my heir-at-law, whom failing, to my next kin."

Mrs Grant was soon after married to Mr Sillars, with whom, on 5th June 1852, about three weeks after the date of her trust-disposition, she entered into an antenuptial contract of marriage, by which, subject to a liferent to her intended husband, she disponed to "herself and the children to be procreated of the said intended marriage, whom failing, to herself and her heirs and assignees whomsoever," the heritable property particularly described and conveyed by the trust-disposition. Mrs Sillars died in 1853 without issue. Mr Sillars survived her, but died in 1871. There was a residue of her estate after paying the legacies, and providing for the annuity to her aunt.

The claimant, William John Stewart, son of a cousin of the testatrix, claimed the residue as her heir-at-law.

The Rev. John Glen and others, cousins-german of the testatrix, claimed it as her next of kin.

The Lord Ordinary (Ormidale) pronounced this interlocutor:—"Finds that, on a sound construction of the trust-disposition of the late Mrs Sillars, her next of kin, the claimants the Reverend John Glen, Miss Margaret Glen, and Mrs Janet Watson Glen or Napier and her husband, for his interest, are entitled to the fund *in medio*: Therefore ranks and prefers said claimants in terms of their claim, and decerns: Repels the claim for William John Stewart, and decerns: Finds no expenses due to or by either party."*

* "NOTE.—The question which the Lord Ordinary has had to determine in this case is, whether the claimants, who stand in the position of Mrs Sillars' next of kin, are entitled to be preferred to the fund *in medio*, being the residue of that lady's means and estate, preferably to the competing claimant Mr Stewart, who has the character of heir-at-law.

"This question the Lord Ordinary has felt to be attended with considerable

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The heir-at-law reclaimed.

He argued;—"Heir-at-law" is a singular term. It must be i preted in its ordinary meaning, and the claimant being her heir-at-la the ordinary meaning of the word, fell to be preferred.

The next of kin argued;—The testatrix must have meant heir o body, and having left no heir of her body the claimants fell to be ferred as her next of kin. She could not have meant heir-at-law, c provision to the next of kin would be meaningless. There never have been a failure of an heir-at-law as long as there were next of This reading was rendered more apparent by her marriage-con entered into three weeks after the date of her trust-disposition. she destined the same residue as was dealt with in her disposition t "heirs and assignees whomsoever." The residue was moveable, being in the trust-disposition a direction to sell.[1]

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difficulty, owing to the peculiar terms in which the bequest of her residu been expressed by the testatrix. By her settlement, which was execut 1852, she directed her trustees, 'immediately' after her decease, to sell an pose of her whole estate, heritable and moveable, and this was accordingly She then directed that from the proceeds of her estate her debts and v legacies should be paid, as well as an aliment of 6s. weekly out of the resi her estate to Mrs Jessie Campbell or Norman; and in the event of any p the residue remaining 'unappropriated for the said weekly alimony at the of the said Mrs Jessie Campbell or Norman,' she directed her trustees 't over the same to my heir-at-law, whom failing, to my next kin, and that first term of Whitsunday or Martinmas that shall occur six months aft death.'

"Who did she mean by her 'heir-at-law' and 'next kin'? At the time death the claimant Mr Stewart was technically and in the strict legal sen heir-at-law, and the other claimants were then her next of kin. But Mr S is not so near in propinquity to her as the other claimants; and it is obvious from the terms of her settlement that the testatrix neither intend contemplated that any lands or other heritable property should be preserv or should descend as such among, her successors. On the contrary, it i from the instructions she gave, to the effect that immediately on her dea trustees were to sell and dispose of her heritable subjects, that she intend contemplated that her succession was to be treated as entirely moveabl this view it does not appear to the Lord Ordinary to be an unnatural or st interpretation to hold that by the expression 'heir-at-law' she in reality her heir or heirs *in mobilibus*. In any other view her settlement wo irrational. It is impossible that her next of kin, in the ordinary sense c expression, could succeed, failing her heir-at-law, for she could never fail t an heir-at-law so long as she had next of kin. It rather appears, then, Lord Ordinary that the testatrix must have intended by the expression 'l law' her heir or heirs entitled by law to succeed to the residue of her estat verted, as she had directed it to be, immediately on her death, into money that by the expression 'next kin' she must have referred to persons who not by law be entitled to succeed to her *ab intestato*, such as her materna tions, or her relations by the half blood, rather than those technically the strict sense, and having the legal character of her 'next of kin.'

"The Lord Ordinary is not aware of any precedent exactly in point present case, but he may refer to M'Laren on Wills, secs. 726-7-8, for cases which he thinks support and are illustrative of the principles of co tion upon which he has proceeded in deciding the present.

"The Lord Ordinary has considered it proper in this case to allow each to bear their own expenses, in respect a judicial determination of the ma dispute was rendered indispensable in consequence of a difficulty created testatrix herself."

[1] M'Laren on Wills, sec. 422, p. 216.

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LORD JUSTICE-CLERK.—When I read the interlocutor and note of the Lord dinary his construction struck me at once as not altogether a satisfactory one. s Lordship construes the term "heir-at-law" to mean "next of kin" and the m "next kin" to mean relations by the mother's side, not next of kin. The ficulty which the Lord Ordinary found was to arrive at some meaning attributle to "next kin" that should distinguish it from heir-at-law, when so interted. I am of opinion that we cannot read the destination as so construed.

It has been stated that according to our canon of construction "heir-at-law" a flexible term, and may bear reference to heritage or moveables, and be interted as heir in heritage, or executors in moveables, as the case may be. That sound enough in the general case as applied to the term heir; although perhaps e term heir-at-law has a more direct tendency towards the heir in heritage. ut there remains the question, whether it is the construction applicable here.

The property of this lady consisted almost entirely of heritage, and the direcion given to the trustees to sell was not so much with the purpose of converting he succession into moveables as of providing funds to meet certain purposes of he trust. It was therefore not unnatural that she should wish her heir in eritage to succeed to the residue; and when I find the term "heir-at-law" used a contradistinction to "next kin" I cannot hesitate to read it in that sense. The case of Cathcart[1] which Lord Cowan mentioned is much in point. The ound of doubt suggested is that the heir in heritage could not fail as long as here were next of kin, and therefore the conditional institution would have no eaning as a conditional institution. It certainly could not; but I am not clear hat as a substitution the destination might not have effect, or at least might not ave been supposed by the testatrix to have effect. It may fail, as substituions in moveables often do; but that can be no reason for refusing effect to words which, in the collocation in which they stand, have a definite meaning as echnical terms.

LORD COWAN.—There is undoubtedly a difficulty in the construction of this bequest, but looking at the whole terms of the deed I am satisfied that the Lord Ordinary has fallen into error. I put out of view altogether the marriage-contract, and think its date quite immaterial. I wish this to be clearly understood in explaining the ground of my opinion. I likewise put entirely out of consideration the imaginary difficulty raised on the use of the expression "next kin," instead of "next of kin." I do not think there is anything in that, one way or the other.

The question is, what is the meaning of the destination clause. I humbly think it all-important that the succession of this lady was heritage. Her instructions to her trustees to sell were plainly with the object of obtaining funds to fulfil the fourth purpose of the trust. And the meaning and intention of this destination of the balance or residue was, as I think it may be fairly presumed, to give it to the person who would have succeeded to the heritage had not a sale been necessary to obtain funds for the other purposes of the testatrix. The words are very explicit—"to my heir-at-law,"—and I can see no good reason for refusing them full effect. It has been said that, in that view, the addition of the words, "whom failing, to my next kin," is unintelligible, and can bear no reasonable construction at all. I am not satisfied of that. I can imagine circumstances in which they would be susceptible of a meaning, viewing them as substitutional. Say that the residue had been lent out by the trustees, as they were entitled to do, on heritable security, and that the heir-at-law after succeeding left the money thus invested and died intestate, would not the testatrix's next of kin have taken under this substitution to the exclusion of the heir's next of kin? But in truth we are not entitled to void a clear destination like this in the way attempted. The heir-at-law is the person whom the law recognises as the legal representative in any succession. It may very well be that

[1] Cathcart v. Cathcart, May 26, 1830, 8 S. 803.

No. 26.

Nov. 29, 1872. Sillars' Trustees v. Stewart and Others.

the testatrix, looking to the possibility of a number of brothers and sisters succeeding, intended the succession to go to the eldest son, and failing him to the other children equally. But it is quite unnecessary to enter upon such speculations; the ground upon which I place my judgment is that the testatrix has declared, and must be held to have intended to favour, the heir who would have succeeded in heritage, had her direction to sell not been necessary for the execution of the trust; and in the light of that intention there is no difficulty in reading her destination.

LORD BENHOLME.—This case seems to me a clear one. I am not inclined to give the same weight as the Lord Ordinary has done to Mr Paterson's argument that no case can be supposed which this lady could have in view in which the substitution could take effect, as there never could be a failure of an heir in heritage as long as there was next of kin. We are not called on to encounter that difficulty; we need only ask ourselves, is there an heir-at-law; and if so, the destination to next of kin is avoided. Heir-at-law is a singular term, and designates that individual who at law would have been entitled to take heritage *ab intestato*. Is there such a one in existence? The litigant who, under the Lord Ordinary's interlocutor, has been found unsuccessful, is such. Had the term been "my heirs" it might have taken its meaning from the nature of the succession, but the term "heir-at-law" is different. In short, the Lord Ordinary has fallen into error in trying to remove a difficulty which we are not bound to solve.

LORD NEAVES.—I am of the same opinion. I cannot doubt that on a natural reading of this deed heir-at-law means heir in heritage. It is said that cannot be, as there never can be a failure of an heir in heritage as long as there are next of kin, and that heir-at-law must mean heirs *in mobilibus*. If that be so, there arises this other difficulty that heirs *in mobilibus* and next of kin are identical, and to get rid of that it is said that next of kin may mean the maternal relations. The Lord Ordinary seems to think that this is the meaning, but it seems to me a strained interpretation.

I am of opinion that heir-at-law means the heir in heritage, and in that view I think we are arriving at a conclusion quite consistent with the whole deed. The testatrix does not say that she wishes her property to be treated as moveable; on the contrary, she allows investments on heritable bonds. What she says is, "I am obliged to turn my houses into money in order to provide the weekly allowance I have given to Mrs Norman, but after providing for that allowance I wish the residue to go to my heir-at-law."

THE COURT pronounced the following interlocutor:—"Alter the interlocutor complained of: Find that on a sound construction of the trust-disposition of the late Mrs Sillars, her heir-at-law, William John Stewart, is entitled to the fund *in medio:* Therefore rank and prefer him and his mandataries in terms of his claim: Repel the claim of the Rev. John Glen, Miss Margaret Glen, and Mrs Janet Watson Glen or Napier, and decern: Find no expenses due."

J. C. & A. STEUART, W.S.—J. & A. PEDDIE, W.S.—Agents.

No. 27.

HUGH MILLER, Appellant.—*Trayner.*
WILLIAM TAYLOR KEITH, Respondent.—*Scott.*

Nov. 30, 1872. Miller v. Keith.

Bankruptcy (Scotland) Act, 19 and 20 Vict. c. 79, sec. 141—Expenses of Trustee who had resigned office—Composition.—The 141st section of the Bankruptcy Act enacts that, in a sequestration, before the Lord Ordinary or the Sheriff shall pronounce the deliverance approving of a composition, "the commissioners shall audit the accounts of the trustee, and ascertain the balance

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o or by him, and fix the remuneration for his trouble, subject to the review e Lord Ordinary or the Sheriff, if complained of by the trustee, the bank- or any of the creditors, and that the expenses attending the sequestration he remuneration of the trustee shall be paid or provided for to the satis- n of the trustee and commissioners before such deliverance approving of the osition is pronounced." In a sequestration a trustee resigned office before ing payment of his account. After a new trustee had been appointed the rupt offered a composition to his creditors. The Sheriff approved of the osition, after receiving a report by the trustee, in which he stated that the rupt and his cautioner had offered to the first trustee a bill for £20 in full s claim for £60, and that the commissioners and the reporter thought the reasonable, and that the reporter was satisfied therewith. In an appeal by rst trustee against the Sheriff's deliverance, *held* (1) that the first trustee s sufficient title to appeal, and (2) that he was entitled to have his account ed in terms of the statute.

1ST DIVISION. Sheriff-substitute of Edinburgh.

B.

UGH MILLER, C.A., was elected trustee on the sequestrated estate of liam Taylor Keith, who was sequestrated on 29th April 1872. Mr Miller ng resigned, Mr J. D. Ferrie was appointed trustee in the sequestra- , and on 21st August a meeting of creditors agreed to accept an offer he bankrupt of a composition of 1s. in the pound. On the following Mr Miller wrote to the new trustee enclosing his account for law nses in the sequestration, amounting to £42, 19s. 11d., and the unt due to him for outlays and trouble amounting to £17, 5s. 6d., requested him to arrange for a settlement of these before granting his rt as trustee to enable the bankrupt to carry through his discharge.

y sec. 141 of the Bankruptcy (Scotland) Act (19 and 20 Vict. c. 79), s provided that "before the Lord Ordinary or the Sheriff shall pro- nce the deliverance approving of the composition the commissioners l audit the accounts of the trustee, and ascertain the balance due to y him, and fix the remuneration for his trouble, subject to the review he Lord Ordinary or the Sheriff, if complained of by the trustee, the krupt, or any of the creditors; and the expense attending the seques- ion and such remuneration shall be paid or provided for to the satis- ion of the trustee and commissioners before such deliverance is nounced."

he trustee (Ferrie) reported to the Sheriff that his account had been ited by the commissioners, the balance ascertained, and his remunera- fixed, and that the expenses, so far as the reporter's trusteeship was rned and the expense of taking out the sequestration, had been paid rovided for to his satisfaction and that of the commissioners.

Ir Miller objected before the Sheriff that his expenses had not been ided for in terms of the 141st section of the Act. The Sheriff milton) having, on 30th October, superseded consideration of the appli- n for discharge, the trustee (Ferrie) lodged an additional report, which —"The trustee reports that since submitting his previous report as he acceptance of the offer of composition by the bankrupt he had d a meeting of the commissioners on the estate, which was held of date (7th November 1872), at which an offer was made by the bank- (Mr Keith), to grant his bill for £20 sterling, payable at four months the date of his discharge, signed by himself and the cautioner, for his position, in full of all expenses incurred by Mr Hugh Miller, C.A., the er trustee, including his own commission and outlays, under reserva- of all Mr Keith's pleas against the charges of his former trustee, &c. commissioners on the estate (of whom a quorum was present at the ting) thought the proposal reasonable, and approved of it. . . . . reporter respectfully submits and reports to your Lordship that he

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considers the proposal for the settlement by the bankrupt of the expenses incurred by the former trustee to be reasonable, and that he is satisfied therewith."

The Sheriff-substitute pronounced this interlocutor:—"The Sheriff-substitute having considered the foregoing report, minute of meeting of creditors, and bond of caution therein referred to, together with the trustee's additional report and relative productions, and having heard the parties on 30th October last, and again since the lodging of said additional report, Finds that the offer of composition, with the security therein mentioned, has been duly made, and is reasonable, and has been unanimously accepted by the creditors or mandataries of creditors assembled at said meeting: Therefore approves of the said offer with the security; but before granting a discharge, appoints the bankrupt to appear and emit the statutory declaration."*

Mr Miller appealed, and argued that the report approved by the Sheriff-substitute was not in conformity with the provisions of the statute.

The respondent argued;—(1) The appellant had no *locus standi* under the 141st section of the Act. The question whether he had any remedy against the present trustee or the bankrupt was not before the Court. (2) The report and resolution of the commissioners were in conformity with the statute, and could not be interfered with.

At advising,—

LORD PRESIDENT.—There are a great many suspicious features in this sequestration. The first remarkable circumstance in its history is, that while a large apparent majority of the creditors claiming voted against the appellant when he was a candidate for the trusteeship, he was nevertheless declared duly elected, on the ground that a large body of the creditors who voted against him had no good claims. The next step was the examination of the bankrupt, in the course of which the Sheriff-substitute found it necessary to send him to prison, because he would not answer a question regarding the disposal of considerable sums of money which had recently come into his hand. When this matter was brought before the creditors on the report of the trustee they divided. One motion was made that the trustee's report be approved of, and another that it should not be approved of, in respect that in the opinion of the creditors the bankrupt had given a full and satisfactory statement of his affairs so far as was in his power, and that his examination had been protracted and oppressive, and was being carried on by parties having no claim against the estate. The second motion was carried by a majority in value of £1593 against £630—the creditors who voted for the motion which was carried being substantially the same who had voted for the unsuccessful trustee. In consequence of the support he had thus obtained the bankrupt petitioned for liberation, which was refused by the Lord Ordinary. The bankrupt reclaimed against that decision, and by that time the trustee, Mr

* "NOTE.—At the hearing on 30th October Mr Macara, W.S., appeared for Mr Hugh Miller, C.A., formerly trustee in the sequestration, and objected that the expenses incurred during Mr Miller's tenure of office, including his remuneration, had not been paid or provided for, in terms of the 141st section of the Bankrupt Act. As the objection appeared to be a relevant one under the statute and was in point of fact borne out by the terms of the trustee's report, the Sheriff-substitute was unable at once to pronounce a deliverance approving of the offer of composition, and superseded consideration of the application for discharge until the bankrupt should arrange, to the satisfaction of the trustee and commissioners, for the settlement of the expenses referred to. This has now been done, as appears from the additional report lodged by the trustee, and the minute of meeting of commissioners therein referred to and produced.

"The Sheriff-substitute would have hesitated to sustain Mr Miller's title to oppose the bankrupt's discharge upon any other than the special ground above mentioned."

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ller, finding that he had no funds in his hands, resigned his office. In conse-
nce of that the bankrupt got the Lord Ordinary's interlocutor recalled in
ence, and thus obtained liberation, which, I think, is very much to be
retted. The trustee then very properly, upon the 22d August, sent in his
ount to the new trustee, and, in his letter sent therewith, said—"You will
ase arrange the settlement of this account before granting your report as trus-
to enable the bankrupt to carry through his discharge." Nothing was done
furtherance of that request. But an offer of composition was received, enter-
ined, and accepted by the creditors, and the new trustee had reported to the
eriff that everything was in order, and, among other things, that the trustee's
ount had been provided for, and there was nothing to prevent the bankrupt
m obtaining his discharge. It was quite impossible, looking to the course of
oceedings in this sequestration, to doubt that this was mere revenge against
r Miller for his having done his duty under the sequestration. If it were
ssible under the Bankruptcy Act that such proceedings should be successful it
ould be very much to be regretted. But I see no reason to doubt that the
tatute has effectually provided against such a result. It provides that before any
leliverance can be given approving of a composition "the commissioners shall
udit the accounts of the trustee, and ascertain the balance due to or by him,
nd fix the remuneration for his trouble, subject to the review of the Lord Ordi-
ary or the Sheriff, . . . and the expense attending the sequestration and
uch remuneration shall be paid or provided for to the satisfaction of the trustee
and commissioners before such deliverance is pronounced." Now, it was con-
tended that the only account which can be audited, and the only remuneration
which can be fixed, and the only accounts or expenses that require to be paid
or provided for under the 141st section of the Act, are those due to the existing
trustee at the time when the audit takes place. Nothing could be more un-
reasonable than such a construction of the statute. That trustee may have been
in office only for a week or two, while the sequestration might have endured for
years. In what particular form the accounts of a previous trustee should be
audited was a matter of little importance. I should think the natural way would
be for the existing trustee to embrace the whole in his own accounts, so that
the whole should be considered together, and the accounts provided for before
the sequestration was brought to an end. But if he do not choose to do so, it
cannot be supposed that the previous trustee cannot have his accounts audited.
I am quite clearly of opinion that the commissioners at this stage have to deal
with the accounts of all trustees who may have been appointed in the seques-
tration. Hence the interlocutor of the Sheriff will not do. The Sheriff-sub-
stitute at first seemed to have been impressed himself with the difficulty arising
under this clause of the statute, but he had been satisfied by what was subse-
quently done. Now, that which was done afterwards was not that which is
required by the statute. The statute requires the commissioners to audit the
accounts, to ascertain the balance which was due to the trustee, if any, and to
fix his remuneration; and further, after that is fixed, it is to be paid or provided
for to the satisfaction of the trustee or commissioners before any deliverance is
pronounced. Now, what was done here was this—the commissioners met and
had submitted to them a proposal by the bankrupt to grant bill along with the
cautioner for the composition of £20 to Mr Miller in full of his claim of £60,
5s. 5d., payable at four months from the date of his discharge. Mr Miller did
not accept that offer, and it would have been very strange if he had, looking to
the amount of his claim. The only question that remains is, whether that
minute records a sufficient compliance by the commissioners with the require-
ments of the 141st section of the statute. It appears to me that not one of the
things required by that section has been done. The commissioners allowed the
bankrupt and his cautioner to dictate to the former trustee what he was to re-
ceive, and I am therefore of opinion that we must find that the former trustee's
accounts have not been audited, the balance has not been ascertained and his
remuneration has not been fixed, that there has been no payment, or provision
made for payment of the balance due to him in terms of the 141st section of
the Bankruptcy Act, and that therefore the offer cannot be accepted.

No. 27. LORD DEAS and LORD ARDMILLAN concurred.

Nov. 30, 1872. Miller v. Keith.

THE following interlocutor was pronounced :—"Recall the interlocutor appealed against: Find that the accounts of the appellant, as trustee in the sequestration from 30th May to 15th July 1872 have not been audited, the balance due to or by him has not been ascertained, the remuneration for his trouble has not been fixed, and the expenses attending the sequestration during the appellant's trusteeship, and the amount of his remuneration, have not been paid or provided for in terms of the 141st section of the Bankruptcy Scotland Act, 1856: Find that until the provisions of the said section shall have been complied with in the above particulars no deliverance can competently be pronounced approving of the composition offered by the bankrupt, and decern: Find the appellant entitled to expenses; allow an account," &c.

L. M. MACARA, W.S.—J. M. MACQUEEN, S.S.C.—Agents.

No. 28. CHARLES LAWSON AND OTHERS, Petitioners.—*Sol-Gen. Clark.*
WILLIAM CHARLES KNIGHT CLOWES AND OTHERS (Andrew Lawson's Trustees), Respondents.—*D.-F. Gordon—Duncan.*

Nov. 30, 1872. Lawson v. Lawson's Trustees.

Process—Leave to Appeal—48 *Geo. III. c.* 151, *sec.* 15.—An action was raised by the trustees of a deceased partner of a firm for count and reckoning as to his interest in the firm. The remaining partners averred that by certain letters produced an agreement had been entered into between the firm and the partner, by which he ceased to be a partner, and became entitled only to an annuity from the firm. The Court unanimously held that the letters did not form a concluded agreement, and ordered production of the balance-sheets of the firm, and the deceased partner's account with the firm. The firm presented a petition craving leave to appeal, and offered to secure payment of the annuity to the family of the deceased pending the appeal. Petition (Lord Benholme *diss.*) refused.

2D DIVISION. R.

THE trustees of the deceased Andrew Lawson, seedsman, Edinburgh, brought an action against the petitioners, partners of the firm of Peter Lawson and Son, seedsmen there, concluding for count, reckoning, and payment as to the interest of Mr Andrew Lawson as a partner of that firm.

The defenders alleged that by certain letters, which were produced, an agreement had been entered into between Mr Andrew Lawson and the firm some time previous to Mr Andrew Lawson's death, by which he ceased to be a partner, and became only entitled to an annuity of £300 per annum.

After certain procedure the Court unanimously pronounced this interlocutor:—"Find that the letters founded on did not constitute a concluded agreement between the late Andrew Murray Lawson and the defenders, and before further answer ordain the defenders to produce in process, 1st, certified copy of the company's balance-sheet prepared and signed by the partners in 1867; 2d, certified copy of any balance-sheet prepared and signed in 1868; 3d, copy of the account of Andrew Murray Lawson with the firm as it stood at the time of his death on the 11th of December 1869, reserving all questions of expenses."

The defenders, the present petitioners, asked leave to appeal, as required by the 15th sec. of the Act 48 Geo. III. c. 151.

They argued;—If the alleged agreement was sustained no further inquiry would be necessary. The Court were always tender of allowing an examination of the books of a firm, and the production ordered by the

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Nov. 30, 1872.
Lawson v. Lawson's Trustees.

rlocutor complained of was only introductory to a more complete examination of the petitioners' books. Arrangements would be made by ich the petitioners would guarantee the continuance to Mr Lawson's ily of the £300 per annum pending the appeal.

The trustees argued;—Had Mr Lawson been alive he would have been itled to the production complained of. His family ought not to be ced in a worse position through his death. It would be in the power the Court to refuse any farther examination of the books of the firm if should appear to be unnecessary and injurious to the firm.

At advising,—

Lord Cowan.—The exercise of the power committed to us, to give or withhold ve to appeal in cases of this sort, is always a delicate matter, and is to be lged of according to the circumstances of each particular case. As your Lordips will recollect, in the case of the Western Bank[1] we some years ago made a mit to an accountant as we have done here, the result of which was foreseen be a long accounting, but which was essential to our proceeding with the case. he petition for leave to appeal at that stage was refused. It appeared at first ght hard upon the parties, who thought themselves aggrieved by the remit. t the House of Lords in no way interfered with our discretion. In another se, that of Bell of Enterkine, 3d November 1868, 7 Macph. 49, the petition to peal was refused, because in our opinion it was premature, as there remained legal question arising after the domicile had been settled and disposed of bere the accounting should take place. The petition was refused because the parties uld not have that point settled first, but leave to appeal would have been granted d it been applied for at that subsequent stage. In this case I am very clear that e should, in the exercise of our discretion, refuse this application. The interlocutor proposed to be taken to review, while it negatives the defence of concluded ttlement, does not necessarily lead to any protracted accounting. Indeed I am ot at all satisfied that even if the judgment we have pronounced were to be reersed, the limited order that we have made would be recalled. I think it is one e were entitled to make in any view of the case. We have not ordered a neral accounting, as the Lord Ordinary did. Had that been the case, there ould, I admit, be more ground for the application, and if after we have seen the cuments which we have ordered to be produced we see cause to order a general ccounting, it will be for consideration, should the application be renewed, hether or not it should be granted then. I can see no objection whatever to se productions ordered being made, and whatever may be the result I do not nsider that at the present stage we should be exercising a wise and just discretion, aving due regard to the interests of the other party, in permitting an appeal hich would hang up the case for two years at least.

As to the fear expressed by the defenders of a public exposure of their affairs, think it is quite groundless. The productions are to be made to us; we are ot the public, and there is no reason why they should go further.

Lord Benholme.—I am of a different opinion. It appears to me that if our dgment is reversed there will be an end of this litigation, and a settlement tween the parties on a different basis than if our order stands; because in that se there will be a quick mode of ascertaining the rights of parties indeendently of any investigation.

It has been suggested by Lord Cowan that we do not do much harm by ordering these partial productions, but it seems to me they are only introductory to more full examination, which will be shut out as being unnecessary in case is alleged agreement is held good.

Now, in regard to the respective dangers or embarrassment to the parties spectively according as the appeal is admitted or refused, there is no equality. n the one hand these children are to receive the £300 a-year pending the ap-

[1] *Ante*, vol. iv. p. 1071.

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Nov. 30, 1872. Lawson v. Lawson's Trustees.

peal, while if the defenders are once compelled to produce their books, a danger or damage they may sustain is irremediable. I am always tender the rights of companies where they state a plea which, if well founded, wo supersede the necessity of minute and detailed investigation into accounts. I think we ought to grant leave to appeal.

LORD NEAVES concurred with LORD COWAN.

LORD JUSTICE CLERK.—Though I am satisfied to refuse this application I not quite so confident in my opinion as the majority of your Lordships. T general rule against giving leave to appeal in the case of merely interlocut judgments is founded on strong grounds of expediency, and satisfactory reas must be shewn by the applicant why appeal should be allowed.

Now, this judgment is essentially interlocutory. If I could agree with L Benholme that though in form differing from the course taken by the L Ordinary we are in reality just paving the way for the general account which he has ordered I should then think with him that there was n reasons for allowing appeal. But I think it right to make it fully und stood that the very opposite view was present in my mind when I fram this order for production. It was exactly because I thought the result of t order would not necessarily lead to a general accounting that I thought advisable that we should make it. This is an action by the representatives a deceased partner against the remaining partners in a concern. Their c tract of copartnery specially fixes the last balance-sheet as that which shall termine the rights of such representatives. There may be very good reas why the representatives who are not themselves partners should not be allow to see beyond such last balance-sheet. On the other hand, when the balan sheets and accounts are produced, there may be circumstances arousing suspici or satisfying us that we must get behind the last balance-sheet in order to justice between the parties. The question we had to consider was, whet there was an agreement excluding the representatives from the sight even that last balance-sheet. We have found that there was no completed agreeme But even if their had been such an agreement as that sought to be establish I see nothing in it which could prevent the representatives seeing that balan sheet in question. Before Andrew Murray Lawson could have been asked sign a formal agreement based on the letters in question he must have been titled to examine the balance-sheets himself, and under these circumstance did not appear to me that the surviving partners could resist the product called for by our last judgment. I therefore think it would be wrong to ha up the case at its present stage for an indefinite time. I do not wish in the le to say what may be the result of the production of the last balance-sheet of t firm, or what we may then do. All these questions remain entire.

THE COURT refused to grant leave to appeal.

MACKENZIE & KERMACK, W.S.—JOHN WALKER, W.S.—Agents.

No. 29.

BOARD OF SUPERVISION, Petitioners.—*Millar—Gloag.*
LOCAL AUTHORITY OF MONTROSE.—*Shand—Balfour.*

Dec. 3, 1872. Board of Supervision v. Local Authority of Montrose.

Public Health (Scotland) Act, 1867 (30 *and* 31 *Vict. c.* 101)—*Board of Sup vision—Title to Insist—Petition and Complaint—Local Authority—Sewerage Held* that whenever a local authority "shall refuse or neglect" to construct necessary system of drainage in the district under their supervision, the Bo of Supervision has a right to present a petition to have them compelled to do On a petition and complaint by the Board of Supervision, the Court sisted p cedure, to allow a local authority reasonable time to discover the most suita system of drainage, and to have it executed.

2D DIVISION. I.

BY the Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 10 very full powers are given to local authorities for behoof of the public

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take all works necessary for the drainage of the districts under their supervision; and by sec. 97 it is enacted,—"In case any local authority shall refuse or neglect to do what is herein or otherwise required by law of them, or in case any obstruction shall arise in the execution of this Act, it shall be lawful for the Board, with the approval of the Lord Advocate, to apply by summary petition to either Division of the Court of Session, or during vacation or recess to the Lord Ordinary on the Bills, which Division or Lord Ordinary are hereby authorised and directed to do therein, and to dispose of the expenses of the proceedings, as to the said Division or Lord Ordinary shall appear to be just." And by section 3 it is declared that the word "Board" shall signify the "Board of Supervision for the Relief of the Poor in Scotland."

The Board of Supervision presented this petition and complaint against the local authority of Montrose, on the narrative that the drainage of the burgh was extremely defective, and the effluvia from the sewage highly injurious to the health of the inhabitants, and that although the subject had been frequently before the local authority they had refused to improve the drainage, and praying the Court to find "that the local authority have refused or neglected to do what is required of them in the said Act, or otherwise by law, and that their refusal or delay to carry out a proper system of drainage in the burgh of Montrose is an obstruction in the execution of the Act; and to remit to a man of skill to report upon the drainage of the said burgh; and upon said report being returned, to ordain the local authority to execute such works as shall be considered necessary to effect the adequate drainage of the burgh, or to give such other remedy; or do otherwise in the premises as to your Lordships shall seem proper."

Answers were lodged for the local authority, in which they stated that they were a newly elected body, that they were willing and anxious to carry out a complete system of drainage in the burgh, but that they craved the Court to allow them a reasonable time to take steps for that purpose.

The Board argued that the local authority had shewn, by their previous conduct, that they would do nothing unless compelled.

The local authority argued, that they were endeavouring to discover the most suitable system of drainage for the burgh, and that they were anxious to have such carried out. Under the statute the Board of Supervision had no right to complain, unless there was "obstruction" to the carrying out of the Act. There had been none such. At all events, the local authority were entitled to a reasonable time to discover the most suitable system, and to have it executed.

Lord Justice-Clerk.—I am sure your Lordships have no desire to assume the functions of the local authority, nor to do anything which might appear to be unreasonable towards a body of that nature. But the statutory right which the Board of Supervision have in this application exercised for the first time is one very important for the public interest, and I do not find that there is any question raised in the answers about its competency. An application such as this is, however, only the ultimate remedy. The respondents, in their answers, state that they, a newly elected body, are willing and anxious to promote a complete system of drainage, such as to allow them a reasonable time to take steps for that purpose. I think that course is a proper one. We are aware that a popularly constituted body like the local authority cannot move with great expedition in such a matter. We cannot dismiss the application, but, after the assurances we have received, I think we should appoint them within three months to report what steps they have taken with this important object.

Lord Cowan.—The power conferred on the petitioners to apply to this Court,

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Dec. 3, 1872.
Board of Supervision v. Local Authority of Montrose.

in order to enforce proper drainage, is of the utmost importance to the and the operations sought to be enforced by this petition require to be v sidered, and it is right to see if the application is justifiable, and that t properly executed. Mr Shand argues that the Board of Supervision l power to come to this Court unless there is obstruction to the drainag tions being carried through. The words of the Act, however, are—"in c local authority shall refuse or neglect to do what is herein or otherwise r by law of them." Neglect is sufficient to entitle the Board to come i That there has been delay here in doing what is necessary for the sanit dition of the burgh there can be no doubt, but the causes of that del been fully stated on the part of the local authority; and the course whi Lordships propose will bring matters into the condition which the healtl community requires. Since a specific scheme is referred to we will dela how it is being carried out.

Lord Benholme.—This petition raises a question of great importance the first application of the kind presented by the Board of Supervision. not object to what your Lordship proposes; and in making an observati the peculiar position in which this local authority is placed I must not as differing from the course proposed.

The burgh of Montrose has been always considered a peculiarly healtl of residence. It has a remarkable basin of water in its neighbourhood and emptying with the tide, causing a great body of water to pass up an alternately with great force and rapidity through a narrow channel, w spanned by a drawbridge. This creates a sort of natural drainage, or, a a motion of the atmosphere, to which some think the peculiar healthines burgh is due. I do not make that observation to suggest a doubt as to t priety, or even necessity, of a regular system of drainage, or to insinua the Board of Supervision have been premature in their application; but t that we should proceed with peculiar tenderness in dealing with these commissioners. Because it may be extremely difficult for men to de what on the whole is the best system of drainage for the burgh. The b which I have referred, while it seems to suggest a facility of drainage, a gests an inconvenience; for while the sewerage at one time of the tide be rapidly swept down into the sea, at another it might be swept up i basin and be deposited at low tide upon its dry area. It will be extreme cult to connect the proposed drainage with the sea.

Farther, I understand that some attempt is being made to utilise the d by irrigating an extensive links or sandy surface belonging to the town, might afford a remuneration for the expense of the drainage operations practicability or possibility of this seems another reason why full time be given to the local authority to consider the best mode in which th can be done. The question of time is not of much consequence in this the burgh is exceptionally healthy. The commissioners, I feel satisfied, v propose any scheme which would be insufficient or abortive, but will, w reasonable time, propose one complete and effectual scheme, whether in co tion with irrigation or not. We cannot dismiss this petition: that is ou question. But we can pause, so as to allow the commissioners a reasonab to consider what scheme they may propose.

Lord Neaves concurred.

This interlocutor was pronounced:—"The Lords, in respect t spondents have judicially stated their willingness to adopt with an efficient system of drainage, appoint the respondc report, within three months from this date, what steps the adopted to carry out the objects referred to in the answers: *ultra* supersede consideration of the case."

Murray & Falconer, W.S.—James Webster, S.S.C.—Agents.

LADY MASSY AND HER HUSBAND, First Parties.—*Sol.-Gen Clark—Marshall.* WILLIAM ALLASON CUNINGHAME AND OTHERS (Scott's Trustees), Second Parties.— *Watson—Muirhead.*

No. 30.
Dec. 5, 1872
Massy v. Scott's Trustees.

Succession—Legacy—Liferent and Fee—Trust.—A trust-settlement directed the trustees "to pay" a legacy to a lady, "to be settled by my said trustees on herself and her issue, with power to her of disposal in case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband." *Held*, at a date when the legatee was forty-two years of age, and had been for several years married and had no children (1) that the legatee was not entitled to have the legacy paid to herself absolutely; and (2) that in order to give effect to the expressed intention of the truster, the trustees were bound to invest the money and to take the securities in the name of the legatee in fee, exclusive of the *jus mariti* of her husband, and after her death to any children she might have also in fee, subject to the condition that the children's right of succession should not be defeated by any gratuitous act of the legatee, and failing children, to the heirs of the legatee, excluding those of her husband—Lord Ormidale *diss.* on the grounds (1) That the exclusion of the *jus mariti* of the legatee's husband was not required by the settlement; and (2) That the trustees were bound to retain the legacy so long as there was a possibility of the legatee having issue, unless the legatee found caution or security to repeat in that event.

2D DIVISION, and three consulted Judges.

THE late Mrs Jane Cuninghame or Scott, of Edinburgh, died on 8th February 1868, leaving a trust-settlement in which the second purpose was that "my said trustees shall make payment, at the first term of Whitsunday or Martinmas after my death, of the following legacies to the persons after-mentioned, viz. "to John Dunbar, my nephew, ... ; and I appoint my said trustees to pay to my sister, ... ; to Isabella More Nisbett, now Lady Massy, my grandniece, and her heirs, the sum of £5000 sterling, to be settled by my said trustees on herself and her issue, with power to her of disposal in the case of no issue, and failing issue and disposal by her to return to her own heirs, excluding those of her husband."

R.

In a codicil,* the truster directed the trustees to settle the legacy to John Dunbar in such manner as to secure to him the liferent, and the fee to his children.

In 1872 a special case was presented to the Court by Lady Massy and her husband of the first part, and by Mrs Scott's trustees of the second part, for the opinion and judgment of the Court upon the following questions:—"1. Whether Lady Massy, the party of the first part, is entitled to the fee of the legacy of £5000, and to have the same now paid to herself absolutely? 2. Whether Lady Massy is entitled to have the said legacy of £5000 invested on securities taken in name of herself 'and her issue, with power to her of disposal in the case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband?' 3. Whether the trustees, the parties of the second part, are entitled or bound to retain said legacy during Lady Massy's life, or to invest the said legacy in securities taken in name of themselves or other persons, as trustees for behoof of the said 'Lady Massy in liferent for her liferent use allenarly, and her issue in fee, with power to her of disposal in the case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband,' the interest or annual proceeds of said legacy being always paid to Lady Massy during her life?"

Lady Massy, at the date of the special case, was in her forty-third year, and had been married since 1855 without having had any children.

* Quoted in Dunbar v. Scott's Trustees, July 18, 1872, *ante*, vol. x. 982.

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Dec. 5, 1872. Massy v. Scott's Trustees.

The case was ordered to be argued before seven Judges.

The first parties argued;—It was not the intention of the testatrix that any trust should be interposed between the legatee and the fund which was bequeathed. The money was either to be paid to her or invested for her behoof. The direction that her trustees should pay the money at the first term of Whitsunday or Martinmas implied that they were to denude themselves. They had no authority to retain the money. The direction to "settle" was merely a direction as to the mode of payment.[1]

The trustees argued;—It was the duty of the trustees to carry out the intention of the testatrix, which was that the legacy should not be paid absolutely to Lady Massy, but should be so "settled" that her children's rights would be secured.[2] The absolute direction to pay was controlled by the subsequent direction to settle. If the intention had been that Lady Massy should have the fee, there was no reason for the power of disposal being given in the event of her not having children.[2]

At advising,—

LORD PRESIDENT.—By this special case we are called on to fix the construction to be put upon that part of Mrs Scott's settlement which bequeaths a sum of £5000 to her grandniece, Lady Massy, and her heirs. The duty of the Court in this and all similar cases is to endeavour, first, to ascertain what was the intention of the testatrix, and, second, to give effect to that intention if it be such as the law will recognise.

It is contended, on the one side here, that the meaning of this portion of the trust-deed is to settle £5000 on Lady Massy in liferent and her children in fee; while on the other hand it is maintained, that under this clause Lady Massy is entitled to the fee of £5000, and to have it paid over to herself at once unconditionally.

Now, I find it difficult to give effect to either of these contentions. The legacy in question is undoubtedly given in very peculiar terms. The second purpose of the trust-deed begins with these words,—"That my said trustees shall make payment at the first term of Whitsunday or Martinmas after my death of the following legacies to the persons after mentioned, *videlicet*." It is accordingly argued that everything following these words in the second purpose is to be read as a direction to pay to certain persons. I do not attach much importance to that view. The sentence is broken before we reach the legacy to Lady Massy.

After bequeathing a certain sum to her nephew, John Dunbar, the testatrix goes on to say, "and I appoint my said trustees to pay to my sister," and therefore a new sentence begins there. It is in the course of that sentence that the legacy to Lady Massy is expressed, and in these terms,—"To Isabella More Nisbett, my grandniece, and her heirs, the sum of £5000 sterling, to be settled by my said trustees on herself and her issue, with power to her of disposal in the case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband." If this sentence had included no more than the words "Lady Massy and her heirs," there can be no doubt that it would have been a simple bequest to Lady Massy herself, but out of the words that follow the difficulty has arisen. The sum of £5000 is directed "to be settled,"

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[1] Edward v. Sheill and Small, Feb. 12, 1848, 10 D. 685; Grant v. Gunn's Trustees, Feb. 28, 1833, 11 S. 484.

[2] Glenorchy v. Bosville, 1 Whit. and Tudor, p. 1; Sprot's Trustees v. Sprot, May 22, 1828, 6 S. 833; Gordon v. Gordon's Trustees, March 2, 1866, *ante*, vol. iv. p. 501; Graham v. Stewart, May 25, 1855, 2 Macqueen, 295; Murray v. Graham, May 3, 1849, 6 Bell's App. 441; Sherratt v. Bentley, Nov. 22, 1834, 2 M. and K. 149; Pursell v. Elder (H. L.) June 13, 1865, *ante*, vol. iii. p. 59.

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d we must ascertain what the testatrix meant by that. It has been argued by e trustees that the word "settle," so used, imports that Lady Massy is to have right of liferent of the sum merely; and that the fee is to be retained for her ildren in the event of her having any. But there is no direct mention of ferent here, and yet the testatrix, when she wished to create such a right of ferent and fee, knew perfectly well how to do so, as we see in the fourth dicil, where she very pointedly restricts the legacy of £18,000 already given John Dunbar to a liferent to him and a fee to his children. Now, it is a very markable thing that the testatrix, supposing she intended a similar right of ferent and fee in both cases, should carefully make that settlement in the case the one legatee, John Dunbar, by special codicil, while leaving the provision the other legatee, Lady Massy, to stand as it was in the original deed. Nor it unimportant to observe how John Dunbar's legacy stood in the original ed. It was a legacy to him, and failing him to his children. Now, that is t one of those legacies about which a doubt might arise. The doubt did cur to Mrs Scott, or else she changed her mind, but in Lady Massy's case she lowed the legacy to stand in its original terms.

It must next be observed that as there is no mention of liferent here, neither there any mode pointed out by which this assumed settlement of liferent and e could be maintained. It is not said that the trustees are to retain the fund pay it over to other trustees. It is not said that they are to invest it and ke the securities payable to the parties according to their respective rights. here is therefore neither mention of liferent and fee, nor any machinery hereby the creation of such rights might be effectuated. Yet when she does tend to make such a settlement she knows quite well how to do it. In the se of the residuary legatees she provides that the trustees, if they thought oper, should have full power to refuse to convey any share of the residue to e persons entitled thereto, and to retain and settle and secure the same in ch manner as that it should be free from the power of such residuary legatees. gain, in the codicil already referred to, she empowers the trustees either to act emselves as trustees with regard to the legacy to John Dunbar, or to appoint her trustees for that special purpose. I therefore find it quite impossible to ell out of this provision to Lady Massy any intention on the part of the testa- ix to limit her to a mere liferent. I come accordingly to the conclusion that e third question must be answered in the negative.

But then, on the other hand, Lady Massy contends that this is nothing more an a legacy to herself and her heirs, and I think it is quite as impossible to ncur in this view. If the testatrix had meant no more than that, then she ould have said no more. But being of opinion that she did mean something ore, we must consider how she directed it to be settled, in order to see whether e settlement intended is such an one as the law will give effect to. She directs e legacy to be settled on Lady Massy "and her issue." Now, I do not think at it is impossible to settle a provision on a person and her issue without sup- osing a right of liferent merely in the former and fee in the latter. I think at under such a settlement the person called is fiar, and her issue are fiars *ccessive*,—that is to say, they have a right of succession, but no present right. et us see how the other words used consist with this view. They are as fol- ows,—"With power to her of disposal in the case of no issue." That I interpret s a right of testamentary disposition. A power of disposal in connection with ch words as "in the case of no issue" can mean nothing but a power of testa- entary disposition. "Then, failing issue and disposal by her, to return to her n heirs, excluding those of her husband." This suggests that the *jus mariti* to be excluded in regard to the legacy, and in fact it must be so if it is to be iven effect to at all as I suggest. If the *jus mariti* took effect there would be immediate vesting of the legacy in the husband by the implied assignation of arriage, which would defeat the testatrix's intention. Again the issue of Lady assy might be by a subsequent marriage. In short, the idea is that the sband and his representatives are to be excluded absolutely, and the fee is to st in Lady Massy herself *a morte testatoris*, but her issue by this or any sub- quent marriage are to have a right of succession.

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Now, that right of succession is a thing known to our law. We are familiar with it in marriage-contracts. We had a very distinct and interesting example of it lately in the marriage-contract of Mr Anstruther and also in that of Sir Charles Lamb (Arthur and Seymour v. Lamb, June 29, 1870, *ante*, vol. viii. 928), in which case the children were held to have a right, not a hope merely, of succession. Such a right does not limit the right of the fiar to use the fund, to part with it for onerous causes, to dilapidate and spend it. But on his death his children are creditors against his estate, not so as to compete with onerous creditors, but so as to have a valid claim against his solvent estate, which cannot be defeated by gratuitous deeds either *inter vivos* or *mortis causa*.

I confess I have not yet seen any such postponed right established by trust-settlement. All the cases that have come under my notice have been by contracts of marriage. But I do not see any difficulty in holding that if such right can be conferred by a marriage-contract so it can also by a testamentary deed. Mrs Scott has attached this as a condition to Lady Massy's legacy, which she was quite entitled to do. Lady Massy has in fact been placed just in such a position as she would have been by a marriage-contract giving her children a *jus crediti*.

In these circumstances, I think we should answer the first question in the negative. With regard to the second question, however, it does not suggest to my mind any words of conveyance at all satisfactory and applicable to the case. What I should propose is, that we should find and declare that the parties of the second part, trustees acting under the trust-disposition and settlement of the testatrix, are bound to invest the proceeds of the said legacy of £5000, and to take the securities therefor to and in favour of the said Lady Massy in fee, exclusive of the *jus mariti* of her present or any future husband, and after her death to her children by the present and any future marriage, equally among them, also in fee, subject to the condition that the right of succession of the said children to a sum equal to the proceeds of the said legacy on the death of their mother, Lady Massy, shall not be defeated or prejudiced by any gratuitous act or deed done or executed by her, whether *inter vivos* or *mortis causa*, with power, nevertheless, to the said Lady Massy, failing such children, to dispose of the proceeds of the said legacy by any testamentary writing, and failing such children and the exercise of such power of disposal, then to the heirs of the said Lady Massy, exclusive of those of her husband. I need hardly suggest to the trustees that in making such investment the most suitable securities are heritable securities, because thereby the conditions attaching to this provision would at once appear on the record. But this cannot be laid on them as a positive order of the Court.

The third question, as I have already said, will fall to be answered in the negative.

In this manner I think the intention of the testatrix will be fully carried out.

Lord Justice-Clerk.—I concur with the proposed judgment in so far as it holds that Lady Massy was not restricted to a mere liferent. I think there is no ground for holding that it was the intention of the testatrix so to limit the beneficiary named and favoured for behoof of her unborn issue.

With regard to the second point, however, I have more difficulty. The effect proposed to be given to the limiting words of conferring a right of credit in the possible issue, as protecting the destination or substitution to unborn issue, as against gratuitous alienation, is a novelty. It is a right familiar enough under marriage-contracts; but I am not aware of any instance in which such effect has been given by testamentary bequest, and that by an implied prohibition against testing, to the prejudice of a destination or substitution *in mobilibus*. Had the bequest been direct to the legatee in these terms I would have thought that the destination was not effectually protected. Some meaning, however, must be given to the direction to settle, and I am not disposed to carry my doubts so far as to differ from the judgment proposed. It is plain that without the exclusion of the *jus mariti* it would altogether fail to have the effect intended, and it illustrates the difficulties in the way of the course we are going to take that we are

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to insert an exclusion which is certainly not expressed in the settlement. m reconciled to the judgment on the ground that it probably more nearly hes what the testatrix really meant than any other result.

COWAN.—Two questions have to be considered by the Court in answer- queries submitted for our opinion in this special case—(1) The meaning ct of the legacies bequeathed to Lady Massy and her heirs, and appointed settled" on herself and her issue, with power to her of disposal in case sue, and failing issue and disposal by her, to return to her own heirs, ng those of her husband. These words appear to me to exclude the idea nited and absolute right to the fee of the legacy being conferred on Lady the amount being appointed to be settled on her and her issue, and fail- e, on her own heirs, excluding those of her husband,—unless, in the case sue, the power of the disposal conferred on her ladyship should be d. A right of succession is thus given to the issue of Lady Massy, she cannot gratuitously disappoint, although by her onerous deeds and e fund may be attached or spent and lost. This limited right in the issue will require to be kept in view in the settlement of the fund by tees; and further, the nature of the bequest, and the terms in which it is re such as to require that the *jus mariti* should be excluded. In the views y your Lordship, therefore, on this branch of the case, I entirely concur. he second question, it appears to me that the trustees are called upon and to settle this legacy upon Lady Massy in such terms and under such ns as to secure full effect to the protected succession of the possible Lady Massy; and I am of opinion that the form of settlement proposed respects suitable to the circumstances.
taining these views, I concur in the answers to be returned to the queries.

DEAS.—This is entirely a question of intention. It is clear that the testa- not mean the sum to go absolutely to Lady Massy, for that would have it to Lady Massy's husband, whose heirs are expressly excluded. The sum e settled by the trustees on Lady Massy and her children under certain ons, and the question is, what the testatrix intended these limitations to ne might have thought she contemplated a bequest to Lady Massy in and to her children in fee, had it not been that we see from the codicils May 1871 that when she intended a liferent and fee she knew perfectly w to provide for it. It might also have been inferred that the testatrix d that the money should remain in the hands of the trustees. But in e codicils we find that she expressly provided for this when such was ntion. I think therefore, upon the whole, that the limitations suggested Lordship come as near as possible to what must have been in the mind estatrix, and upon that ground I concur in answering the questions in proposed by your Lordship.

BENHOLME.—This case has given me a great deal of anxiety, all the as the conclusion to which the Court have arrived does not appear to rely to correspond with the intention of the testatrix. What she had in her as the protection of the shares of the children. She may have intended this on to be absolute, merely giving to Lady Massy the power to test upon vision in the event of her having no children, and withholding from her ver of disposal in the meantime. What occurred to me was, that the might hold the funds in their own hands, or might appoint other trus- hold them, until the contingency of children was out of the question. difficulty of such an arrangement is to say how long the trustees are to e funds, for the law of Scotland does not recognise any period at which possible for a woman to bear children. If any such period was recognised aw the trustees would be bound to retain the funds till it arrived.
if the testatrix desired to limit the right of Lady Massy she might have in the same way as she did as to her nephew John Dunbar, or as she has dealing with the residue.

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I think the judgment which your Lordship proposes goes as far as we are entitled to go. No doubt creditors may carry off the fund, but the testatrix might have protected the right if she had desired to do so.

LORD NEAVES concurred.

LORD ORMIDALE.—In the present, as in every case involving the construction of a testamentary writing, the important question is—what was the intention of the testatrix? for that intention ought to be given effect to so far as practicable.

The terms in which the legacy in question has been left are undoubtedly somewhat perplexing. I have no hesitation, however, in holding that by the expression, "to pay," the testatrix did not intend that the amount of the legacy should on her death be at once handed over to Lady Massy, to be at her absolute disposal without qualification or restriction. The whole terms of the bequest, when read together, and in connection with the deed of settlement generally, exclude such a construction. The expression, again, "to be settled," as it is not followed by a specification of any precise form of settlement, must be held, I think, to be a matter which the testatrix intended that her trustees should be left to carry out and give effect to in a mode sufficient to secure and satisfy the object of the testatrix.

What, then, must be held to have been the true object of the testatrix, as regards the legacy in dispute? It appears to me that her object was to give Lady Massy a right to the capital of the £5000, but subject to a certain restriction or limitation which it is the duty of her trustees to attend to.

Although Lady Massy had been for some time married at the date when the legacy in question was left to her, the testatrix says nothing about her existing or any future husband. I am not prepared, therefore, to hold that she intended that any restriction or limitation should be imposed as regards the right which might arise to him. But I think it is impossible to read the whole terms of the bequest, and especially the direction of the testatrix to her trustees to settle the legacy on Lady Massy "and her issue, with power to her of disposal in case of no issue," without being satisfied that the trustees were and are restricted from now paying the legacy to Lady Massy, irrespective of the contingent interest constituted in favour of her children. On the contrary, it appears to me that her trustees are bound to see that these contingent interests are so protected that in the event of their ever emerging they shall be given effect to. In this view, I am unable to arrive at the conclusion that the trustees are either bound or entitled now and at once to pay the legacy of £5000 to Lady Massy absolutely and unqualifiedly, or to give it to her in the form of a security expressed in terms of the bequest, with the addition, which, as I have already said, I can find no warrant for, of an exclusion of her husband's *jus mariti*. It appears to me that such a mode of proceeding, while it might create considerable trouble and expense, would offer no real protection to the contingent interests in question, for on Lady Massy obtaining right to the legacy in any such form as that suggested she would have it in her power, whenever she pleased, to convert it into money, and so to put an end to all semblance even of protection.

Although, therefore, I cannot assent to such a mode of proceeding as that to which I have just alluded, I think there is a mode by which the trustees may be enabled at once to discharge their duty by taking care that the contingent interests in question are sufficiently protected, and also to pay over the amount of the legacy to Lady Massy. I think that this may, in accordance with the principle which was recognised and given effect to in the case of Schenimes, 25th June 1828, 6 Sh. 1019, the case of Shaw there referred to, and the case of Blackwood, 11th June 1833, 11 Shaw, 699, be very well done by Lady Massy, as a condition of receiving payment of the legacy, finding caution or security that, in the highly improbable, although possible, event of her yet having children, their interests will be provided for. But of course, if such caution or security is not found the trustees must, I think, retain the legacy in their own hands or power, so long as there may be a possibility of the contingent interests emerging.

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ith these explanations, I am of opinion, in answer to the three questions itted to the Court in the special case, that the trustees are bound to retain egacy in their own hands or power, so long as there is a possibility, in any nable sense, of Lady Massy having issue,—paying to her ladyship in the itime the income arising from the same; and it being always in the power ady Massy and her husband to obtain payment of the legacy on finding ion or security to the satisfaction of the trustees that the contingent interests r issue, in the event of her having any, will be duly provided for.

THE following interlocutor was pronounced:—"The Lords of the Second Division, having, along with two Judges of the First Division and Lord Ormidale, one of the Lords Ordinary, heard counsel on the special case for Lady Massy and Others, find and declare, in conformity with the opinion of the majority of the seven Judges, in answer to the first question, that Lady Massy, party of the first part, is entitled to the fee of the legacy of £5000, bequeathed to her by the testatrix, subject to the qualification after expressed, but that she is not entitled to have a sum of £5000, or the proceeds of said legacy, now paid to herself absolutely: Find and declare, in answer to the second question, that the parties of the second part, trustees acting under the trust-disposition and settlement of the testatrix, are bound to invest the proceeds of the said legacy of £5000, and to take the securities therefor to and in favour of the said Lady Massy in fee, exclusive of the *jus mariti* of her present or any future husband, and after her death to her children by the present and any future marriage, equally among them, also in fee, subject to the condition that the right of succession of the said children to a sum equal to the proceeds of the said legacy, on the death of their mother, the said Lady Massy, shall not be defeated or prejudiced by any gratuitous act or deed done or executed by her, whether *inter vivos* or *mortis causa*, with power nevertheless to the said Lady Massy, failing such children, to dispose of the proceeds of the legacy by any testamentary writing, and failing such children and the exercise of such power of disposal, then to the heirs of the said Lady Massy exclusive of those of her husband: Find, in answer to the third question, that the said trustees are neither bound nor entitled to retain the said legacy during the said Lady Massy's life, nor to invest the proceeds of the said legacy in securities taken in name of themselves or other persons, as trustees for behoof of the said Lady Massy in liferent for her liferent use allenarly, and her issue in fee: Find no expenses due to either party, and decern."

RUSSELL & NICOLSON, C.S.—ALEXANDER STEVENSON, W.S.—Agents.

No. 31.
Dec. 6, 1872.
Nicolson v. Johnstone and Wright.

BERT NICOLSON (Respondent), Appellant.—*Sol.-Gen. Clark—Harper.*
SSTONE AND WRIGHT (Appellants), Respondents.—*Watson.—Strachan.*

rrestment—Preference—Bankruptcy—Act 1696, *c.* 5—19 *and* 20 *Vict. c.* 79 *ıkruptcy (Scotland) Act*, 1856), *secs.* 10, 11, 12, *and* 108.—A person who insolvent granted a trust-deed for behoof of his creditors to a trustee, who red into possession of his property. A creditor of the insolvent, who was arty to the trust-deed, used arrestments in the hands of the trustee. Therewithin sixty days of granting the trust-deed, the insolvent absconded, and ecame notour bankrupt. More than four months after notour bankruptcy as sequestrated. *Held* that the creditor, being entitled under the Act 1696 duce the trust-deed, had secured an effectual preference by using arrestment ıe hands of the trustee, which was not affected by the sequestration.

No. 31.

Dec. 6, 1872. Nicolson v. Johnstone and Wright.

1st Division, with four consulted Judges. Sheriff-substitute of Dumfriesshire. M.

Sheriff-officer—Execution of Search—Notour Bankrupt.—Observations on the terms of execution of search by sheriff-officers as affording *prima facie* evidence of absconding so as to constitute notour bankruptcy.

Bankruptcy—Trustee.—Question, Whether a trustee in a sequestration can in litigation make admissions in points of law?

On 22d November 1870 Joseph Gracie, grocer, Dumfries, granted a trust-deed in favour of William Gordon for behoof of his creditors. Gordon entered into possession of Gracie's property.

On the 26th November 1870 Johnstone and Wright, wholesale grocers, Dumfries, used arrestments in the hands of Gordon, on the dependence of an action raised by them against Gracie, which resulted in decree in their favour, and again on 5th December 1870 on a protested bill due by Gracie to them. The two debts together amounted to about £38.

Johnstone and Wright having charged Gracie upon the extract registered protest to make payment of the bill, obtained warrant to imprison, in virtue whereof a search was made for him on 3d December 1870, by a sheriff-officer, who returned the following execution:—"Archibald Hyslop, sheriff-officer, passed to the dwelling-house and premises occupied and possessed by the said Joseph Gracie in High Street of Dumfries, and, holding the said warrant to imprison, in Her Majesty's name and authority, I made diligent and strict search for the said Joseph Gracie, by looking and searching carefully and attentively in and through every part, corner, and apartment of the said dwelling-house and premises capable of containing a person, and where it was possible he, the said Joseph Gracie, might be concealed, in order to have apprehended and incarcerated his person in terms of the said warrant to imprison, but, notwithstanding of the most strict, diligent, and minute search in and through the said places as aforesaid, he, the said Joseph Gracie, could not be found." The execution further bore that all this was done between the hours of eleven and twelve forenoon.

Gracie, who had gone to England, returned after a short period, and on 19th December 1870 he was apprehended and incarcerated under the warrant.

On the 18th April 1871 the estates of Gracie were sequestrated, and Robert Nicolson was elected and confirmed trustee thereon.

Johnstone and Wright lodged a claim in the sequestration to be ranked as preferable creditors for their debt of £38, 5s. 1d.

The trustee in the sequestration, on 1st September 1871, pronounced the following deliverance:—"The trustee admits this claim to the extent of £38, 5s. 1d. as an ordinary debt. The arrestments used by the claimants in the hands of William Gordon . . . . . being inept, and not having attached any funds belonging to the bankrupt in their hands, the balance of their claim, amounting to £10, 10s. 9d., is not chargeable against the estate. The arrestee, William Gordon, at the date of these arrestments, was not debtor to the bankrupt, and held no funds of his, but held the trust-estate of the bankrupt under a disposition in his favour *qua* trustee for behoof of the bankrupt's creditors, and was therefore accountable to them alone, and not to the bankrupt. . . . Alternatively, the trustee holds that the claimants, subsequent to using the arrestments, acquiesced in that trust-deed, and from their *mora* in raising the action of forthcoming are barred from acquiring a preference over the other creditors."

Johnstone and Wright appealed to the Sheriff. The trustee appeared.

The appellants in the inferior Court maintained that the date of notour bankruptcy was 3d December 1870, and pleaded that the voluntary trust-deed of 22d November, having been granted within sixty days of

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bankruptcy, was rendered null by the Act 1696, c. 5, and that no restments having been used within four months after the date of bankruptcy, so as to secure a *pari passu* ranking with their arrest- :hey had thereby secured an effectual preference.
trustee maintained that in point of fact the appellants had ac- l in the private trust-deed, and were therefore barred from ging. He also denied that notour bankruptcy took place on 3d ber. In answer to the appellants' averments on this point he -(Ans. 6.) "Admitted that the bankrupt was charged on the registered protest and decree referred to, and failed to make pay- terms thereof, and that a warrant of imprisonment was obtained extract registered protest. Explained that Joseph Gracie, after the trust-deed, went to Liverpool in search of work and to see ends, leaving his wife and family in Dumfries, where he remained fortnight, and returned to Dumfries. Denied that he absconded e appellants' diligence."
eaded, *inter alia*, that (the date of notour bankruptcy being assumed th December 1870, and the sequestration having taken place on ril 1871) the general arrestment effected by the sequestration was to be ranked *pari passu* with the appellants' arrestments.*
Sheriff-substitute (Hope) sustained the appeal, recalled the de- e of the trustee, and ordained the trustee to rank the appellants equestrated estate as preferable creditors to the extent of their ith interest.†

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sec. 12 of 19 and 20 Vict. c. 79, it is enacted that arrestments and s within sixty days prior to bankruptcy, or four months after it, "shall d *pari passu* as if they had all been used of the same date," &c. And 08 it is enacted that "the sequestration shall, as at the date thereof, alent to an arrestment in execution, and decree of furthcoming, and to ted and completed poinding."

TE.—The first question to be considered is, would the debt due to the s have been a preferable one on the estate if there had not been a rust-deed. The trustee says that it would not, on the plea that 'the the bankrupt having been sequestrated within four months of the notour bankruptcy the appellants cannot claim a preference. On what is founded the Sheriff-substitute has been unable to discover. He can ee reason in it, nor find authority for it. If the arrestments had been xty days prior to sequestration, then it might have been pleaded with hat the debt was not preferable, but that was not the case. The next is, what difference (if any) does the fact of the bankrupt having executed trust-deed for behalf of his creditors make.

trustee says that as the bankrupt had divested himself of his estate ie arrestments were used, and the trustee under the private deed held t belonging to the bankrupt but to the creditors, the arrestments were nd further, that 'the appellants having acquiesced in the foresaid trust rise, led the arrestees to believe that they were acceding creditors, and om prosecuting separate measures to obtain a preference over the other

' It appears to the Sheriff-substitute that none of these pleas would n good before sequestration, and that they cannot be any better now.

he first place, the private trust-deed, having been granted when the as insolvent, and within sixty days of notour bankruptcy, was null cible, and therefore could not place the debtor's funds beyond the reach acceding creditor's diligence; and, in the second place, there is not only nce in process of the appellants having acceded, but the averments on cts are not relevant and sufficient to be sent to proof.

action was in dependence in this Court in which these points would n settled when the arrestees and the bankrupt, or one or other of them,

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The trustee appealed to the First Division.

After the parties were heard, the Court appointed the case to be before seven Judges.

It was then stated for the trustee that he consented that the case s be disposed of on the footing "that there had been no acquiescen Johnstone and Wright in the private trust-deed; that the true d notour bankruptcy was the 3d December 1870."

The trustee argued;—The private trustee, in whose hands the s ments were used, did not hold for the bankrupt, but for his cre The result of giving effect to the contention of the arrestees would give them a preference over the other creditors, whereas the intent the trust-deed was to make all equal. The object of the Act 169 to prevent preferences among creditors, and it cannot be pleaded so give a preference.[1]

The respondents argued;—The effect of notour bankruptcy is t down the trust-deed, and to leave the trust-funds still the property bankrupt; at all events, the trustee was bound to account to the rupt, and that is sufficient ground for diligence.[2]

At advising,—

LORD BENHOLME.—This case arises under the sequestration of Joseph a grocer and spirit merchant in Dumfries. It arises in reference to the m which certain arrestments, or rather the debts secured by the arrestments, be ranked in the sequestration. The trustee held that they are to be only as ordinary debts. The Sheriff-substitute has found that they are e to a preference. The question is, whether the one decision or the other correct one.

The facts of the case, as they ultimately appear on the admissions of are very few and simple. This man Gracie, when in a state of insolvenc cuted a trust-deed for the distribution of his estate among his creditors 22d November 1870. This trust-deed fell under the operation of the Act in respect that the granter was rendered notour bankrupt within sixty da its date. It was consequently voidable under that statute, and therefore

took steps for having the estate sequestrated, with the view of defeati preference which the appellants were endeavouring to secure. If this s had any result at all, it has been favourable to the appellants, for it imme put an end to the trust-deed,—at least Mr Gordon has acknowledged this b ing over the estate, so far as undisposed of, to the trustee in the sequestra

"It seems to the Sheriff-substitute that if the trust-deed has been set a some effect, it must be set aside for all purposes; but whether that be so the trustee in the sequestration, under sections 10 and 11 of the Bank Act, is entitled to set aside either by way of action or exception 'all alie of property by a party insolvent or notour bankrupt which are voida statute, or at common law,' and, 'in so doing, shall be entitled to the be any presumption which would have been competent to any creditor.' It s to the Sheriff-substitute that if a trustee is entitled to do this he is also to do it in the interests of any creditor who might have done it himself t the sequestration; and therefore the trustee in this case ought to have effect to the appellants' contention, set aside the trust-deed and all its e way of exception, and ranked the claim preferably on the estate."

[1] 2 Bell's Com. (5th ed.) p. 487; Souper v. Smith's Creditors, M Stalker v. Aiton, M. 745; Globe Insurance Company v. Scott's Trustee 16, 1849, 11 D. 618; Sutherland v. Watson's Creditors, M. 1199; W Creditors v. Muirhead, M. 1201; Snee and Company v. Anderson's Credit 1206; Sinclair v. Lochhead, M. App. Bankrupt, No. 9; Johnston v. Fai M. App. Bankrupt, No. 5; Carron Company, M. 1110; Ross, M. 1111.

[2] Peters, &c. v. Speirs, &c., M. App. Bankrupt, No. 1; 2 Bell's Co ed.), pp. 494-496; Mudie v. Dickson, M. 1104.

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statute its nullity can be pleaded without a process of reduction. The was that the private trustee ceased to hold the goods for behoof of the rs who were intended to be benefited by the trust-deed, and held for the ipt and his creditors. The debts of Johnstone and Wright are not dis- and it is quite ascertained that the arrestments were duly used in the of the private trustee, one on 26th November, and the other on 5th ber. The question whether, in these circumstances, they are entitled to a nce, depends upon the date of sequestration in reference to the date of bankruptcy. The date of sequestration was 18th April 1871, four s and more after the date of bankruptcy (3d December), and less than onths after the other (19th December),—I allude to the contentions of in the earlier stages of this litigation. It seems that the bankrupt, after harged, and after the days of charge had expired, left the country. On ember 1870 a sheriff-officer made the usual and necessary search for him t success. Gracie returned after a short time, and was incarcerated on December. The 3d December has ultimately been admitted at the bar as e date of notour bankruptcy. Had it not been for this admission there have been some doubt as to this point, and some proof might have been d, the question being whether the execution of search, taking into con- ion the admission that the debtor had left the country, afforded sufficient ption that he had absconded to avoid the diligence of his creditors. But tter has been set at rest, for although proof might have been asked to hat there was no absconding the trustee has not asked to be allowed but has admitted that the date of bankruptcy was 3d December. In con- ce of that admission all doubt is removed, for the sequestration not having d within four months of notour bankruptcy it cannot be alleged that any arrestment which can compete with those of Johnstone and Wright's ents. Although they were used within sixty days of notour bankruptcy, tour bankruptcy was not within four months of the sequestration. Con- ly the equalisation of these arrestments with the general arrestment by the sequestration did not take place.

her material point has been admitted, viz., that these creditors had never ced in the private trust-deed, and were therefore not barred from plead- nullity.

refore arrive at the conclusion that the interlocutor of the Sheriff-substi- right. His decision is in terms of a provision of the bankruptcy statute, nerever a preference has once been obtained over any part of the bank- tate, that part of the estate passes into the hands of the trustee in the ration under burden of that preference.

COWAN.—The first point noticed in the note to the interlocutor of the regards the effect of the statutory provision equalising diligences within nths of the sequestration. The solution of this question depends upon e at which it is to be held the debtor was made notour bankrupt. That so by imprisonment on 19th December 1870 is admitted, and if this be e of the notour bankruptcy, the sequestration on 18th April 1871 was the four months. But diligence had been used against the debtor, under act registered protest and warrant, in virtue whereof a search was made on 3d December 1870, conform to execution of search in process. And recent debate it was admitted by the counsel for the trustee that the had been thereby effectually made notour bankrupt as at the date of the ecution of search. Hence it follows that the provision of the statute in n has no application, inasmuch as the date of the sequestration was more ur months subsequent to the notour bankruptcy.

this admission should have been made did not surprise me, having to the terms of the execution of search giving rise to the presumption of bankruptcy. That execution proceeded on the warrant of the Sheriff's and his *fiat ut petitur* issued in terms of the Personal Diligence Act, and d by a sheriff-officer, which is declared by that Act to have the same if the diligence had been used on letters of horning and caption. This

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being so, the execution contains all the essential facts to be found in those ex cutions of search on which the Court proceeded in the cases referred to by B Bell in his Commentaries (7th edition), vol. ii. p. 162. These executions a now before me, having caused an examination of the session papers to be ma in order to ascertain their precise terms. And Mr Bell lays down the doctri established by the decisions in these words—"The messenger's return of exec tion stating that after a thorough search the debtor could not be found, is go evidence, *prima fronte*, that he has absconded; and, unless opposed by contra evidence, is sufficient proof of bankruptcy." In this case the debtor was notou ously insolvent, having executed a trust-deed for behoof of his creditors; an although in the record notour bankruptcy was denied, and it was competent f the trustee to have asked for probation to redargue the presumption of absco ing afforded by the execution, yet, if it was found hopeless to attempt any su proof, the prudent and proper course for the trustee to follow was to avoid incu ring further expense by admitting the bankruptcy to be sufficiently establish by the execution of search.

The next question regards the effect of the arrestments used by the arresti creditors on 26th November and 3d December 1870. Is it to be held that the effect could be destroyed by the prior execution of the private trust-deed f behoof of the whole creditors on 22d November 1870? It is now admitted th there was no accession to the private trust by the arresting creditors. And th being so, their diligence was perfectly legal. But, assuming that the priva trust-deed took full effect, and that the trustee had obtained possession of t debtor's estate, an arrestment used by a non-acceding creditor in his hands su sequent thereto must have the effect only of attaching whatever residue shou remain with the trustee after full payment to the other creditors. This resu however, is obviated by the debtor in this case having been made notour ban rupt, as aforesaid, on 3d December 1870. The effect of this notour bankrupt was to render reducible the trust-deed under the Act 1696 as a voluntary de within sixty days. A reduction at the instance of the arresting creditors migh therefore, have been at any time instituted to the effect of setting aside the p vate trust, so as to enable them to make effectual their arrestments.

The arresting creditors have not instituted a reduction. The necessity f their doing so has been superseded by the sequestration of the debtor's estate April 1871. The effect of that proceeding is, as regards the administration the debtor's estate, to transfer it entirely to the statutory trustee, and to rend void the private trust-deed under the 10th section of the Act. The priva trust has been thereby brought to an end; and the whole effects of the debt remaining in the hands of the private trustee now belong to the statutory tr tee, and have been transferred to him. But, in asserting his right to these effe he can take them only subject to such preferences as have been created ov them by lawful diligence. And in this case the arresting creditors have attach by their diligence in the hands of the private trustee the effects of their debt which he held at the date of their diligence, and which the statutory trustee now entitled to have delivered to him.

This result appears to me to flow necessarily from the various decisions whi were referred to in the debate, and which culminated in that of Johnston, 17 D., App., "Bankrupt," No. 5.

On these grounds I concur in the opinion of Lord Benholme.

Lord Deas.—It appears that on 22d November 1872 the debtor, Jose Gracie, who is no party to this case, granted a trust-deed for the benefit of t whole of his creditors equally in favour of Gordon as trustee.. This deed w approved of by nearly all the creditors; was advertised in the newspapers; w allowed to be acted on; and dividends were paid by the trustee. Arrestmen had, however, in the meantime been used in his hands by Johnstone a Wright as creditors of Gracie, on the 26th November, and again on 6th Dece ber. On 3d December a search was made for the bankrupt, but he was n found, and he was not apprehended till the 19th. Sequestration was award on 18th April 1871.

esent the debtor. He represents the creditors in their just proportions, preferences by arrestment are excluded. A stipulation for a discharge, ; on a full surrender being made, although it will not void the deed, is, a final step to be considered only at the close, and in which non-acceditors may or may not then hold to be binding on them at their pleasure. agement of the trustee may be superseded by sequestration under the ot Statute, although more than sixty days have elapsed without the having in the meantime been made bankrupt, and in that case the nent of the trustee in the sequestration will supersede, from its date, agement of the voluntary trustee.

he other hand, bankruptcy within the sixty days, although there is no ation, will lay open the funds, in the hands of the voluntary trustee, to gence of creditors; and if, in the present case, the debtor was legally l bankrupt by the execution of search on 3d December 1870, the respon- rrestments will confer upon them a valid preference, that date being at e time less than sixty days after the date of the trust-deed and more ir months prior to the sequestration. But if there was no bankruptcy debtor was apprehended on 19th December, this of course leaves less ir months between the date of the bankruptcy and the date of the seques- (which was awarded on 18th April 1871), and gives rise to what appears o have been, hitherto, the only really formidable objection to the claim of ice made in virtue of the arrestments, which claim was rejected by the in the sequestration but sustained by the Sheriff-substitute.

objection was very distinctly raised in the Sheriff-court record. On the d, the arresting creditors stated that they had rendered the debtor bank- the execution of search of 3d December, at which time the debtor had ed from diligence (Art. 6), and further (Art. 10), that founding on their ents as used more than sixty days prior to the said bankruptcy, and on aving been no other legal diligence (meaning no sequestration) "within nths after the said 3d day of December 1870, so as to obtain a *pari passu* thereon, they lodged a claim to be ranked preferably in said sequestra- On the other hand, the trustee in the sequestration denied the alleged ling and the effect attributed to the execution of search of 3d December o Art. 6), and pleaded, *inter alia*, "7th. The estates of the bankrupt been sequestrated within four months of the date of notour bankruptcy ellants cannot claim a preference."

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were made thus explicit to remedy an ambiguity which Mr Bell regretted (v ii. pp. 70 and 80) had been allowed to remain in the statutes in force when wrote his Commentaries, and which has been effectually removed in the pres statute by explicitly declaring, in so many words, that all arrestments with less than four months of the sequestration shall rank *pari passu*, and that t sequestration itself shall operate as an arrestment for behoof of all the credit equally.

It thus becomes a vital matter whether notour bankruptcy took place on December. The only proof offered is the execution of search by the she officer. There is no doubt that such an execution, if in full and regular for affords *prima facie* evidence that the debtor had absconded. But the executi here merely bears that the officer went to the debtor's dwelling-house betwe eleven and twelve o'clock in the forenoon, and looked through the house, a did not find him. A correct form is given in Darling's Office of a Messenger, p 179 and 180, and bears that the messenger "passed to the dwelling-house oc pied by the said E F, and to the shop, warehouse, and cellar occupied by him , and then and there," "made diligent and strict search for the s E F, by looking and searching carefully and attentively in and through eve part, corner, and apartment of each of the said dwelling-house, shop, warehou and cellars capable of containing a man, and where it was possible the said E might be concealed, in order to apprehend and incarcerate his person in ter of said letters. But notwithstanding the most strict, diligent, and minute sear at each of the said places, as said is, he, the said E F, could not be found, having absconded, as I believe, for his personal safety."

The execution must set forth facts which raise a presumption of flight absconding, and it is a grave question whether the execution at the dwellin house in this case contains anything sufficient to raise such a presumptic especially as at the time when the search was executed it was to be expect that the debtor would be at his shop or warehouse, and not in his dwellin house. Mr Bell (Com. ii. pp. 172, 173) says:—"Two questions may arise co cerning absconding—(1) The messenger's return of execution, stating that af a thorough search the debtor could not be found, is good evidence *prima fac* that he had absconded; and, unless opposed by contrary evidence, is sufficie proof of bankruptcy. But what facts will entitle a messenger to return such execution? In a man of good credit mere absence from home is nothing, but a debtor notoriously insolvent such absence is more suspicious, and indeed l been found to infer *præsumptione juris* an absconding under the statute 16 It seems reasonable, however, to require some other circumstance than m absence—as the lateness of the hour, or the apparent concealment or ignora of the domestics of what has become of the debtor. From such circumstan absconding may fairly be inferred." I have always understood this to be sou law. I am quite aware of the decisions in the books which appear to sanct a looser doctrine. But plainly enough Mr Bell did not approve of them. Th is no stereotyped or statutory form for such an execution, but an *actus legitin* which is to have consequences so important ought to be gone about with gr care and precision. In this case the execution sets forth nothing except th between the hours of eleven and twelve forenoon, the officer searched the debt dwelling-house, and did not find him. I do not think that fact was sufficient infer absconding, and the execution does not bear that the officer drew that ference from it. It is not said that he put any questions to the domestics or family. He did not even search the shop, and it appears to me very perilous hold that bankruptcy is to be inferred merely because a merchant, or indeed a other man, who happens at the moment to be insolvent, is not found in dwelling-house at or immediately before the hour of noon.

But at the close of all this litigation the counsel for the trustee has admit that notour bankruptcy did take place on 3d December. I agree with L Cowan's remark that such an admission ought to be in writing. I wo hesitate to accept it from a trustee for creditors if it is meant as an admiss in point of law. But if it is meant to be admitted that there was absconc in point of fact, it is conclusive.

LORD NEAVES concurred with Lord Benholme.

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LORD ARDMILLAN.—I have felt not a little difficulty in regard to this case, which is now presented in a very different manner from what it was when before the First Division. If it had not been for the admission now made at the bar by the counsel for the trustee, but not previously made, I should have had difficulty in holding that the 3d of December 1870, when a search was made for the common debtor Gracie, was the date of notour bankruptcy. There is no proof of absconding except what the search affords. Mere absence from home when sought for is not sufficient, and the execution of search does not state as a fact, and does not contain materials for clearly inferring, that the debtor absconded. The trustee on the record has distinctly denied that Gracie, the debtor, had absconded, or did on that occasion abscond from diligence. The execution of search does not bear that he had absconded, and there is no real evidence from facts and circumstances indicating that he did abscond, or even meant to abscond.

He was not apprehended till the 19th December, and the sequestration was on 18th April 1871, within four months of the date of that apprehension, which, if he did not abscond, was the date of notour bankruptcy. Taking these two dates as the date of notour bankruptcy and the date of sequestration, a question of importance, and not free from difficulty in regard to the effect of the sequestration on the arrestments would have arisen. It is enough for me now to say that, taking the dates according to that state of the facts, and as the case was argued in the First Division, and is presented on the record by the trustee who denied the absconding, I felt difficulty on that question of the effect of the sequestration on the arrestment, and I do not venture to express any opinion on it.

I understand it to be now admitted on the part of the trustee, though it was formerly denied, that Gracie had absconded when the search was made, and that therefore the 3d of December is the date of notour bankruptcy. That important admission in regard to the matter of fact changes the aspect of the case. We could not take an admission in point of law. Taking that view of the fact as it is now admitted I do not differ from the judgment which is proposed.

LORD MURE.—I concur with Lord Benholme and the majority of your Lordships, and, with reference to the main difficulty which has been raised, viz., the date at which notour bankruptcy took place, I wish to rest my opinion not so much on any admission which may be made at the bar, as on the execution of search coupled with the averments and admission made by the trustee on the record, that the bankrupt was absent from Dumfries at the time the search was made. Looking to these facts, and to this further fact, that there has been no proposal made to redargue the execution, I have no difficulty in arriving at the conclusion that the date of notour bankruptcy was the 3d of December. There are several cases in which an execution of search has been held to be at least *prima facie* evidence of absconding, and which are, I think, those referred to by Mr Bell (Com. ii. 173, 5th ed.). There is the case of the Carron Company, 4th July 1775, D. 1110; of Ross, 25th June 1782, D. 1111; and of Spedding, 9th August 1785, D. 1113,—in all of which an execution of search, in the absence of any evidence to the contrary, was held, in the case of an insolvent party, to afford sufficient evidence of absconding. It is true that all that appears on the face of the execution in this case is that the debtor could not be found at his house and shop, and it is said that it is possible he may have been in Dumfries. But it is averred on record that he had absconded from diligence, and the trustee admits that the debtor was absent from Dumfries at the time the search was made, and that when under diligence he had gone to Liverpool in search of work. No doubt he goes on to deny that the debtor had absconded. But we are here in a concluded cause, in which no proof has been asked by either party. And I see no reason why, when the trustee finds that he cannot redargue the presumption of absconding, which is held to arise from the fact that an insolvent party when under diligence has left the country, he should not be entitled to say that he does not stand upon that part of his case.

LORD PRESIDENT.—There are two questions before us, one of which has been

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argued at the bar, and the other has been suggested by my brother Lord I It is right that I should say a few words on each.

The first question is, whether the arrestments used on the 26th November the 5th December in the hands of Mr Gordon, the private trustee, are effec At the time they were used there can be no doubt that Gordon was in posse of the property of Gracie, and in fact that he was in actual possession of a l ber of shop goods which formed the chief part of Gracie's estate. No doul is said that he was in possession of these goods under a trust-deed for beho creditors. That trust-deed became ineffectual in consequence of the superve bankruptcy of the granter within sixty days of the date, whether the bankru took place on 3d December or on 19th December. It is suggested that were not good arrestments when they were used. This depends on the sen the word "good." They were undoubtedly competent arrestments, whethe trust-deed was good or bad. Their effect would depend on the goodness of trust-deed. If the trust-deed were good and not liable to be cut down, then arrestments would attach nothing but the reversion after exhausting the purp of the trust-deed. If the trust-deed became bad, the arrestments were effec to attach all the goods which *de facto* were in the hands of the trustee should have been inclined to arrive at this result on principle, but it has l made matter of express decision in a whole series of cases which have l quoted.

It is said, however, that the bankruptcy did not take place on 3d Decem but only on 19th December, and that occurring as it did on 19th Decembe arrestments used within sixty days before that date, or within four months a it, are to rank *pari passu*. One of these arrestments used within four months a the 19th December was the arrestment which is affected by the sequestrat and confirmation of the trustee. If the facts were before us it certainly wo be an important question whether the sequestration, which, according to a ferent section of the Bankruptcy Act (sec. 108) operates as an arrestment, is arrestment within the meaning of sec. 12. The question does not arise here, I mean to give no opinion on it. Upon the state of the case before us, not bankruptcy took place on 3d December, as matter of fact, and the effect is create a presumption of absconding, which may indeed be redargued, but whi until it is redargued, is conclusive proof of absconding. This has been laid do in a series of decisions in the Dictionary. In Young v. Grieve, 4th July 17 M. 1112, the circumstances of a debtor not being found at his dwelling-house a messenger ready to execute a caption against him, and of his family not giv information whither he had betaken himself, were construed to be an abscond under the statute. In Spedding v. Hodgson, 9th August 1785, M. 1113, it observed from the bench that the absence of a debtor from his dwelling-house a time when he is notoriously insolvent, will create a *presumptio juris* of absco ing; not being, however, a *presumptio juris et de jure*, it may be elided b contrary proof.

Now, it must be kept in mind that an execution of search is not a statut matter. There is nothing in the present Bankruptcy Statute or any other about the execution of a search. It is matter of decision at common law t the execution of a search is *prima facie* evidence of absconding, and that, un redargued, it fixes absconding as a fact. I agree with Lord Deas that an execut of search, like all other diligence, is subject to a strict construction. I infe from his Lordship's observations that there were some things about this ex tion which disentitled it to be regarded as *prima facie* evidence of abscond What the sheriff-officer certifies is,—"I, Archibald Hyslop, sheriff-officer, pa to the dwelling-house and premises occupied and possessed by the said Jos Gracie in High Street of Dumfries, and, holding the said warrant to imprison Her Majesty's name and authority, I made diligent and strict search for the Joseph Gracie by looking and searching carefully and attentively in and thro every part, corner, and apartment of the said dwelling-house and premises cap of containing a person, and where it was possible he, the said Joseph Gracie, mi be concealed, in order to have apprehended and incarcerated his person, in te of the said warrant to imprison, but, notwithstanding of the most strict, dilig

and minute search in and through the said places as aforesaid, he, the said Joseph Gracie, could not be found." No. 31.

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It seems to me that this is a more than usually strict search, and that the execution goes far beyond most executions. I have an example of an execution of search which the Court found in the case of Spedding to be conclusive of the fact that the debtor had absconded. "Upon the 21st day of October 1879, I, Francis Short, messenger . . . passed to the said Thomas Bushby's house at Ardwell, where, after inquiring at his servants if he was at home, and being answered in the negative, I demanded and got access into the said house and searched, but could not find him." But it is said that it is open to the trustee to redargue the presumption of absconding. Quite true; but the trustee was compelled on record to make one admission, that the debtor had left the kingdom—a most pregnant circumstance in the question of absconding. It did not surprise me in the least that, through his counsel, he declined to stand upon this part of his case. It is said to be an admission not of fact but of law. I do not think so. Notour bankruptcy is a matter of fact, and to be proved by evidence of a particular description perfectly well known to legal practitioners and to trustees in sequestrations. Had it been an admission in point of law, is it so very clear that a trustee in a sequestration cannot give away a point of law? I should think that, if it were competent for any one, it would be competent for him. He is charged with the disposal of claims, and when he admits a claim he admits both fact and law. But here he is not giving up a point of law, but simply giving up a fact which he would otherwise have to prove.

I am of opinion that we should refuse the appeal.

THE Court pronounced the following interlocutor:—"In conformity with the opinions of a majority of the seven Judges present at said hearing, affirm the interlocutor appealed against, and refuse the appeal, and decern: Find the appellant liable in expenses; allow an account," &c.

R. P. STEVENSON, S.S.C.—JAMES MACK, S.S.C.—Agents.

JAMES STEWART ROBERTSON, Pursuer.—*Lord-Adv. Young—Sol.-Gen. Clark—Adam.*
MRS WILLIAMINA WILSON ROBERTSON OR STEWART AND ANOTHER (Stewart's Trustees), and ALEXANDER ROBERTSON STEWART, Defenders.—*Shand—Moncreiff.*
DONALD LIVINGSTON, Defender.—*Millar—W. F. Hunter.* No. 32.

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Nuisance—Property.—Circumstances in which a farina manufactory was held to be a nuisance to a neighbour, in respect both of the discharges therefrom into a stream bounding his property, and of occasional and temporary annoyance from the smell of the settling tanks.

Nuisance—Landlord and Tenant.—An action was brought by A against B, a neighbouring proprietor, and C, his tenant, for declarator that they were not entitled to carry on at the premises occupied by C a manufacture whereby a nuisance was created to the pursuer. B, in the missives of lease between him and C, had stipulated that C should "not erect any buildings or others at the farina works carried on by him without the express permission of the proprietor in writing, and should not have anything about said premises that should be a nuisance to the property or to the public." *Held* that as B did not prevent the use of the water and the erection of buildings, &c. by C, and as he had appeared and defended the actions, on grounds implying the assertion of more serious rights than those claimed by the tenant, the findings as to nuisance and expenses must be directed against him as well as the tenant.

JAMES STEWART ROBERTSON was proprietor of the lands of Edradynate, in the parish of Logierait, in Perthshire, which were separated by Derculich

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Burn from the lands of Derculich, in the parish of Dull, belonging to Stewart's Trustees and Alexander Robertson Stewart of Derculich.

About 1846 Donald Livingstone, who was tenant of the farm of Laigh, on Derculich estate, converted a lint-mill, situated on the east or Derculich side of the said stream, into a mill for the manufacture of farina from potatoes.

Mr Robertson's avenue lay along the other side of the stream, leading to the house of Edradynate, which was situate on the west side of Derculich Burn, at a distance of 300 yards from the mill. The avenue passed within 20 yards of the mill.

On 2d December 1871 Mr Robertson brought this action against said proprietors and tenant, concluding for declarator that they were not entitled to carry on the manufacture of farina or starch as presently carried on by them at the mill, at least that they were not entitled to carry it on in such a way as to cause injury to the pursuer, his property, or tenants, or so as to cause a nuisance, and for interdict against the defenders "carrying on the said manufacture of farina or starch at the said mill or other premises, at least from carrying it on in such way and manner as to cause injury to the pursuer, his property, tenants, and others as aforesaid, in their health, comfort, or otherwise, or so as to create a nuisance," and also for declarator that the pursuer had right to have the water of the burn maintained in a state fit for the use of man and beast, and that the defenders had no right to pollute it so as to render it unfit for the primary uses, and for interdict prohibiting the defenders "from discharging into the said burn or stream at any time from the said mill or other premises any impure water, material, or stuff of any kind, whereby the said water may be polluted or rendered unfit for domestic use, or the use of cattle, or for any of the primary purposes for which water is used as aforesaid, or its amenity in any way diminished." There was also a conclusion for declarator that the defenders were not entitled to divert the water of the stream from its natural channel further than it was in use to be diverted for the lead or cut to the lint-mill, and for interdict against the defenders making such further diversion.

The pursuer averred that the earth, refuse, dirt, and noxious or deleterious matters resulting from or used in the manufacture of farina were carried into and polluted the stream, which was formerly pure, and fit for the primary purposes; that a portion of the pulp, resulting from the grinding or crushing of the potatoes, was conveyed to extensive tanks, where it was allowed to remain till it fermented, when it sent forth intolerable smells; that a quantity of noxious matter drained from these tanks into the stream.

Stewart's Trustees and Mr Stewart admitted that Livingston had converted the lint-mill into a farina-mill, and averred;—"The present defenders, who have not resided at Derculich for many years, have no personal knowledge of the rest of the statements made in these articles, but do not admit their accuracy. They themselves have neither caused nor authorised any pollution of the burn, or any nuisance in connection with the said farina-mill. On the contrary, in the minute of lease, dated 8th June and 10th July 1861, between the late Stewart Robertson Stewart and the defender Donald Livingston, under which the latter holds his farm, the said Donald Livingston, *inter alia*, binds and obliges himself not to have anything about the farina works, or elsewhere, that shall be a nuisance to the property or to the public."

In reply to specific averments made by the pursuer with regard to the pollution of the stream, and the smell, they "denied that the present defenders performed any of the operations stated. If any offensive smells *are caused* by the said operations the present defenders are not answerable

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therefor." They also "denied that the present defenders have caused or authorised any pollution of the burn, or nuisance of any kind."

The pursuer pleaded, *inter alia*;—(1) The manufacture carried on by the defenders at the foresaid mill being a nuisance, the pursuer is entitled to have the same stopped. (2) The said stream being the joint property of the pursuer and of the proprietors of Derculich, the said defenders are not entitled to pollute the same, or render it unfit for the primary purposes for which such water is used.

The defenders Stewart's Trustees and Mrs Stewart pleaded;—(1) The pursuer's averments as to an additional quantity of water having been diverted from the stream by the present defenders' tenant are irrelevant, and insufficient to support the relative conclusions of the action. (2) In virtue of their titles, and the possession which has followed thereon, the present defenders are entitled to use the water of the Derculich Burn in such quantities as they find necessary, from time to time, for manufacturing purposes. (3) The pursuer and his predecessors having recognised and acquiesced in the said use and control of the water of the said burn by the present defenders and their predecessors, the pursuer is barred from now objecting to such use and control being continued. (4) The present defenders not having caused or authorised any pollution of the Derculich Burn, or any nuisance in connection with the farina works, are entitled to absolvitor from the conclusions of the action relating to such alleged pollution and nuisance.

The defender Livingston pleaded;—(1) The pursuer's averments, in so far as material, being unfounded in fact, the defender should be assoilzied from the conclusions of the action. (2) The defender ought to be assoilzied, in respect that for time immemorial the stream in question has been used for secondary purposes. (3) The defender having used the water of the stream since 1845 in the same way as at present, and not having infringed or violated any right belonging to the pursuer, ought to be assoilzied from the conclusions of the action. (4) The water of the said stream not having been diverted by the defender to any greater extent than it has for time immemorial been in use to be diverted, or so as to injure the rights of the pursuer, the defender is entitled to absolvitor. (5) The pursuer and his authors having acquiesced in the operations of the defender complained of, is barred from obtaining decree in terms of the conclusions of the summons.

The Lord Ordinary, on 7th February 1872, before answer allowed the parties a proof of their respective averments.*

The substance of the proof is stated in the note to the Lord Ordinary's interlocutor of 19th March 1872, by which his Lordship, "having considered the closed record, proof, and whole process, finds (first) that it is sufficiently proved in point of fact that for some time previous to the raising of the present action, and

* "NOTE.—The counsel for the landlords maintained that there was no relevant case stated against them, and that they ought not to be sent to proof. He urged that the whole allegations were directed against the tenant, and that it would involve needless expense to make the landlords parties to the proof. On the other hand, the pursuer maintained that his averments were directed both against the proprietor and tenant, both of whom, he alleged, concurred in the whole acts complained of, and both were liable therefor. Although the averments are somewhat indefinite, the Lord Ordinary thinks that he cannot safely dispose of the case on relevancy. Further, the action involves declaratory conclusions of right, to which the landlords, who resist these conclusions, must necessarily be parties; and still further, the landlords appear to join issue at least upon the question as to the amount of water which the pursuer is entitled to abstract and use. The proof, however, *is allowed* before answer."

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in particular during the summer and autumn of the year 1871, the defender Donald Livingston so carried on the manufacture of farina or starch from potatoes at the mill occupied by him on the lands of Derculich as to cause a nuisance to the pursuer: Finds (second) that the said nuisance was occasioned both by smell or unpleasant and offensive odours emanating from the said defender's manufactory, and from refuse produced therein, and by the pollution of the Derculich Burn, occasioned by the said defender's operations: Finds (third) that the Derculich Burn is not a stream dedicated to manufacturing purposes, and that it has not for the prescriptive period been so polluted as to be unfit for the primary uses: Finds, in point of law (fourth), that the defenders are not entitled so to carry on the manufacture of farina or starch at the mill of Derculich as aforesaid as to cause a nuisance to the pursuer, either by offensive smell or by pollution of the said stream; and with these findings, and before further answer, appoints the cause to be enrolled, that the defenders, or either of them, may state whether, and how, they are prepared to abate the said nuisance in time to come, or that a remit may be made for ascertaining how the said nuisance may be abated, or for such further proceedings as may be necessary: Finds the pursuer entitled to expenses up to this date, reserving for after consideration whether there should be any, and what, modification of said expenses in reference to the pursuer's plea as to the quantity of water diverted or abstracted by the defenders, and remits the account of said expenses to the Auditor of Court to tax the same, and to report."*

* "NOTE.—This case has been litigated with great keenness on both sides, and it has been very fully and ably argued both on the questions of fact and on the questions of law which it involves. Both in fact and in law the case is attended with difficulty and nicety.

"The Lord Ordinary has embodied the results at which he has arrived in the preceding interlocutor. The first three findings are findings in point of fact; the fourth is a finding in point of law. These findings will ultimately lead to the disposal of the action; but the Lord Ordinary cannot proceed further at present, because the defenders are entitled to suggest means by which the nuisance may be abated without abolishing or discontinuing their manufacture. For example—the offensive smells may perhaps be prevented by covering the tanks or receptacles from which the smells proceed, and the pollution of the burn may perhaps be prevented by making a settling pond, or by washing the potatoes in tanks, or in some other place than in the open mill-lade. Into these matters, however, the Lord Ordinary cannot at present enter, and he may probably require the assistance of a skilled reporter.

"I. The Lord Ordinary's first finding is that a nuisance has been caused to the pursuer by the mill in question.

"This is really a jury question, and the Lord Ordinary has dealt with it as such. There is conflicting evidence, and the Lord Ordinary is far from saying that there is no difficulty in weighing and deciding upon that evidence. It is certainly not a very strong case of nuisance. The nuisance is not constant, and in ordinary circumstances it is not very great. When the supply of diseased potatoes is small, when the weather is cold, when the wind is in a particular direction, or when the burn is in flood, very little annoyance, or no annoyance at all, may be caused to the pursuer; and even when there may be unpleasant odour or a polluted stream, feelings of good neighbourhood might induce persons in the pursuer's position to overlook the matter, and put up with what many would hold to be a very trifling inconvenience.

"Still the pursuer is entitled to insist in his absolute right, and the Lord Ordinary has found himself obliged to hold that at least sometimes, and in circumstances occurring more or less frequently, the defenders' mill has occasioned a nuisance both by causing offensive odours and by polluting the stream. In particular, it seems to be established that the nuisance was more frequent, more

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The defender Livingston reclaimed, and argued;—The Lord Ordinary, in making a remit, had followed the same course which was adopted in

ontinuous, and greater in degree during the summer and autumn of 1871—that is, during the period immediately preceding the raising of the present action—than it had been during previous years. It may even be true that, but for the onsiderable failure of the potato crop in 1871, and the greatly increased manufacture at the defenders' mill that year, this action would never have been raised; nd it seems to be true that a large and offensive tank, which was in operation n 1871, has, since this action was raised, been removed. Still, if only in 1871 nuisance was caused, this would justify the action and entitle the pursuer to me remedy, or to some security that in future years the nuisance should not e repeated.

"The Lord Ordinary abstains from any analysis of the evidence of nuisance. rom the nature of the case the evidence is limited. The pursuer's mansion-ouse and lodge seem to be the only houses injuriously affected; for although r Livingston's house is near his work he cannot complain of his own manufactory. It was only on rare occasions too that the smell reached the pursuer's ansion-house; but the Lord Ordinary thinks that it amounts to a nuisance if pervaded with sufficient constancy or frequency the avenue, or approach there-. Then the pollution of the stream seems to have been not inconsiderable. fty cartloads of diseased potatoes for a considerable period were daily washed the lade, and this at intervals during the working day. It may be that the eam, after each washing, soon ran itself clear, but then it was very soon polted again by the next washing. The pursuer seems well entitled to complain f this.

"On the whole, although not a very clamant case, the Lord Ordinary thinks at during 1871, at least, the nuisance is proved.

"There is no dispute as to the particular mode in which the nuisance is aused,—viz., (1) By offensive smell; and (2) By pollution of the stream.

"A considerable part of the proof was directed against offensive deposits of anure made up of the refuse of the mill. There is no special conclusion as to hese, and they were treated simply as the mode in which the manufacture was onducted so as to cause offence. To some extent these deposits have now been emoved, or are in course of being removed, and it was stated that they would ot be renewed. This belongs, however, rather to the abatement of the nuisance han to the proof of its existence.

"III. The third finding in the preceding interlocutor raises questions of some icety both in point of fact and in regard to the legal effect of the alleged facts.

"(1) The defenders urged that they had absolute right to the water, to take ny quantity of it, and to use it for any purpose, in particular for manufacturing urposes. On this point the landlord of Derculich Mill relied on his titles, and n the past history of the stream. The Lord Ordinary is of opinion that on a air reading of the titles they do not support the defenders' contention. No oubt the defenders, Stewart's trustees, have a grant of Derculich Loch and of he streams therefrom, but they have so only as proprietors of the meal-mill of Derculich, and of the mill lands thereof. The meal-mill and its lands are far urther up than the farina work, and have nothing to do therewith. All the ater from the meal-mill is restored to the burn long before it enters the lands n which the farina mill is situated, and which are held by different titles. The efenders cannot use the titles of one estate as giving them a right to divert or se the water for a different estate far further down the stream.

"(2) The defenders contended that Derculich Burn was dedicated to manufacturing purposes, and was no longer applicable to the primary uses. The efenders have failed to instruct this. No doubt there was at one time a waulk r dye mill about a mile further up the stream, but this only existed for a few ears, and it has been discontinued and in ruins for at least half a century. It oes not appear that even when it existed it created any nuisance or material ollution of the stream. The other mills upon the stream merely used the water

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Rigby and Beardmore v. Downie,[1] but that was a much clearer nuisance than was presented upon the evidence here. In this ca the pollution of the stream and the smell from the works, if the be regarded as nuisances at all, or as unwarrantable uses of p were occasional and temporary. The works were less offensive t which had ever been held to be a nuisance; and were less so tha kiln on the verge of an estate, the erection of which had been he a legitimate exercise of the right of property, and not *in æmulat* neighbours.[2] Moreover, the mill had existed since 1846, and the and his father were barred by acquiescence.[3]

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as a motive power, and did not in any way pollute it, for it is impo hold that the accidental escape of sawdust or of lint dressings into th would ever give any right permanently to pollute it, so as to unfit i primary uses.

"The only other ground upon which it was maintained that the st been dedicated to polluting manufactures was that at one time holes or steeping lint existed on or near the stream. But although a lint hole c a week or a fortnight an offensive smell, this occurred only once a acquiescence therein would not entitle the defender to carry on his prese facture, if it really causes a nuisance. If the water from the lint h returned to the stream it might pollute it, but probably only for an h that only once a year; and such as it was, the steeping of lint has bee tinued for about forty years. Such uses, it is thought, are quite insuf establish that the Derculich Burn is a manufacturing stream, and tha residing thereon have no right to insist that its water shall be applicat primary uses.

"(3) The defenders pleaded the pursuer's acquiescence as a bar to th action. It appears to be true that the pursuer and his father, from feelings, were very unwilling to take proceedings against the defe Livingston, and they appear to have submitted for a good many years they considered a grievance and an annoyance. But last year things worse than ever, and it would be most unfair, as well as most unfort hold that delay or reluctance to challenge an incipient and a growing will cut off altogether the right to challenge it to whatever height it carried. The cases regarding acquiescence in encroachments or building apply to a case like the present, where admittedly the pursuer has no stop the defenders from building what they please on their own land; Lord Ordinary thinks that the pursuer's forbearance in past years does vent him from vindicating his legal rights.

"The Lord Ordinary's finding in point of law needs no remark. If Ordinary is right in his findings in point of fact there cannot be much about the law applicable to the case.

"The Lord Ordinary has found both the landlords and the tenant the expenses hitherto incurred. No doubt the landlords did not direct the nuisance. But they appeared and resisted decree, although the pur concluded for expenses against such of the defenders as might appear a Still, further, the landlords raised very important questions upon the tit *alia*, claiming right to the whole water 'for manufacturing purposes.' pleas the landlords have been unsuccessful. There may possibly be som for modifying the pursuer's expenses in respect that he claimed too l right to stop the diversion of the stream otherwise than by the old lade the old purposes. This formed a very small part of the case, however, Lord Ordinary reserves its effect on the expenses till the account is s there is room for modification at all it will be very slight."

[1] March 8, 1872, *ante*, vol. x. 568.

[2] Fraser v. Dewar, 1767, M. 12,803.

[3] Hart v. Taylor, 1827, 4 Mur. 307.

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Argued for Stewart's Trustees and Mr Stewart;—The landlord was not sponsible for the nuisance, and ought to have been allowed to get out f the action when the record was closed.[1]

Argued for the pursuer;—There was clearly a nuisance here. The ndlord's stipulation in the lease was unavailing in this action, because o man can authorise another to commit a nuisance, and the object of the tion was to regulate the future use of the property, being one which rded not merely the nuisance alleged to be created, but the rights of e conterminous proprietors.

At advising,—

LORD PRESIDENT.—The pursuer of this action complains of a nuisance arising m a farina mill occupied and carried on by the defender Livingston upon property of the other defenders, and situated on a small stream which rides the pursuer's property from theirs. This nuisance consists partly of offensive odour which pollutes the air, and partly of offensive refuse ich flows from the manufactory into the stream, and pollutes the water. e object of this action is to secure to the pursuer protection against that isance in time to come, and so the conclusions are partly for interdict and tly for declarator. There is no conclusion for damages, and therefore the tinuation of the nuisance, and the length of time which it has endured, ne to be of comparatively little importance. In regard to the existence of nuisance, the Lord Ordinary has found it proved "that for some time pre- us to the raising of the present action" (2d December 1871), "and, in par- ular, during the summer and autumn of the year 1871, the defender Donald ingston so carried on the manufacture of farina or starch from potatoes at mill occupied by him on the lands of Derculich as to cause a nuisance to pursuer."

Now, it appears to me, my Lords, that it is almost impossible to dispute the ndness of that finding in point of fact. No doubt, this nuisance is not very at, and is very inferior in its effects and consequences to many others upon ich we have been called to decide. Still, it is indisputable that it is a isance both as regards smell and pollution of the water. No doubt it was se in the summer and autumn of 1871, and the defender has tried to main- n that it has been proved that there really was no nuisance until that time. lo not consider that the fair result of the evidence. If it existed, however, in 71, then the pursuer had the right to complain of it, and to raise this action. is a common thing for defenders in actions like this to say that the pursuer s made his complaint, and raised his action, either too late or too soon. But is pursuer, in my opinion, has hit upon the exact time when the nuisance was st; he did not cry out before he was hurt, but was prompt to take steps en the nuisance became too offensive. Therefore, I am of opinion that there a be no doubt as to the correctness of the Lord Ordinary's first finding. Then finds, in the second place, that the nuisance is occasioned by the smell and ise from the manufactory, and by the pollution of the Derculich Burn; and, the third place, that the Derculich Burn is not a stream dedicated to manu- turing purposes, &c., following up these findings in fact with a finding in int of law that the defenders are not entitled so to carry on their manufac- re as to cause the nuisance complained of by the pursuer. Now, these two st findings, numbers 3 and 4, are directed against both sets of defenders. The st two findings are findings against the defender Livingston alone, who is the rty who directly causes the nuisance. But the Lord Ordinary has found ainst the proprietors, the other defenders, that "the Derculich Burn is not a eam dedicated to manufacturing purposes, and that it has not for the prescrip- ve period been so polluted as to be unfit for the primary uses;" and that both

[1] Collins v. Hamilton, &c., April 19, 1837, 15 S. 895; Dun v. Hamilton, arch 11, 1837, 15 S. 870, H. L., 3 S. and M'L., 356; Rich v. Basterfield, 4 . R. 783, 16 L. J. C. P. 273.

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of the defenders are not entitled "so to carry on the manufacture of f starch . . . . as to cause a nuisance to the pursuer." As far as fender Livingston is concerned these latter findings raise no new issue; was already settled by the first findings. But the other defenders ma that these findings should not have been directed against them. Th that they are not parties to the making of the nuisance. They say that the mill to the tenant, but gave him no authority to carry on this work create a nuisance. That would have been a satisfactory and conclusiv ment in a different state of this record and proof if these defenders h forward and disclaimed Livingston's proceedings, and said they were that the water should be preserved clean and fit for primary uses. H been their attitude they were not obliged to appear, because the conclu expenses is only directed against those defenders who appear to oppose clusions of the action. They, however, chose to appear, and opposed t suer's conclusions, and that upon grounds which are negatived, and rightly negatived, by this interlocutor which is now before us. In thei to the second article of the condescendence they say—"For manufactur poses the present defenders and their predecessors and authors have, fr immemorial, or at least for forty years, had exclusive possession and co the said burn under their titles. The water of the burn has, during th been used by the present defenders and their foresaids in driving vario after-mentioned belonging to them." Then their second plea in law i lows:—"In virtue of their titles, and the possession which has followe on, the present defenders are entitled to use the water of the Derculich such quantities as they find necessary from time to time for manufacturi poses." If that plea is not maintained to defend Livingston's proceedi difficult to see why it is maintained at all. That becomes plain too upon at the proof, because there it appears that they endeavoured in thei examination of the pursuer's witnesses to prove that Livingston does reality create any nuisance at all. I think that the finding of the Lord C against these defenders is not only right, but absolutely necessary to p the contention that the water has become dedicated to manufacturing p and so is lost for its primary uses, and that therefore they are entitled what use of it they please without considering the pursuer's right to a use of the water. On these grounds I consider the Lord Ordinary's inte right, both in fact and law. The Lord Ordinary concludes with—"A the cause to be enrolled, that the defenders, or either of them, may state and how they are prepared to abate the said nuisance in time to come, o remit may be made for ascertaining how the said nuisance may be abate I understand, neither of the defenders availed themselves of this—they desire to state any mode in which they were prepared to abate the nuisa were they prepared to have an inquiry under a remit. In consequence silence the Lord Ordinary pronounced another interlocutor, which is als us, and under review. By this interlocutor he "remits to Mr James lecturer on chemistry, Edinburgh, to inspect and examine the farina c manufactory carried on by the defender Livingston at the mill of Dercul water courses and works therewith connected, and to report whether th and effluvia emitted from the said manufactory, and the pollution of th of Derculich occasioned by said manufactory, can be prevented or aba in what manner." This was undoubtedly intended by the Lord Ordina an interlocutor in favour of the defenders, and was meant to give t opportunity of devising, with the help of a chemist, means by which the carry on their operations in an inoffensive way. They, however, object interlocutor as strongly as to the other, and, in fact, have a quarrel v Lord Ordinary on every point.

If your Lordships agree with me that the Lord Ordinary's interlo correct, then effect must be given to the conclusions of the action. I unc the defenders to say that they wish a judgment, aye or no, upon the que nuisance. They say the mill must either go on as it does at present o *all.*

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But if they find that the Court agrees with the Lord Ordinary they may perhaps, even yet, if they desire it, get some such remit as was suggested and ordered by the Lord Ordinary.

LORD DEAS.—There are two questions here, one with the tenant, and the other with the landlord. As to the tenant, it is impossible not to sympathise to some extent with his position. But, looking at the proof, I cannot arrive at any other conclusion than that arrived at by your Lordship in the chair. The owners on each side of the stream are equally interested in the water, and any improper use made of it is, therefore, one to which the pursuer is quite entitled to object. I regret much that the tenant insists on a decision on the question of legal right, in place of consenting to a remit to ascertain how far the pursuer's objections may be obviated. This last is a course very commonly taken, and we should have been extremely willing to have adopted it here.

I agree with your Lordship that what took place in 1871 was of itself quite a sufficient ground for the judgment now to be pronounced. There is no doubt that there was a nuisance, and that that nuisance was much increased in 1871. It is not, however, very material what was the state of matters prior to 1871. The summons was brought in December of that year; and since a judgment on the legal point is insisted on we have no alternative but to find that there was a nuisance.

With regard to the position of the landlord, every case of this kind must be judged of by its own circumstances. It is true that in the third article of the lease Donald Livingston binds himself "not to erect any buildings or others at the farina works carried on by him, without the express permission of the proprietor in writing, and not to have anything about said premises or elsewhere that shall be a nuisance to the property or to the public." But the farina works had been erected by the tenant during the currency of a previous lease, and their existence is here recognised by the landlord, and was, of course, taken into view in fixing the rent. Then the last article of the lease bears,—"The tenant will be allowed to make such erections as he will find necessary (with consent of the proprietors as before mentioned) for carrying on a farina manufactory," and "to be allowed as at present the privilege of water from Derculich by shutting the sluice every night." If, therefore, the proprietor allows the erections to be put up, though without giving express permission, that, in a question with the adjoining proprietors, is much the same as if he directly sanctioned them. The right to the water is expressly given, and a power to make erections for a farina manufactory, although with a reserved right to the proprietor to regulate the extent of such erections, which he has not interfered to do.

Then we cannot overlook that in the record the landlord justifies and claims right for himself and his tenants to do all that has been done, and to use the water of the Derculich Burn for manufacturing purposes as he and they think proper. The answer to the second article of the pursuer's condescendence, and the 2d and 3d pleas in law for the landlord, assert these rights broadly, and his first plea in law goes even beyond what is pleaded by the tenant. On the whole I am afraid that there is no course open to us but that proposed by your Lordship, unless the tenant at the eleventh hour shall accept the proposal for a remit to ascertain whether the pursuer's objection cannot be obviated without discontinuing the works.

LORD ARDMILLAN.—There are some nuisances so serious—so intolerable—so plainly beyond the reach or hope of removal or diminution—that there is no doubt, and no alternative. The process which, in a situation not protected by prescription or dedication to manufacturing purposes, causes such a nuisance, must be put an end to. The law absolutely forbids it. But sometimes there occurs a case where, in the course of a manufacture not in itself unlawful, a nuisance has arisen, which, though sufficiently offensive to entitle a neighbour to complain, is not necessarily, and at all times, a nuisance, but to which mitigation or alleviation may be given by the skill and exertions of the manufacturer; and there may well be conceived a case where the ends of justice and the reason-

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able rights and interests of the complainers would be sufficiently protected b such mitigation reducing the nuisance to a point where the interposition of la is not appropriate.

It is not every slight pollution of a stream, nor every disagreeable odour, th is to be dealt with as a nuisance, and put down by authority of law. Th expression "abatement of nuisance" does not necessarily mean the entire a absolute removal of all pollution of stream, and all disagreeable odour, but su diminution of pollution and of smell as to render it such as ought fairly a reasonably to be submitted to.

I agree with the Lord Ordinary in the view which he takes of the eviden I think that a nuisance to a considerable extent has been proved to be cau by the farina manufactory,—both as regards the pollution of the stream and regards the offensive smell. I think it clear that the stream has not be dedicated to manufacturing purposes, and that there has been no prescripti I do not refer to the detail of the evidence. I have read it all carefully, an have come to the conclusion that both the pollution of the stream and the off siveness of smell has been sufficiently proved to an extent amounting nuisance.

There is no prescription to protect against complaint, and neighbourly acq escence in an increasing annoyance seems to have reached its limits in 187 when it became (as some of the witnesses say) intolerable.

Many of the remarks made by the defenders' counsel would have great weig if accompanied by a *bona fide* effort to mitigate the nuisance; and any consid able mitigation obtained by earnest endeavour in a friendly spirit, though invol ing some expense, could not fail to produce a good impression, and, it may be, favourable result. I do not think that this is such a case of nuisance as wou necessarily have required the interposition of law at once to put down the farm manufactory, if reasonable mitigation thereof had been proposed. It is by n means a very serious or aggravated case of nuisance. It is not constant, it only occasionally that it reaches the mansion-house, and it is in certain perio and states of whether so slight as to be within the reach of reasonable forbe ance.

It has occurred to me, and I suggested it during the discussion, that a stren ous effort under skilful advice ought to be made to remove the nuisance if p sible, or so far to mitigate and alleviate it, both as regards the burn and t smell, as to leave no ground for reasonable complaints.

The defenders, however, have hitherto declined to act on this suggestion.

We are therefore under the necessity of dealing with the case as it stands the proof.

I am of opinion that a nuisance has been proved of which the pursuer is e titled to complain, and in respect of which the pursuer is entitled to demand abatement, and accordingly I concur in the Lord Ordinary's judgment, and the remarks which have been made by your Lordship.

On the separate pleas maintained by the landlord I am further of opin that, looking to the terms of the lease to the defender Livingston, and to t pleas maintained, and the course of examination pursued, by the landlord, must remain as a defender, and be dealt with as a defender, and that the L Ordinary has rightly dealt with him in this interlocutor.

I give no opinion as to a trifling diversion of the burn for ordinary purpo But in judging of the plea for the landlord we must bear in mind that t water of the burn was diverted for the special purpose of working the far mill which caused the nuisance.

If the other defender, the tenant, is correct in alleging that the nuisance unavoidable—inseparable from the working of the mill—incapable of mitigat or diminution—then the landlord who granted the lease, and authorised t working of a mill necessarily creating a nuisance, and who supplied the b water for the purpose of that working, cannot escape from responsibility.

THE following interlocutor was pronounced:—"Having heard cou sel on the reclaiming note for the defender Donald Livingst

against Lord Gifford's interlocutor of 16th May 1872, and as bringing under review also the previous interlocutor of 19th March 1872, adhere to both interlocutors, and refuse the said reclaiming note: Find the pursuer entitled to expenses since the date of the interlocutor of 19th March 1872; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report, and remit the cause to the Lord Ordinary to proceed, with power to his Lordship to decern for the amount of said expenses when ascertained."

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ADAM, KIRK, & ROBERTSON, W.S.—MITCHELL & BAXTER, W.S.—SKENE & PEACOCK, W.S.—Agents.

OHN WALKER AND OTHERS, Complainers.—*Sol.-Gen. Clark—Watson.*
T RIGHT HON. WILLIAM LAW, LORD PROVOST OF EDINBURGH, AND OTHERS, Respondents.—*Lord-Adv. Young—Fraser—M'Laren.*

No. 33.
Dec. 7, 1872.
Walker v. Law.

2D DIVISION.
Lord Jerviswoode.

Usage—Corporation—Membership—Copartnery—Mandate—Joint Contributors.—The charter of the Edinburgh Royal Infirmary, granted in 1736, rporated into a body politic all and every the contributors who had or ht thereafter contribute to the funds of the institution, and constituted a general court of contributors "all and every the members of the said oration or body politic who shall have contributed £5 sterling each, more." The Edinburgh Royal Infirmary Act, 1870, provided that y person who was prior to the Act a member should continue to be and that in future every person who contributed not less than £5 in sum, or the continuous annual sum of £1 after such annual contribu- had been made during three consecutive years, should be a member he corporation and of the general court. Six managers were annually en by the general court from among the contributors.

n a suspension and interdict brought to try the validity of an election ertain persons as managers, *held*, in respect of the terms of the charter Act of Parliament and the usage which had followed thereon, (1) firms contributing the necessary amount were entitled to be repre- ed at the meeting of the general court by one, but only one, of their ners, and that no written mandate from the firm was required by such ner; and (2) that votes which were given in respect of joint contribu- s were valid in cases in which the amount of the contributions when ded by the number of contributors would have been sufficient to have lified each such contributor, but in no other case.[1]

R.

WEBSTER & WILL, S.S.C.—MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

Anderson v. Magistrates of Wick, 1749, M. 1842; Magistrates of Dunbar e Heritors, April 10, 1835, 1 S. and M. 134 (Lord Brougham, p. 195); ot's Hospital v. Macdonald, April 7, 1830, 4 W. and S. 98 (Lord Wynford's ion); Rex v. Mashiter, January 13, 1837, 6 Ad. and El. 153; Rex v. ie, January 30, 1837, 6 Ad. and El. 374; Kirk-Session of Largs, June 9, , F.C.

No. 34.

Dec. 7, 1872.
Dunbar and Others v. Dunbar.

ELLEN CATHERINE NUGENT DUNBAR AND OTHERS, Pursuers.—*Sol.-Gen. Clark—Crichton.*
ROBERT LENNOX NUGENT DUNBAR AND HIS TUTORS, Defenders.—*Marshall—Blair.*

Entail—Aberdeen Act (5 *Geo. IV. c.* 87)—*Provisions to Younger Children—Deductions from Free Rent.—Held* (*diss.* Lord Neaves, *rev.* judgment of Lord Ormidale) that in estimating the free rental on which provisions to younger children are to be fixed, under the Act 5 Geo. IV. c. 87, there falls to be deducted the interest of the provisions to which the younger children of a former proprietor may be entitled.

2D DIVISION. Ld. Ormidale. R.

THE deceased Robert Nugent Dunbar, heir of entail of the lands of Machermore, by contract of marriage bound himself and the succeeding heirs of entail to pay certain provisions to his younger children at his death. At the date of his death £1147, 16s. of provisions to the younger children of a former proprietor remained unpaid. By the Aberdeen Act (5 Geo. IV. c. 87), sec. 1, it is enacted—"That it shall and may be lawful to every heir of entail in possession of an entailed estate under any entail already made or hereafter to be made in that part of Great Britain called Scotland, under the limitations and conditions aftermentioned, to provide and infeft his wife in a liferent provision out of his entailed lands and estates by way of annuity," the said annuity not to exceed "one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, liferent provisions, the yearly interest of debts and provisions, including the interest of provisions to children hereinafter specified, and the yearly amount of other burdens, of what nature soever, affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the granter." Sec. 4,—"That it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid to grant bond of provision or obligations binding the succeeding heirs of entail in payment, out of the rents or proceeds of the same, to the lawful child or lawful children of the person granting such bonds or obligations who shall not succeed to such entailed estate, such sum or sums of money, bearing interest from the granter's death as to him or her shall seem fit; provided always that the amount of such provision shall in no case exceed the proportions following of the free yearly rent or free yearly value of the whole of said entailed lands and estates, after deducting the public burdens, liferent provisions including those to wives or husbands, authorised to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens of what nature soever, affecting or burthening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid to the heir of entail in possession—(that is to say)," for one child, one year's free rent; for two children, two years' free rent; for three or more children, three years' free rent. And sec. 6,—"Provided always, and be it enacted and declared, that where the powers hereinbefore contained of granting provisions to a child or children shall have been exercised by one or more heir or heirs in possession of any such entailed lands and estates as aforesaid, to the full extent of three years' free rent or value of the entailed estate as aforesaid, it shall not be in the power of any heir in possession of the same lands and estates to grant further provisions to his or her child or child

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ome part of the provisions granted to the extent of three years' or value as aforesaid shall have been paid or extinguished, but payment or extinction thereof, or any part thereof, it shall e power of such heir in possession to grant provisions to his ild or children to the extent of the provisions so paid or extin- as aforesaid, the heir in possession of any such entailed lands and s aforesaid being always hereby empowered to grant provisions her child or children to such extent of the power of granting as to a child or children hereinbefore contained as may be open ercised for the time, so that the provisions to be granted do not ase exceed the proportions aforesaid of one year's free rent or one child, of two years' free rent or value for two children, and years' free rent or value for three or more children."

unbar's younger children brought this action for their provisions is heir.

pleaded;—(1) Under the provisions of the foresaid contract of the pursuers are entitled to two years' rent of the entailed lands tes of Machermore and others as at the death of the said Robert Dunbar, with interest.

efenders pleaded;—(2) Under and in terms of the said Act the to the widow and the interest of provisions to the younger children r heir of entail form proper deductions from the rental in calculat- pursuers' provisions. (3) In terms of the said Act no more than rs' free rents of the said entailed estate can be charged at one id the provision to the pursuers will fall to be restricted to a sum long with the foresaid prior provision to Misses Antoinetta and e Nugent Dunbar, of £1147, 16s., will not exceed three years' free he said estate.

arties were agreed that the annual rental of the estate, for the of this action, was £1261, 19s. 8d., subject to the deduction of— 11s. 6d. as public burdens; and (2) £200 as the annuity to the f the late Robert Nugent Dunbar; and it was contended by the s that in estimating the free annual rental a further deduction of . 5d. should be made as the annual interest at 4 per cent on the nce of £1141, 16s. The pursuers opposed this last deduction.

ord Ordinary (Ormidale) pronounced this interlocutor:—"Finds as stated by the counsel for both parties that they concurred in the Court to proceed on the footing of their being agreed that disputed question between them relates to the manner in which nce of a provision which had been made in favour of his children randfather of the defender, amounting, said balance, to £1141, 16s. e dealt with in ascertaining the amount at which the pursuers' s ought now to be fixed: Finds, as regards this disputed ques- t the said balance of £1141, 16s. falls to be deducted from three e rents of the estate belonging to the defender: Finds that the ere agreed that the annual rental of the estate in question, for oses of this action, is £1261, 19s. 8d., as per the state No. 9 of subject to the deduction of—(1) £79, 11s. 6d. as public burdens; £200 as the annuity to the widow of the late Robert Nugent ; and that it was contended by the defenders that in estimating annual rental a further deduction of £45, 13s. 5d. should be the annual interest at 4 per cent on the said balance of £1141, ds that the defenders are not entitled to the deduction of the said 45, 13s. 5d., and that the free annual rental of the estate for the of this action is to be taken as amounting to £982, 8s. 2d.: Finds circumstances that the sum for which the pursuers are entitled to

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decree is £1805, 8s. 6d., for which decerns in favour of the pursue against the defenders, with interest thereof at the rate of 5 per cent p annum from the 25th of July 1866 till payment: Finds the pursuers e titled to expenses," &c.*

The defenders reclaimed. They argued;—The heir was entitled to deduction of the interest of the provisions to the younger children of t former heir in so far as unpaid. It was the interest of a debt which t statute said was to be deducted.[1]

The pursuers argued;—The 4th section of the Aberdeen Act could on mean the interest of the provisions to the widows of former proprieto It could not mean the interest of the provisions to the younger childr also. If so there would be a double deduction—first, of the capital of the provisions, and second, of the interest. The intention of the statute w that an heir might be burdened to the extent of three years' free rent, but no further extent. But if the pursuers' contention was upheld, a succee ing heir could never be burdened with three years' free rent as long as a part of the provisions to the younger children of a prior heir remained u paid, as he would be entitled to a deduction not only of the amount

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* "NOTE.—The only question as to which the parties were not agreed in t case was whether, in ascertaining the sum to which the pursuers are entitl not only the £1141, 16s., being the amount remaining undischarged of a pro sion made by the grandfather of the defender, a former proprietor of the estate, his children, must be deducted from the three years' free rental of the estate, l also, as contended for by the defender, whether the interest of that sum should be deducted in estimating the free annual rental. The Lord Ordinary does think that this contention of the defender's is well founded. He is entitled, terms of the act 5 Geo. IV. cap. 5, to have the sum of £1141, 16s., the bala remaining unpaid of the former provision, deducted; but the Lord Ordinary c not see, either in the statute itself or on principle, any reason for holding t interest of that sum should also be deducted. The principal itself being o deducted, there cannot, so far as he can discover, be any room for allowing a duction in respect of interest, which indeed must be held to have been dispo of as an accessary along with the principal itself.

"The Lord Ordinary was referred, in the course of the debate, to the case Brodie v. Brodie, &c., 6th Dec. 1867, 6 Macph. 92, but the decision in that c proceeded on a specialty which does not occur here. It rather appears to t Lord Ordinary that the decision in the case of Brodie would have been in c formity with his views as now expressed, had it not been for the specia referred to.

"It has only further to be mentioned that the sums in the interlocutor n pronounced were adjusted and fixed on by the parties themselves.

"The Lord Ordinary has been unable to see any ground for refusing to t pursuers their expenses. The correspondence produced, which took place bef the action was raised, shews that the pursuers ineffectually endeavoured obtain from the defenders a rental of the estate in question, in order that th might know and settle upon what their just claim was. That rental (No. 9 process), however, was not forthcoming till produced with the defences, and t pursuers having been perfectly satisfied with it, there need have been no furth litigation; but the defenders then contended that they were entitled to a dedu tion not only of the capital sum of a former provision, but also of interest there In this contention, however, which they maintained to the last, the defenders ha been unsuccessful. If being therefore clear that the whole expense of the litig tion has been caused by the defenders, it is only right they should be subject in payment of them."

[1] Lockhart v. Lockhart, July 15, 1853, 15 D. 914; Bonar v. Anstruther, Ju 6, 1868, *ante*, vol. vi. 910; Duff on Entails, p. 79; Cochrane v. Cochrane, No 25, 1846, 9 D. 173; Brodie v. Brodie, Dec. 6, 1867, *ante*, vol. vi. 92.

visions, but of the interest of them also. He would therefore
ain of the interest.
ising,—

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JUSTICE-CLERK.—The case, or the point which has been argued to us,
very meagrely stated on the record, but there is no dispute about the
hich it depends. The controversy relates to the amount of a bond of
granted by the last heir of entail under the Aberdeen Act, and depends
stion, whether, in estimating the three years' free rent in terms of the 4th
the Aberdeen Act, the interest of provisions granted under that sec-
e statute by a prior heir, not yet extinguished, are to be deducted.
o other question.
rd Ordinary has found that such interest is not to be deducted, but on
f the authorities, and on the words of the statute, I am unable to
hat conclusion. It seems to me opposed to the words of the Act,
e words of the Act were doubtful, to the whole current of authority
ice.
e or canon for ascertaining the capital sum to which the statutory
r whomsoever exercised, can apply, is contained in the 4th section of the
Act, and in that section only. The question, how much of that capital
an or available for provisions to the heir in possession for the time
r the 6th section,—and the mode of recovering the rights of the heir
a debtor in the provision, and the remedies open to the creditors, are
by subsequent clauses. But no other clause in the statute deals with
the rule under which the free rent of the estate is to be ascertained.
r concern the principal or capital sum, which consists, in whole or in
ree times one year's rent, the amount of which can only be arrived at
ng the rules laid down in the 4th section.
e so laid down is the following:—"That it shall and may be lawful to
entail in possession of any such entailed estate as aforesaid to grant bond
n or obligations binding the succeeding heirs of entail in payment,
rents or proceeds of the same, to the lawful child or lawful children of
n granting such bonds or obligations who shall not succeed to such
state, of such sum or sums of money, bearing interest from the granter's
to him or her shall seem fit; provided always that the amount of such
shall in no case exceed" the proportions therein mentioned "of the
y rent or free yearly value of the whole of said entailed lands and
ter deducting the public burdens, liferent provisions, including those to
husbands, authorised to be granted by this Act, the yearly interest of
provisions, and the yearly amount of other burdens, of what nature
ecting or burthening the said lands and estates, or the yearly rents or
hereof, and diminishing the clear yearly rent or yearly value thereof
id to the heir of entail in possession." Does the word "provisions"
rovisions granted under this clause? This is an important question, if
eal doubt about it. There must at this moment be many rights burden-
ed estates, the amount and effect of which must have been regulated
nstruction of the Act, whatever that may be, and the rights under them
to be limited or enlarged according to the construction we may adopt.
words of the 4th section there can be no doubt that the expression is
to include, and *prima facie* does include, provisions under the clause.
that there are no explanatory words to this effect adjected to this clause
s in the first section in providing for the mode of ascertaining the free
he widow's annuity, nor such as occur in the very line before, in this
se. But this raises no inference sufficient to limit this general expres-
the matter is put beyond all doubt by the test which is afforded by the
of the sentence "other burdens," &c. The only question remaining
er this provision does or does not burden the estate or the rents.
not burden the estate, but it certainly does burden the rents and pro-
he estate. The 8th section of the statute makes this certain, for it pro-
t while the provisions granted by the Act shall not affect the fee, they

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shall affect the rents. The 9th section is also material. It provides that aft a year has elapsed from the death of the granter the creditor in the bond ma call up the amount, and the heir on payment may take an assignation, and kee up the debt. It also provides that the creditors may use all diligence again the rents, but may not adjudge the estate. The 10th section gives the heir privilege by which, on assigning one third of the rents, he frees himself fro diligence during his life, although of course the unpaid balance will remain o his death. Finally, under the 12th section, it is provided that in no case c the heir in possession be deprived of more than one-third of the free rent of t estate, and he is authorised to apply to the Court to restrict the burd accordingly.

Under these provisions of the statute there cannot, I think, be any dou that these bonds affect the rents, and therefore that the interest of them must deducted in estimating the amount of the year's rent three times, which the limit of the burden; and this I believe to have been the uniform understan ing of the profession, as I gather from our institutional writers. Mr Duff in h work on entails states that the interest of provisions to wives and children mu be deducted. Mr M. Bell in his lectures states it still more clearly. He say that the free rent is to be ascertained in the same way as that directed in th first clause as regards the widow's annuity. Now, it is a matter of express decisio in the case of Boyd, 13 D. 1302, that the interest on provisions granted unde the 4th section must be deducted in ascertaining the free rent in order to fix th amount of the widow's annuity. Mr Ross also states the law in the same way.

What thus seems to have been the practice is so far borne out by decisio that I have not found that it ever was questioned judicially. It was argued t us that the word "provision" did not even include provisions granted under th powers of the entail. But Lord Curriehill's opinion in the case of Lockhart, 15 D 914, is conclusive on this point,—and he lays down the contrary as the undoubte construction of the statute. On the question whether provisions under th 4th section do or do not affect the rents I think the case of Cochrane, 9 D. 173 sets that matter at rest. That case related to a provision which burdene neither the estate nor the rents, but had been found in the House of Lords t be a personal burden on the successive heirs of entail. The question whic arose in this case was whether the interest of this provision ought to be deducte in fixing the amount of free rent under a bond granted in virtue of the 4th sec tion of the Aberdeen Act. It was found that it should not; because, unlike pro visions under the Aberdeen Act, it was purely a personal debt, and did no affect the rents, and that the debt could not be kept up against the rents by th heir on payment as can be done under the Aberdeen Act. The opinions of Lor Justice-Clerk Hope, Lord Moncreiff, and Lord Cockburn clearly establish tha a provision under the Aberdeen Act does affect the rents, not merely becaus it is a personal debt of the heir of entail, but because *vi statuti* it is a burde on the rents into whose hands soever they may come, and therefore can be kep up against the succeeding heirs.

The Lord Ordinary seems to have thought that the provisions of the 6th sec tion might lead to an opposite conclusion; and that somehow the result of de ducting the interest in question would give rise to a double deduction of it. I think this is a mistake. The 6th section does not relate to the mode of ascer taining the free rent. It has no connection with that subject. It relates ex clusively to the capital sum after it has been ascertained under the 4th section and only applies in the special case of the bond of provision, along with sums al ready laid upon the estate under the 4th section of the Act, exceeding that sum It provides that no greater burden than the three years' free rent shall burde the rents or the heir in possession; and that therefore the last bond must be limited to the sum which will complete that amount until part of the prior bur den is paid off or extinguished. It has no other object or effect. It never comes into operation at all unless the margin has been exceeded, and when it has it only postpones the excess as a charge on the rents until they are relieved of the prior and existing burden. In cases in which it applies it cannot receive effect until the capital sum of free rent has been previously ascertained.

LORD COWAN and LORD BENHOLME concurred. No. 34.

LORD NEAVES.—I am sorry to have to express a difference of opinion in this case. The question is as to the construction of the 4th and 6th clauses of the Aberdeen Act. The view which I take is this: Suppose an estate has an invariable gross rental, it is in the power of the first heir to burden it to the extent of three years' free rents. If there are no provisions to wives or children there is no doubt how the matter would stand. You would deduct the public burdens and the yearly interest of real burdens, and you would then have the net rental. Having so found the net rental the successive heirs in possession for the time have power to keep the estate burdened to the extent of three years of that rental, and it seems to me to make no difference that the provisions have been granted by one heir after another so long as the three years' rent is not exceeded. Suppose the net rental of an estate to be £10,000 a-year, if the successive heirs in possession have never burdened it beyond £30,000 there is no ground of complaint. Then, let us look at the 6th clause; the first portion is negative,—"Where the powers hereinbefore contained of granting provisions to a child or children shall have been exercised by one or more heir or heirs in possession of any such entailed lands and estates as aforesaid to the full extent of three years' free rent or value of the entailed estate as aforesaid it shall not be in the power of any heir in possession of the same lands and estates to grant further provisions to his or her child or children till some part of the provisions granted, to the extent of three years' rent or value as aforesaid, shall have been paid or extinguished;" but "upon the payment or extinction thereof, or any part thereof, it shall be in the power of such heir in possession to grant provisions to his or her child or children to the extent of the provisions so paid or extinguished as aforesaid." Suppose the first heir lays on the whole £30,000; nothing more can be done. But if when another heir comes into possession £10,000 has been paid off, he is by the express words of this 6th clause empowered to grant provisions to his children to the extent paid off. He can put on the same amount as has been paid off, leaving a succeeding heir in no worse situation than if the original burden had not been partially extinguished. I cannot conceive that if an heir pays off £10,000 he cannot put on £10,000, but must submit to a new calculation, deducting £1000 annually for the interest of the £20,000 still remaining. Each succeeding heir seems to me to have the power to supplement the partial exercise of the right by the prior heirs so as to bring up the full amount which the first heir could have laid on had he pleased. The first heir puts on £20,000 when he could have put on £30,000. He leaves £10,000 to the second heir to fill up. I cannot see that in fairness it makes any difference to the succeeding heir whether the full amount of the burden has been laid on by one heir or by ten.

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No doubt we are not to construe the 6th section alone. We must also take into view the 4th section. But I cannot believe that because £10,000 of the original £30,000 has been paid off there is to be a deduction of £1000 a-year as interest on the remaining £20,000, so that the succeeding heir would escape for £3000 less than if the original burden had not been partially extinguished. The 4th section is peculiar. It is not at all like the 3d clause as to widows' provisions; and it seems to me the true meaning is, if no provisions to children have been granted, when starting them, the "interest of debts and provisions" on the estate falls to be deducted, but when these burdens are once begun the 6th clause regulates subsequent exercise of the power.

There is no decided case to the effect that the interest of provisions to children 'burden" the rents. There are no doubt vague expressions in the books and apparent indications of opinion in the case of Cochrane, but it is not at all clear that the interest of a child's provision under the statute can be said to burden or affect the rents in itself. No doubt diligence may be used for it as it may be for any other debt, but in no other way can the interest be said to affect the rents than that the heir is due the money; and his rents, whether of the entailed estate or of any other estate belonging to him, may be attached in payment. The rents are not intercepted from the heir; he is entitled to them, but they

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may be taken in payment. I do not see anything in the 4th clause which supersedes the view involved in my opinion as to what seems the most equitable provision of the 6th. The estate can only be burdened to the extent of three years' free rents, but it makes no difference by how many or how few heirs the burdens are imposed.

THIS interlocutor was pronounced:—"Recall the interlocutor in so far as it finds that in estimating the free annual rental the sum of £45, 13s. 5d., being a year's interest on the sum of £1141, 16s., which is the balance of the prior bond affecting the entailed estate, should not be deducted from the free rental: Find that the said sum must be deducted: Find that the pursuers are entitled to decree in this process for the sum of £1168, 8s. 2d.: Find the pursuers liable in expenses since the date of closing the record, and remit," &c,

CRAWFORD & GUTHRIE, S.S.C.—HUNTER, BLAIR, & COWAN, W.S.—Agents.

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Mitchell's Trustees v. Waddell, &c.

ALEXANDER SMAIL AND OTHERS (Mitchell's Trustees), Pursuers.
MRS JANET WADDELL OR ROBERTSON, Claimant.—*Millar—J. G. Smith.*
THOMAS WADDELL, Claimant.—*Millar—J. G. Smith.*
MRS AGNES WADDELL OR WHITE AND HUSBAND, Claimants.—*Sol-Gen. Clark—Orr Paterson.*
GEORGE ARCHIBALD, Claimant.—*Watson—Millie.*

Succession—Testament—Universitas—Heir.—A truster left his property "to my own nearest heirs and assignees whomsoever in and through my mother, hereby excluding the relations by my father, and all others except through my said mother." *Held* (1) (*diss.* Lord Cowan) that the estate was not intended to pass as a universitas to his mother's next of kin, but that his mother's heir-at-law succeeded to the heritage and her heirs in moveables to the moveables; and (2) that although part of the property was conquest in the truster the mother's heir of line, not her heir of conquest, succeeded.

2D DIVISION.
Ld. Ormidale.
R.

THE late Thomas Mitchell, Haddington, left three heritable properties, (1) a property lying in the town of Gilmerton, to which he had succeeded as nearest lawful heir of line and of conquest to Alexander Mitchell, his only brother; (2) a property situated on the north side of the Crossgate or High Street of Haddington, purchased by the testator and paid for by him with his own funds; (3) a property in Market Street, Haddington, purchased and paid for by the said Alexander Mitchell, but conveyed direct by the sellers to the testator, the same not having been disponed to Alexander Mitchell in his lifetime. He also left moveable property. By his trust-deed he left his heritable property to his son Thomas Mitchell, subject to a liferent of the property in Crossgate of Haddington, and in Gilmerton, to his widow, Mrs Wilhelmina Banks or Mitchell, during her widowhood. He farther left her a liferent of his household furniture. The remainder of his moveable property he directed to be conveyed one half to his son Thomas Mitchell, and the other half to his widow. By the sixth purpose of his deed he declared—"In case the said Thomas Mitchell should predecease me without leaving lawful issue, my trustees shall pay and apply the estate and effects before directed to be conveyed to the said Thomas Mitchell to David Mitchell, my father, and in case of his being then dead, to my own nearest heirs and assignees whomsoever in and through the late Helen Waddell, my mother, hereby excluding the relations by my father, and all others, except through my said mother, in the same way as if the said Thomas Mitchell had been alive." The deed authorised the trustees to sell the heritage.

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Thomas Mitchell and David Mitchell both predeceased the testator, whose trustees brought this action of multiplepoinding for the distribution of his estate.

Competing claims were lodged for (1) Thomas Waddell, the immediate elder and only surviving brother of the testator's mother; (2) Mrs Janet Waddell or Robertson, the only surviving sister of the testator's mother; (3) Mrs Agnes Waddell or White, the heir-at-law of the testator's mother, being the only child of the deceased David Waddell, her younger brother; and (4) George Archibald, who was the son of one of the three sisters of the testator's father, who were his heirs both in heritage and moveables.

Thomas Waddell claimed to be ranked and preferred equally with the said Mrs Janet Waddell or Robertson to the whole estate, heritable and moveable, left by the testator, subject to the rights of the widow; or otherwise, to the whole of the heritable portion of the estate which was conquest in the person of the testator, subject to the rights, if any, of the widow. He pleaded;—(1) On a sound construction of the deed in question the whole estate of the testator, heritable and moveable, subject to the provisions in favour of the widow, were appointed, in the event which occurred, to be paid to the testator's nearest relatives on the mother's side, and therefore fell to the claimant and Mrs Janet Waddell or Robertson as the surviving members of the family at the testator's death. (2) Or otherwise, the claimant being heir of conquest of the testator's mother, is entitled to the property which was conquest in the person of the deceased.

Mrs Janet Waddell or Robertson claimed to be ranked and preferred, equally with the said Thomas Waddell, to the whole estate, heritable and moveable, left by the testator, subject to the rights of the widow; or otherwise, to be ranked and preferred to the one-half of the moveable estate not conveyed to the widow. She pleaded;—(1) On a sound construction of the deed in question the persons standing in the relation of nearest of kin to the testator on the mother's side at the time of his death became entitled, subject to the rights of the widow, to the whole estate of the deceased, heritable and moveable, as *personæ designatæ*, notwithstanding the character of the property bequeathed, which accordingly falls to be divided between the claimant and her brother Thomas Waddell. (2) *Separatim*, or otherwise, the claimant, as heir *in mobilibus*, is entitled to the personal estate, in so far as the same is not conveyed to the widow.

Mrs Agnes Waddell or White claimed (1) the heritable subjects in Tolbooth Street or Market Street of Haddington, with the rents and proceeds thereof since the truster's death. (2) The fee of the heritable subjects in Crossgate or High Street of Haddington, and at Gilmerton, under the burden of the liferent of the truster's widow during her viduity. (3) Any other heritable estate of which the truster died possessed. (4) One-half of the moveable estate, including any interest accumulated thereon since the truster's death. (5) The household furniture, plenishing, and effects in the truster's dwelling-house, under burden of the widow's liferent during her viduity. She pleaded;—Being the truster's nearest heir in and through his mother she is, in virtue of the said settlement, entitled to be ranked and preferred in terms of her claim.

George Archibald claimed as representing his mother, one of the heirs-at-law and next of kin of the testator. He pleaded;—(1) According to a sound construction of the sixth purpose of the said deed the whole heritable estate of the testator was disponed and conveyed in favour of his nearest heirs and assignees whomsoever. (2) Otherwise the said 6th purpose of the codicil is with respect to the heritable estate of the testator incapable of interpretation, contradictory in its terms, and void of meaning, and falls to be held *pro non scripto*. (7) According to a sound construction of

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the sixth purpose of said deed the half of the free residue of the t moveable estate and the whole of his household furniture was con his next of kin and nearest heirs *in mobilibus*. (8) Otherwise the s purpose is contradictory in terms, and falls to be held *pro non scr*

The Lord Ordinary (Ormidale) pronounced this interlocutor:- that the sixth trust purpose of the additional settlement of the Thomas Mitchell, of 22d June 1859, is not void from uncertainty; cording to the true construction of the said sixth trust pur claimant Mrs Agnes Waddell or White is entitled to the testato able subjects situated in Tolbooth Street or Market Street of I ton, and in the Crossgate or High Street of Haddington, and at Gi but subject, in so far as regards the said subjects situated in th gate or High Street of Haddington, and the subjects in Gilmerto liferent thereof conferred by the said additional settlement u Wilhelmina Banks or Mitchell, widow of the said Thomas Mitc under the conditions attached to the said liferent by the said a settlement; and that the claimants Thomas Waddell and Mrs Jar dell or Robertson are entitled to one-half of the free moveable e effects of the said Thomas Mitchell, and to the household furnitu ishing, and effects in the dwelling-house of the testator, subject s the liferent of the said furniture, plenishing, and effects conferred said Mrs Wilhelmina Banks or Mitchell, but with and under the c attached to the said liferent by the said additional settlement: R prefers the said several claimants upon the fund *in medio* accord

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* "NOTE.—The Lord Ordinary is of opinion that the sixth trust purp additional settlement of the testator is not void from uncertainty, as m by the claimant George Archibald, and that there are no grounds on v testator's heirs-at-law can succeed. By that additional settlement th are directed to convey the testator's heritable subjects in Haddingtor merton to his son, Thomas Mitchell, on his attaining twenty-one years o under burden of the liferent over part thereof conferred upon his wid household furniture and plenishing is to be liferented by the widow, a death is to fall and belong to the said Thomas Mitchell; and one-h moveables is to be paid and applied to the widow, and the other half t Thomas Mitchell on his attaining majority. It is by the trust purpo additional settlement provided, that if the testator's son, Thomas Mitche predecease him without issue, an event which happened, the trustees sl and apply the estate and effects therein directed to be conveyed to hi testator's father David Mitchell; and in case of his being then dead, v happened, 'to my own nearest heirs and assignees whomsoever in an the late Helen Waddell, my mother, hereby excluding the relations by r and all others, except through my said mother, in the same way as if Thomas Mitchell had been alive.' There is here not only an express of his relations by his father, but there is a direction to the trustees t apply his estate and effects to certain parties, in regard to whom there thought, be no doubt. The expression, 'my own nearest heirs and whomsoever in and through the late Helen Waddell, my mother,' is rate. But the intention of the testator, in regard to the persons who tended by that sixth trust purpose to favour, appears to the Lord Ordi clear. And he considers that these persons are the nearest heirs whon his mother.

"This being the case, and the succession being partly moveable and pa able, the moveable estate falls to the next of kin of the testator's mothe heritable estate to the heir of line of his mother as her heir whomsoever. one of the heritable subjects was conquest in the person of the dec heir of conquest of the mother is not, it is thought, entitled to take u a destination. The mother had no right to the subjects, and her hei

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Mrs Robertson reclaimed.

She argued;—There was no such term known in our law as an heir through a mother, and the testator meant his relations through his mother.[1]

Thomas Waddell so far adopted Mrs Robertson's argument, and further argued that if it was unsuccessful he was, as heir in conquest to the testator's mother, at least entitled to the heritable property, which was conquest in the testator.

Mrs White argued;—It was true that there was no such term in law as heir through a mother, but the persons whom the testator had in view were those who would have succeeded to the properties had they belonged to the testator's mother. The claimant was therefore entitled to the heritage as her heir-at-law. The claimant took as heir-at-law not of the testator but of his mother, therefore there was no distinction between the heritage and the conquest[2] and she was entitled to the whole.

George Archibald argued;—If the property, both heritable and moveable, was left to the testator's heirs and assignees, the sixth purpose had no meaning, and the testator died intestate.[3]

At advising,—

LORD BENHOLME.—The question for decision arises in an action of multiplepoinding and exoneration brought by the trustees of the deceased Thomas Mitchell. They have summoned various competitors, whose pleas appear to rest exclusively on the sixth purpose of the trust. I will not therefore trouble your Lordships by reading more than that sixth purpose, which is as follows:—"In case the said Thomas Mitchell should predecease me without leaving lawful issue, my trustees shall pay and apply the estate and effects before directed to be conveyed to the said Thomas Mitchell to David Mitchell, my father, and in case of his being then dead, to my own nearest heirs and assignees whomsoever, in and through the late Helen Waddell, my mother, hereby excluding the relations by my father and all others, except through my said mother, in the same way as if the said Thomas Mitchell had been alive." Thomas Mitchell predeceased the truster, and the truster's father, David Mitchell, did the same, so the succession falls "to my own nearest heirs and assignees whomsoever in and through the late Helen Waddell, my mother." It is obvious that this clause, scientifically considered, is meaningless, because a man can have no heirs through his mother. At the same time I cannot give effect to the heir at law's contention that there is here so much uncertainty as to create intestacy. I say no more as to his contention than that all relations through the father are expressly excluded.

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quest could not therefore have any right. The heritable estate must be given according to the direction of the testator, and that direction being to the testator's nearest heirs whomsoever in and through the mother, must be held, the Lord Ordinary conceives, as designating her heir of line as the party entitled to the heritage—(Boyd, 28th June 1774, Dict., 3070; Miller, 9 Shaw, 295, and 7 W. & S., 1; Robison, 21 D., 905). The claimant Mrs Agnes Waddell or White has therefore been preferred to the fund *in medio*, in so far as it consists of heritage, as the heir of line of the testator's mother.

[1] Boyd v. Boyd, 1774, M. 3070; Angus v. Angus, Dec. 6, 1825, 4 S. 279; Miller v. Miller, Jan. 19, 1831, 9 S. 295, *aff.* August 27, 1833, 7 W. and S. 1; Hunter v. Nisbet, Nov. 14, 1839, 2 D. 16, Lord Moncreiff's note, p. 18; Carnegy v. Scott, July 17, 1852, 14 D. 1057, *aff.* May 10, 1855, 2 Macq. 281; M'Cormack v. Barber, Jan. 25, 1861, 23 D. 399; Nimmo v. Murray's Trustees, June 3, 1864, *ante*, vol. ii. 1144; Cockburn's Trustees v. Dundas, June 10, 1864, *ante*, vol. ii. 1185; Bell's Lectures on Conveyancing, ii. 992; M'Laren on Wills, i. 709.

[2] Boyd, *supra*; Miller, *supra*; Robison v. Robison, June 3, 1859, 21 D. 905.

[3] Patrick v. Nichol, Dec. 7, 1838, 1 D. 207; Gardner v. Ogilvie, Nov. 25, 1857, 20 D. 105; Buchanan v. Angus, May 15, 1862, 24 D. (H. L.) 5.

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Whom, then, did the truster mean by his nearest heirs and assignees through his mother? He left a mother's brother, a mother's sister, and a mother's niece through a deceased brother. The father of the niece was the truster's mother's younger brother, the surviving brother having been elder than the mother. We must endeavour to find out which the testator meant. It has been contended that the testator having used the word "relations" in reference to his father must have meant relations also through his mother. I cannot agree to that. He uses different words "heirs and assignees," and while "relations" was most properly used when excluding those by the father, as it embraced parties who would have been entitled either to heritage or moveables, it cannot be transferred to the instituting clause, as the testator has shewn no indication that he intended the same parties to take both his heritage and his moveables. I cannot think we can interpolate the word "relations" for "nearest heirs" in the instituting clause.

When he uses the words "his own nearest heirs in and through his mother" it seems to me that he means that his mother's heirs should take; and that gives rise to the contention of his mother's niece. She is his mother's heir in heritage, being the daughter of a younger brother. Whether you are to distinguish between the conquest and the heritage is a different question. I am inclined to think we ought not, for a reason that has been given weight to in former cases. This lady will not take as the truster's heir but as the heir of his mother, who never had right to the subjects, and therefore, as appears to me, she must take the whole heritage.

Then there only remains the moveables to be disposed of, and they will fall to the mother's heirs in moveables, her surviving brother and sister.

LORD COWAN.—I have had some difficulty in this case. There are certain matters which require consideration before coming to the construction of the destination clause in question.

First, what are the subjects thus destined? On this part of the case I have formed a clear opinion that they comprise the whole effects left by the testator, whether heritable or moveable. The words taken by themselves, or in connection with other clauses in the deed, appear to me to forbid any other construction.

Second, what is the effect of the authority to sell contained in the latter part of the deed, as regards the supposed conversion into moveables? It will be remarked that there is nowhere in the deed either direction or power to sell in the usual sense, but merely an authority—the intention of the testator clearly being, that if in the course of the ordinary trust management the trustees found it expedient to sell the heritage they were to have authority to do so, but not to confer on them a capricious power of selling unnecessarily, so as to alter the succession of the testator. Starting, therefore, with the assumption that "the estate and effects" here mentioned is the whole *universitas* left by the testator, we come to the question, to whom is this estate destined. I confess myself much puzzled as to the sound construction of the terms used in this deed; at the same time I am satisfied that it is not a case for the heir at law to come forward and say there is such uncertainty and inexplicability as to require the succession to be dealt with as intestacy. The testator has stated clearly his intention to favour some person or persons other than his heirs *ab intestato*, and we must consider, and if possible construe, the expression of his wishes so as to give effect to his intention. My difficulty in reaching any satisfactory conclusion is, that the testator and the writer who drew his settlements do not appear to have understood the effect of the phraseology employed. They seem to have thought that "heirs in and through my mother" was a legal term of undoubted significance. That admittedly it is not, and I am driven to conclude that we have not in these words, taken by themselves, a sufficiently clear indication of the mind of the testator. I do, however, find a glossary for this construction in the words which follow, "excluding the relations of my father and all others, except through my said mother," *i.e.*, the parties he desired to favour were his nearest relations by his mother. Looking at that expression, I cannot but hold that it is the parties standing in that relation to him whom the testator intended to favour, and that

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are to succeed to a *universitas* of his estate; but if the view I take is re- d by your Lordships, and assuming the views expressed by Lord Ben- e to be adopted by the Court, I think it right to say that I entirely acquiesce s Lordship's conclusion that as regards the heritage it is the heir of line, as eir at law pre-eminently, who is to be preferred, and the heirs *in mobilibus* are to take the moveable and personal estate.

ORD NEAVES.—There is no doubt that in this inconsistent clause technical ls are misapplied. It often happens that technical words are used by un- ed testators in such a way that more difficulty arises when we come to con- them than we would have if they had expressed their meaning in the ordi- language which they themselves understood. We are bound, however, in ases to try whether we can find out the meaning intended.
ow, here there are two conflicting views, one of which it seems to me must aken. First, that the estate is dealt with as a *universitas*, and therefore that testator intended to confer it on those who, though relations of the mother, py a position corresponding to the next of kin by the father. On this er I rather incline to the opinion expressed by Lord Cowan, that nothing h was done or authorised to be done by the testator after his death in any changed the character of the succession. If, then, the estate were to be n as a *universitas*, and to be disposed of as such, the term "nearest heirs in through my mother" would be held to mean to those relations of his mother hold the position corresponding to next of kin on the father's side. In that it is clear that Mrs White is excluded, as she is not in the same grade of ionship with the other parties, Mrs Robertson and Thomas Waddell. Now, not think that Mrs White was intended to be excluded. That such should he case appears to me entirely repugnant to the general scope of the clause. nsequently exclude this view, and pass to the second, which appears to me more likely alternative, namely, that the estate was not intended to pass as *iversitas*, but as a divided succession of heritage and moveables; in which I cannot but think that the words "nearest heirs" implies more than ations" merely. I think that the testator had this idea in his head that his ier should be taken as a kind of *stirps* from whom an order of succession to be deduced analogous to the legal succession through the father. I efore agree with Lord Benholme, and think that he has rightly removed difficulty that might have been introduced by the different succession to tage and conquest according to our law.

he LORD JUSTICE-CLERK concurred.

THIS interlocutor was pronounced:—"Refuse said note, and adhere to the interlocutor complained of: Find no expenses due to either party, and decern."

DAN & WELSH, S.S.C.—W. P. ANDERSON, S.S.C.—WATT & ANDERSON, S.S.C.—Agents.

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Dec. 9, 1872.
M'Neill's Trustees v. Campbell.

MRS AGNES LOUDEN OR M'NEILL AND OTHERS (M'Neill's Trustees), Pursuers.—*Pattison—Watson.*
THE OFFICERS OF STATE AND OTHERS, Defenders.
REV. COLIN CAMPBELL, Defender.—*Millar—Duncan.*

inds—Sub-valuation—Approbation—Reduction—Decree in Absence.— d that it was competent for a heritor who had in absence obtained decree of obation of a sub-valuation of the teinds of his lands to bring a reduction of ame, on the ground of its being disconform to the Sub-commissioners' report, hich it bore to proceed.
inds—Valuation.—A parson who was titular of three-fourths of the whole ls of his parish, and tacksman of the other fourth, called the bishop's fourth, ured and consented to a sub-valuation according to the whole rental bolls.

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TEIND COURT. Teind Clerk.

Held that the titularity had been sufficiently represented, and that it was not a valid objection to the valuation that the bishop had not been called.

SEE *ante*, vol. x. p. 753.

Mrs Agnes Louden or M'Neill, widow of the late John M'Neill of Ardnacross and Glenmore and others, as trust-disponees of the said John M'Neill, were in the year 1862 proprietors (1) of the lands of Camusnanesran, or Over and Nether Camus, of the portions of the lands of Melford, called Tallich, Dowage, Glenmore, Ardcloisk, Glenbeg, and Barbea; (2) of the lands of Kilmelford and others,—all lying within the united parishes of Kilninver and Kilmelford in Argyleshire.

By the report of the Sub-commission for the valuation of teinds applicable to the said united parishes it was found and declared in the year 1629 that "the landis of Glenmoir, Glenbeig, Barbe, Duag, Tulliche, Over and Nether Camess, wt. the pertinents of parsonage and great teynd, the number of 23 bollis meall, and for the vicarage and small teyndes y^r^of threttie pundis money. The lands of Killmelphoirt perteining to the said Mr Colin Campbell, of parsonage teynd 3 bolls meall, and for the vicarage brockis and small teynds y^r^of 56 sh. money."

In an action of approbation of the said sub-valuation, which was raised in 1866, the trustees set forth that they were proprietors of the several pieces of land above mentioned, and recited that part of the report of the Sub-commission which related to the said lands of Glenmoir and others (being the lands No. 1) with the pertinents, and which found and declared the value of the parsonage and great teinds thereof to be "the number of 23 bollis meall," and that of the vicarage and small teinds thereof to be "threttie pundis money." They further stated, *per incuriam*, that the lands of which the teinds were so valued were the whole lands (No. 1 and No. 2) above mentioned, and concluded that the report of the sub-commission should be ratified and approved by the Court in so far as concerned the valuation of the pursuers' lands, meaning thereby the said whole lands in the said united parishes.

The action having been duly called, and no appearance being made for the defenders, decree in absence was, on July 4, 1870, pronounced in terms of the libel. That decree bore that the Lords Commissioners for Plantation of Kirks and Valuation of Teinds ratified, allowed, and approved of the report of the Sub-commissioners of the Presbytery of Argyll, in so far as concerned the valuation of the pursuers' lands libelled, and interponed their authority thereto, and in terms thereof found, declared, decerned, and ordained that the foresaid valuation of the said teinds, in so far as concerned the pursuers' lands libelled, and which was in the terms following, viz.—"The landes of Glenmoir, Glenbeig, Barbe, Duag, Tulliche, Ower and Nether Camess, wt. the pertinents of personage and great teynd, the noumber of twentie three bollis meall, and for vicarag and small teyndes y^r^ of threttie pundis money"—had been ever since the said report, was now, and should continue and endure in all time coming as the just worth and constant yearly avail of the teind, parsonage and vicarage, of the said lands.

A supplementary action of approbation relative to the lands of Kilmelford was thereafter raised, concluding that the portion of the said report which applied to the said lands should be approved of as the valuation of the teinds thereof, without prejudice to the above mentioned decree of valuation, but this action was dismissed for the reasons stated in the Lord President's opinion.

In these circumstances the present action was brought by the pursuers against the Officers of State, the Commissioners of Woods and Forests, and the Lord Advocate as representing the Crown, which is titular of the

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teinds of the said united parishes, and against the Rev. Colin Campbell, the present incumbent, to have the said decree of sub-valuation reduced, and to have the valuation of the several lands contained in the said report ratified and approved of in conformity with its true tenor.

As to the conclusion for reduction, it was pleaded by the pursuers;—The decree in absence above mentioned being disconform to the report of the Sub-commissioners, upon which the same proceeded, and being without warrant, the same was null, and reducible at their instance.

The minister, who alone defended, pleaded;—(2) No relevant or sufficient ground for reducing the said valuation was set forth by the pursuers, at least none was stated which could warrant the Lords Commissioners for Teinds in reducing the same. (3) The said decree of valuation having been pronounced by the Lords Commissioners for Teinds *causa cognita* at the request of the pursuers, and in conformity with the conclusions of their own summons, the same was a decree *in foro quoad* them, and they cannot now seek or obtain its reduction on the ground of the alleged error condescended on.

At advising,—

LORD PRESIDENT.—We have now to dispose of the reductive conclusions of the summons. The object of the reduction is to set aside a decree of approbation of a sub-valuation obtained in 1866, on the ground that it contains an error fatal to its validity, the decree of approbation being disconform to the report of the Sub-commissioners, on which it bears to proceed.

The pursuers are possessed of two different parcels of land in the parish, which, for shortness, may be described by the leading names of Glenmore and Kilmelford. The teinds of Glenmore were valued by the Sub-commissioners at 23 bolls of meal and £30 Scots money, the teinds of Kilmelford were valued at 3 bolls of meal and £2, 16s. Scots money,—thus making a total valuation of 26 bolls of meal and £32, 16s. Scots money.

The summons of approbation raised by the pursuers in 1866 set out the report of the Sub-commissioners, but unfortunately they committed this mistake: the summons set out these two sets of lands, and concluded that the teinds should be valued at 23 bolls of meal and £30 of Scots money, omitting to notice that this was the valuation, not of the whole lands, but only of that part which I have called Glenmore. But as the whole lands were set forth in the summons the decree of approbation made the valuation applicable not only to Glenmore but to Kilmelford.

Such is the mistake committed. It is said in condescendence 11, and said truly,—"The effect of this decree was to make the valuation of the teinds of the lands of Glenmore, Glenbeg, Barbe, Duag, Tulliche, and Over and Nether Cameas, with the pertinents, apply not only to those lands, but also to the lands of Kilmelford, Ardcloisk, Duchray, and Heisker Island. The teinds of the lands of Kilmelford are separately valued by said report, and the lands of Ardcloisk and Duchray and Heisker Island are not mentioned in it. The decree was thus erroneous, and disconform to the grounds upon which it proceeded, and to the report of the valuation by the Sub-commissioners, and was unauthorised, and was to the hurt and prejudice of the pursuers."

The defender seems to contend that the decree was not to the prejudice of the pursuers, because it valued the lands at less than the valuation contained in the report by the Sub-commissioners, and therefore, instead of being to the prejudice of the pursuers, was in their favour. But the prejudice to the pursuers was very distinctly developed in a previous process, in which they proposed "without prejudice to the decree of approbation," to set the matter right by having the valuation of the lands of Kilmelford brought in as an addition. The present defender then contended that it was impossible to set the matter right without a reduction. We intimated the same, and accordingly the pursuers consented to have the action dismissed, and have brought the present action of reduction.

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Now, the defender says that the reduction cannot be obtained; that, in short, the error is irremediable, and that, by this mistake, the pursuers have lost the benefit of the sub-valuation. His plea on this point is,—"The said decree of valuation having been pronounced by the Lords Commissioners for Teinds *causa cognita* at the request of the pursuers, and in conformity with the conclusions of their own summons, the same is a decree *in foro quoad* them, and they cannot now seek or obtain its reduction on the ground of the alleged error condescended on." One cannot read this plea without having it suggested to one's mind whether this defender has any legitimate interest to maintain this plea or to defend this action at all. But it is needless to go on this. The error is an error committed in the framing of the summons by the pursuers. The decree was not one *causa cognita*. It proceeded as a matter of course, for there was no one to object. It would be a very strong thing if an error of this sort could not be rectified in any way. We are told that in cases where the Court have pronounced a decree against the pursuer in the absence of the defender this is a decree *in foro* against the pursuer. But the present is not a decree against the pursuer. It is a decree of his own seeking. I have no difficulty in advising your Lordships to give effect to the conclusions of reduction.

Lord Benholme.—In no legal sense can it be said that the defender has an interest to oppose the reduction. I can see that he has an actual though an illegitimate object, an interest which, however, we cannot recognise or support. His object is to prevent the pursuers getting the due benefit of their sub-valuation. He says that there shall be no remedy for the error which has been fallen into in the action of approbation; that, in short, the mistake affords a sort of *jus quæsitum* to him although he was no party to the process of approbation. The Court cannot give effect to this contention. A proper mode has been followed for rectifying the mistake, and the defender has no legitimate interest to oppose it.

The other Judges concurred.

In regard to the conclusions for approbation of the sub-valuation, the defender founded upon the terms of the Sub-commissioners' report, as shewing that the valuation had been made by rental bolls, without the consent of the bishop, who was titular of one-fourth of the teinds, while by the sub-commission the consent of all who had interest in the teinds was required to a valuation according to rental bolls.*

Argued for the pursuers;—The bishop's interest was sufficiently represented by the parson, who was titular of three-fourths and tacksman of the bishop's fourth. The point had already been decided in a question between Harrison, Ainslie, and Company,[1] heritors in the same parish, in 1869.

Lord President.—The objection now taken to this report is that it was not competent for the Sub-commissioners to give effect to the whole rental bolls except by consent of the heritors and titulars, and that it is demonstrated *ex facie* of the report itself that such consent was not given. Now, if that should be made out it would be undoubtedly a good defence to this summons of approbation. But we must examine the report with some minuteness. It "Finds and declares that the landes underwrettin perteining to the personnes afterspe'it within the said parochyne of Kilmelphoirt, hes payed in tyme bygane, payes p'ntly ar woirth and may pay for the p'sonage and great teynd thereof as ane constant rent yeirlie in tyme coming the particulare rentalled teynd bolles after spe'it and that the vicarage broks and small tynds of the samen have beine taking up sometymes *ipsa corpora* and sometymes in a small silver rentall and ar woirth

* Quoted in the opinion of the Lord President. The sub-commission, in directing effect to be given to payments by rental bolls, bore, "and which rentals of teinds by the space of fourtie years in victual near hand the just availe betwixt parties agree and none oppose the samen."

[1] *Supra*, p. 260.

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nd may pay as a constant rent yeerlie heireftir the particulare soumes of money underwrittene as is speciallie and particularlie after mentionat viz: . . . . . The landes of glenmoir glenbeig barbe Duag tulliche ower and nether Camess st the pertinentis of personage and great teynd the noumber of twentie thrie ollis meall, and for vicarage and small teyndes yroif threttie pundis money." Then follows the ground of judgment—"Because the foirsaides personage and great teyndes have beine rentalled as is befoir spei't and the samen rental in use to be payed yeirlie attor the space of fourtie yeiris immediately last bypast qh we find to be att the availl." Here it is important to observe that the report is more exact than was required by the Act 1633, c. 19, since it states that the preceding valuation was not merely near the avail but "att the availl." Then comes the course of procedure—"and becaus the said Archbald Lord Lorne patroun of the said Kirk of Kilmelphoirt and the said Mr Colline Campbell p'soun and vicar yrof and titular of thrie q'rteris of the teyndis of the samen appertaining to the said laick patronage and tacksmane and possessor of the fourt q'rter of the samen teyndes, called the bishop's quarter, and the saids personnes heritoris above nameit compeirit all personallie befoir us quha and ilk ane of thame sw'descendeit and aggreit to ye foirsaids rentalled teynd bollis for the saides personage and great teyndes except the sd. Neill Campbell of Kendmoir and because we took trew tryall and informao'une anent the sowmes gerss and holding of the saides landis and alse because the saides heritouris were lawlie summond to have sw'peirit befoire us at ane certaine day to have hard and seine the saids vicarage and small teyndes valued in maner abovewrettine." Now, we have here represented, in the first place, the heritors, except Mr Neil Campbell, all consenting to this system of valuation, and in the second place, the parson of the parish, who is titular of the teinds, except one-fourth thereof, which belongs to his bishop. Now, it is said that because the bishop is not called and does not appear the titularity is not fully represented, and that without the positive consent of everybody interested as titular this system of valuation is not justified by the terms of the report.

Now, I think it would be sufficient for the decision of this case to rest on Harrison Ainslie and Company, which is a judgment directly in point, as between a heritor and the present titular of his parish. We there held that this was a good valuation by rental bolls. But I am unwilling to seem to attach too great importance to that decision, although I believe there are no less than four Judges present who concurred in it. I think it was well decided. It seems to me that the titularity of this parish was sufficiently represented. The interest of the minister as parson was precisely of the same kind as that of the bishop *quoad* his fourth part. It is not to be supposed that there was a division of the lands among the titulars; they really held a *pro indiviso* right to the teinds of the whole parish; their rights were identical except in extent, for the parson here was interested as titular to the extent of three-fourths, while the bishop had the same interest in only one-fourth, so that it was not unreasonable in the Sub-commissioners being satisfied with the parson's consent, particularly as he in point of fact possessed and drew the teind belonging to the bishop in the shape of rental bolls, and was himself quite satisfied. I think it would be unfortunate if, this report having been acted on for so many years, the bishop should not be now held to have acquiesced.

The other Judges concurred.

THE following interlocutor was pronounced:—"Sustain the reasons of reduction, and decern in the reduction accordingly: Further, in the approbation, find, decern, and declare in terms of the conclusions of the libel in all respects, and find expenses due to the pursuer, occasioned by the defences, from the date thereof down to the 28th October last: Appoint an account thereof to be lodged, and remit," &c.

T. & R. B. RANKEN, W.S.—M'NEILL & SIME, W.S.—Agents

No. 37.

Dec. 12, 1872. Allan's Trustees v. Allan and Others.

HUGH ALLAN AND OTHERS (James Allan's Trustees), First Parties.—*Fraser—M'Laren.*
JANET ALLAN AND OTHERS, Second Parties.—*Horn.*

Succession—Legacy—Trust.—A testator, in his settlement, directed his t tees to divide and pay over the fee of the residue of his estate to and among whole children, including his daughters, "declaring that the provisions the made in favour of females shall be purely alimentary to them, and not alien or assignable, and shall be exclusive of the *jus mariti* and right of administrati of husbands, and not affectable by their own or such husbands' debts or deeds. I that as there was a clear direction to the trustees to pay to the beneficiaries were alone interested, and as the Court could not consistently therewith cre trust, which was the only mode of rendering the daughters' provisions inalien the daughters were entitled to receive payment on their own receipts; but the receipts should bear exclusion of the *jus mariti* and right of administrati

2D DIVISION. R.

JAMES ALLAN, sometime manager of Govan Colliery, Glasgow, died the 12th February 1861, leaving a trust-disposition and settlement, d 30th December 1854, whereby he conveyed his whole estate, herit and moveable, to the first parties and others in trust for the purp therein mentioned.

By the second trust-purpose the truster directed his trustees to h and apply the residue of his trust-estate for the liferent use of M Watson or Allan, his spouse,—"And, in the third place, I direct appoint my said trustees, upon the decease of the said Mary Watso Allan, to divide and pay over the fee of the said residue to and am the whole of my children who may survive me, and the issue of suc them as may predecease leaving issue, including among them my gr daughter, Mary Jane Watson Michie, share and share alike, the issu each case taking the share which their respective parents would h received, equally among them, when more than one, payable, the sh of the sons, on their attaining majority, and of the daughters and gr daughters on their attaining that age, or being married, whichever of t events shall first happen . . . . . ; declaring that the provisions he made in favour of females shall be purely alimentary to them, not ali ble or assignable, and shall be exclusive of the *jus mariti* and righ administration of any husband they or either of them have or may h and shall not be affectable by their own or such husband's debts or de or the diligence of their own or his creditors, all which are hereby cluded and debarred; and declaring that the receipts of such fem without the concurrence of their husbands, shall be sufficient for t said provisions."

The truster's widow died on 23d October 1871, and a question ha arisen between Mr Allan's trustees and his three daughters, two of w were married, as to the import of the said third clause in Mr All settlement, a special case was presented for the opinion and judgmen the Court, upon, *inter alia*, the following questions:—"Does the t settlement of Mr James Allan impose upon his trustees, the first par the duty of continuing their possession of that part of the residue of trust-estate which is destined to the truster's daughters during their l respectively? or, Is it competent to the first parties to discharge th selves of their trust by assigning shares of the trust-funds and estat the truster's daughters, parties of the second part, respectively, by a d of assignation containing a declaration to the effect that the es assigned is alimentary, and held exclusive of the *jus mariti* and righ administration in terms of the foresaid provision of Mr Allan's t settlement; or, Are the truster's daughters, parties of the second p

itled to payment or assignation of their shares respectively *simpliciter*, the parties of the first part?" No. 37.

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Argued for the trustees, the first parties;—This case was ruled by that Lady Massy.[1] The direction to pay did not necessarily mean to pay in h; in Scotland,[2] as in England,[3] a trust was the only means of protect- a wife's separate estate from alienation or diligence.

Argued for the daughters, the second parties;—The trustees were nd to divide and pay as directed by the trust-deed.[4] Further, the claration that the fund should be alimentary was ineffectual.

At advising,—

Lord Justice-Clerk.—The question in this case is divided into two parts. e first raises the point, whether the trust-settlement imposes on the trustees duty of continuing to act, in respect of this provision to the truster's daughs being qualified with certain conditions. It is, I think, conceded by all conned that it does not. The second point raised is, whether the trustees can charge themselves by paying or assigning to the beneficiaries, taking discharges m them containing a declaration of the conditions under which the provisions re left by the truster.

The clause in the trust-settlement is in some respects peculiar as regards the ovisions to the truster's daughters. Having in the third purpose directed his ustees "to divide and pay over" the fee of the residue to and among his hole children, including his daughters, the truster afterwards added this clause, "And declaring that the provisions herein made in favour of females shall be ely alimentary to them, not alienable or assignable, and shall be exclusive of e *jus mariti* and right of administration of any husband they or either of them ve or may have, and shall not be affectable by their own or such husbands' bts or deeds, or the diligence of their own or his creditors, all which are here- excluded and debarred."

I think that is a clear instruction to the trustees, first, to pay; and, second, take a receipt from the beneficiaries for the whole capital sum of their provions; and that being the case, the question is, under what conditions this yment is to be made and receipt given. Now, the fund is declared alimentary d inalienable, and if that had been consistent with the other direction to pay er I do not say but that the Court might have taken steps to enforce the ster's intention. If this condition had related to a sum payable annually it ould perhaps have been proper that the Court should exercise its equitable risdiction for the purpose of carrying into effect such an intention. But in the resent case I do not think this is practicable. The testator has attempted to o two inconsistent things. He has ordered his trustees to pay over, while he as endeavoured to limit the full right of property in the payees, and that without a trust, and without creating a separate or resulting right in any one else.

The case of Lady Massy was quite different. There a separate right of credit was reated in the issue of Lady Massy. Here there is nothing of the kind. The two rovisions are inconsistent one with the other, and therefore the beneficiaries are ntitled to simple payment without the conditions to which I have referred.

But the exclusion of the *jus mariti* is a different matter. I think that may e excluded by a truster, and in any receipt to be taken this exclusion should e expressed. What effect that exclusion may have I do not say, but I can see hat some effect it may have, and I therefore think that a clause to this effect hould be inserted in the receipts.

Lord Cowan.—This is a very delicate question indeed. Mr Bell, in his Commentaries, and other writers, lay it down that effectual protection for a fund left

[1] *Supra*, p. 173.

[2] 1 Bell's Com. 128 (124, 7th ed.); Gowans, March 9, 1849, 11 D. 1028.

[3] White and Tudor, L. C. in Eq. (4th ed.), i. 491, 493; Newlands v. Paynter, 1839, 10 Sim. 377; Lewin on Trusts (5th ed.), 553; Sarel, (1864), 28 Jur. 876.

[4] Renniev. Ritchie, 4 Bell, Ap. 244-5 (L. Cottenham); 2 M'Laren on Wills, 66.

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by a father to his children can only be obtained by means of a trust; an question here raised comes in effect to be whether we are to create a tr order to carry out the conditions which Mr Allan annexed to his dau provisions. I am not aware of the Court having ever exercised such pow think we are not entitled to authorise the trustees to do otherwise than th tator has directed, which is to pay the money directly to the beneficiaries. is no ulterior destination, as there was in Lady Massy's case, which requi be protected. The declaration that the funds, when paid over to the dau should be inalienable, is quite impossible of being carried into operation cannot be regarded as of any legal effect, unless under the protection of a which is not created by this deed, and which the Court cannot call into ence. I am not, however, satisfied that in the narrative of the receipt granted to the trustees there should not appear the declaration that the are declared alimentary. In many settlements funds are declared to be su far, at least, as regards annuities, and funds which are only available in the of yearly proceeds; and the declaration, though probably inept as regard principal, may have effect as regards the yearly produce. I quite agree your Lordship that the exclusion of the *jus mariti* and right of administr must be introduced into the receipt.

LORD BENHOLME and LORD NEAVES concurred.

THE COURT found ". . . . . that the trustees of the said J Allan, the first parties, are entitled and bound to make pay to the testator's daughters, parties of the second part, of shares of the trust-estate on their own receipt, containing a c excluding the *jus mariti* and right of administration of the spective husbands," &c.

JOHN GALLETLY, S.S.C.—MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

No. 38.

Dec. 13, 1872. Earl of Glasgow's Trustee v. Earl of Glasgow, &c.

JAMES HOPE, Trustee under the Trust-Disposition of the late Geo Earl of Glasgow.—*Watson—Mackintosh.*

The Right Hon. GEORGE FREDERICK ROSSE, Earl of Glasgow.—*Sha*

The Right Hon. JONATHAN PEEL AND ANOTHER, Trustees of the dec James Earl of Glasgow.—*Sol.-Gen. Clark—Marshall.*

Marriage-Contract.—A husband in his antenuptial marriage-contract dis lands in favour of himself and the heirs to be procreated of his body, and their assignees. *Held* that the heir of the marriage had a protected rig succession, which his father was not entitled to defeat gratuitously.

Marriage-Contract—General Settlement—Approbate and Reprobate—tive Prescription.—A father executed a trust-deed for payment of certain and regulating his succession *in fraudem* of his antenuptial marriage-con and to the prejudice of the heir of the marriage, and afterwards another deed, the two forming together a complete settlement of his whole estate, able and moveable. The heir made up a title under the marriage-contract under it possessed the lands contained in the first trust-deed, and took b under the second deed, but in ignorance of the existence of the first trust- *Held*, that his trustees and executors were not barred by the negative pre tion from challenging the earlier deed, but were entitled to elect either to by his approbation of his father's settlement, or to renounce and restor benefit he had taken, and challenge the first deed.

1ST DIVISION. B.

IN 1788 George Earl of Glasgow and Lady Augusta Hay entered an antenuptial contract of marriage, to which the Earl's mother, Eliza Rosse, Countess of Glasgow, heiress of entail in possession of the l and estate of Hawkhead, was a party. By the contract of marr the said Countess and Earl George, on the narrative that the l

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ed by the existing deed of entail (which was defective) to
and the heirs whatsoever of his body, ratified, approved, and
he substitution of heirs contained in the entail and after in-
n so far as the heirs and children of the intended marriage
interest therein, and bound themselves that neither they nor
em should at any time thereafter do anything by which the
ccession might be altered, or the heirs or children to be pro-
he marriage prejudged or disappointed thereof. But power
d to Earl George, at any time after the succession of the
awkhead should open to him by the decease of the Countess,
to entail the same of new without consent of the heirs or
the intended marriage, provided that the order and course of
ettled upon them should not be thereby interrupted or dis-

This reserved power was afterwards exercised by Earl
deed of entail executed in 1819, and recorded in the Register
fter his death.

iage-contract settled not only the lands of Hawkhead, but, in
on of the marriage, conveyed a number of other lands held in
by Earl George "to and in favours of himself" (Earl George)
irs whatsomever to be procreated of his body, and his or their
hom failing, to Lady Elizabeth Boyle," &c.

George Earl of Glasgow executed a trust-disposition, in the
which he set forth as the consideration that he stood bound
bligations for money borrowed for the use of his eldest son,
Kelburne, the sums being therein specified.

fore disponed to trustees the lands of Thirdpart, and the lands
l and Brodochlie in Ayrshire, and the lands of Stanlie in
re, the last mentioned being part of the estate of Hawkhead,
articularly described, to be held for the following purposes:—
trustees, out of the rents, after paying public burdens, should
the interests of the various debts for which the Earl should
r his eldest son, and, if necessary, should borrow money and
bligations; 2. that so soon as a proper sale could be effected
sell as much of the lands as would satisfy the said debts and
; and 3. that after fulfilling the said purposes they should be
nude of any residue of the said lands and others which still
nd in favour of his eldest son, or heir of entail of the estate of
for the time, under all the conditions, restrictions, and de-
f the then existing entail of the said lands and estate of

granter recommended them, in the first place, to sell Thirdpart,
idland, and others in Ayrshire, and thereafter, if these should
icient for the purposes above mentioned, to dispose of such
e lands of Stanlie as might appear to them to be least detri-
he said estate of Hawkhead. He reserved power to alter or
to sell, burden, or otherwise dispose of the lands at pleasure,
d that the deed should be effectual, though undelivered at his

ees were infeft, but never entered into possession of the said
d by a deed of explanation and codicil in 1830 Earl George
next heir of entail of Hawkhead to pay to the foresaid trustees
£10,000 as trustees for behoof of his younger children, and
t so long as his said eldest son should pay the interest of said
provisions regularly the trustees should not be entitled to
possession of the lands, and to that effect the operative powers
trusts were declared to be conditionally suspended.

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George Earl of Glasgow died on 4th July 1843, leaving a general t settlement dated 24th March 1843. By this deed he conveyed his sonal estate to trustees—1. for payment of his debts; 2. for payme the obligations come under by him to his second wife; 3. for payme annuities to younger children, and of certain provisions amounti £46,000; and the 4th purpose was as follows:—"*Quarto*, being de to preserve in my family the ancient estate of Hawkhead, I hereby and appoint my said trustees to procure the entail thereof, whic some years ago executed by me with consent of my said eldest son recorded in the Register of Entails, and a proper feudal investitur pleted therein: Farther, as the said estate is charged with a consid amount of debt contracted by my said eldest son, for which I joi the securities over the said estate, it is my wish that, after fulfilling other objects before-mentioned, the residue of my said personal e shall be applied in purchasing up the said debts, to the effect the be extinguished, and particularly those affecting the old estate of Ha head, the interest of these debts being to be kept down by the int arising out of any residue of my said funds; and lastly, when these p poses are fulfilled, the sum of £16,000 sterling shall be set apart and lent out by my said trustees upon good securities, real or personal, the interest thereon to be received by my said trustees and added to said fund, and so continue for the space of five years after my decease, the end of which period £6000 shall be paid to my said two you children of my second marriage in equal proportions, and the remain of said fund, with any additional money that may arise out of my executry after fulfilling the objects aforesaid, shall be accounted for paid over to my said eldest son, whom I wish to be considered as residuary heir and executor; and he shall then be bound, on the termi tion of the said trust, to discharge the said trustees, and to do every oth thing which they may consider to be necessary for carrying out wishes; and in order that these presents may receive the more full eff I hereby direct that the trustees appointed by any separate deeds execut by me shall account for and pay over to my present trustees, for the p poses hereof, any sums which may come into their hands in virtue such separate deeds, in order that the same may be applied as aforesa and under these explanations I hereby revoke and recall all other or p settlements, bonds of provision, or other deeds granted by me in fav of my said younger children of my first and second marriages, or any them, which may affect my estate, or be contrary hereto, those in fav of my daughter, Lady Fitzclarence, in regard to the property derived me from the late Admiral Boyle, being always excepted: . . .] serving always to myself my free and uncontrolled liferent use enjoyment of the premises, with power to revoke, alter, or burden th presents at pleasure; but in so far as not altered the same shall rem effectual wherever found at my decease, without the necessity of delive

He was succeeded in the entailed estate of Hawkhead and the ot estates of the earldom by his eldest son, James Lord Kelburne, who exp a service as heir of provision under the marriage-contract of 1788, made up a title in that character.

The trustees under the settlement of 1843 accepted of the trust, a in ignorance of the existence of the trust-disposition of 1825, took pos sion of the trust-estate and proceeded to execute the purposes of trust. At Martinmas 1843 they paid out of the executry the debt aff ing the estate of Hawkhead, amounting to £67,000. They also p certain debts, amounting to £16,000, in ignorance that the paym thereof was provided for by the trust-deed of 1825. It ultimately tur

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nt that after paying these debts, and fulfilling the other purposes of the
leed of 1843, except as after-mentioned, there was a deficiency of £34,000
nder that trust, the provisions left unsatisfied being £20,000, part of the
ovisions to the two younger children of the truster's second marriage,
nd £14,000 due to Earl James of the sum of £16,000 directed to be
cumulated for five years. In order to meet the deficiency so far as
anted the younger children's provisions, Earl James, under the Entail
endment Act, charged the entailed estates with the sums of £8000
d £12,000 contained in two bonds of provision in favour of the Hon.
rge Frederick Boyle and Lady Diana Boyle or Pakington. Earl James
inquished all claim to the remaining sum due to him under the trust-
d.

n 1859 the executors of Earl George conveyed to Earl James, as
duary legatee, the whole residue and remainder of the executry estate,
isting in all of £1692, 15s., and, on the other hand, he granted to
m a full discharge of all their intromissions.

Earl James died on 14th March 1869, having executed in 1858 a
eral trust-disposition of his whole heritable and moveable estate,
ept the entailed estates. He was succeeded in the earldom and
ailed estates of Hawkhead, and also in the entailed estates of Kel-
ne, Kilbirnie, Glengarnock, and Crawford-Lindsay, over which the
two bonds of £8000 and £12,000 were granted, by his brother con-
guinean, the Hon. George Frederick Boyle; and in the entailed estate
hal, which was still liable, as directed in the trust-deed of 1825, for
debt of £18,000, by his sister Lady Augusta Boyle or Fitzclarence.

n the death of Earl James it was found that debts of £17,000, secured
r the estates of Thirdpart, and Baidland and Brodochlie, were still in
istence, and that so, while the trustees under the deed of 1825 were
dead, and the trust had lapsed, the purposes were not all fulfilled.
Mackay, and afterwards Mr James Hope, the party of the first part,
e appointed by the Court trustees under the said trust-disposition; and
Mackay, as trustee, sold the lands of Thirdpart to the present Earl of
gow, at a valuation, for the purpose of applying the price in payment
he said debts.

his special case was brought for the purpose of determining to whom
trustee should now account for the balance of the price of Thirdpart
aining in his hands, and to whom he should convey the lands of
dland and Brodochlie remaining unsold. These were claimed (1) by
first party, for the purposes of the deed of 1825; (2) by the present
l of Glasgow, as heir-at-law of his father, on the ground that no valid
had been made up by Earl James; (3) by Earl James's trustees, on
ground that the deed of 1825 was *ultra vires* of Earl George, being to
prejudice of the rights of the heir of the marriage under the contract
789.

he questions of law submitted for the opinion and judgment of the
rt were,—"(1) Whether the residue of the trust-estate created by
said trust-disposition of 2d December 1825 falls to be settled upon
said George Frederick Rosse Earl of Glasgow as heir of entail in
session of the said lands and estate of Hawkhead at the period when
purposes of the said trust-disposition were fulfilled, and upon the
rs of entail entitled to succeed to the said lands and estate, under all
conditions, restrictions, and declarations of the existing entail of
wkhead? (2) Whether the said George Frederick Rosse Earl of
gow has, as heir-at-law of the deceased George Earl of Glasgow, his
er, absolute right to the said residue, or to any part thereof? (3)
ether the said Jonathan Peel and Honourable David Mure, as trustees

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and executors and residuary legatees of the said deceased Jame Glasgow, have a preferable right to the said residue, or to any pe of? (4) Whether, in the event of the said residue falling to b as aforesaid, upon the said George Frederick Rosse Earl of Glas the heirs of entail entitled to succeed to the said lands and Hawkhead, the first party is bound to settle the same upon George Frederick Rosse Earl of Glasgow and the said heirs of en ject to all the fetters of a strict entail, and to procure the deed to be executed by him for that purpose duly recorded in the R Tailzies, and also feudalised? (5) Whether the said trustees an tors of the said James Earl of Glasgow are entitled to receive o said residue payment of the foresaid debts, amounting to £16,(by the trustees and executors of the said George Earl of Glasgo his executry estate at Martinmas 1843, or any part thereof? (6) the said George Earl of Glasgow, as heir of entail in possessio entailed estate of Kelburne, and of the entailed estates of Kilbi of Crawfurd-Lindsay, and Glengarnock, is entitled, out of the r the said trust-estate, to have the said entailed estates disburdene and what part of the foresaid sums of £8000 and £12,000 cont the said bonds and dispositions in security granted by the sai Earl of Glasgow on 18th July 1850?"

It was argued for the first party (Earl George's trustee);—No *j* was conferred on the heirs of the marriage by the deed of 178 destined the lands to the granter and "the heirs whatsoever to created of his body, and his and their assignees." This was ec to a mere destination to the granter and his assignees. If no *j* was given to the heir of the marriage the deed of 1825 was not as being *in fraudem* of his rights. But even if it were, it was *causa* deed, and formed part of the general settlement of Earl under which Earl James had taken benefit, and was thereby bar challenging the deed.

The second party (the present Earl of Glasgow) argued tha conveyancing operations for political purposes had evacuated the tion in the marriage-contract.

The trustees of Earl James (third parties) argued;—Earl Geor not gratuitously defeat the *jus crediti* conferred on the heirs of riage by the antenuptial contract of 1788. The deed of 1825 been homologated by Earl James. If he took any benefit under of 1843 it was very small, and it was taken in ignorance of of 1825. Had he known of that deed he would have been pu election; and his representative was still entitled to reduce tl on renouncing what he had taken under that of 1843.

At advising,—

LORD PRESIDENT.—This case is somewhat complicated in its det though the questions are framed so as to dispose of the contentions a of the parties, yet some of them require a great deal of attention, bec comprehend a number of subordinate questions.

The main point under the first question is, whether the deed of effectual; which raises (1) the question whether the maker had powe it; and (2) if he had not, whether the deed is still effectual because th his son James to challenge it is cut off on various grounds.

The power of George Earl of Glasgow to make the deed depends a g on the terms of his marriage-contract in 1788, and the right thereby c favour of the heir of the marriage. The entailed estate of Hawkhea belonged to Earl George's mother, was settled by that marriage-contract, existing entail not being effectual a right was reserved to Earl George

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al entail. Therefore, although the estate was settled subject to the
s of the then existing entail it was no breach of the provisions of the
contract to make a new and valid entail. But besides Hawkhead
re settled by Earl George's marriage-contract other fee-simple lands.
ds he, "in further contemplation of this intended marriage," "provides,
and conveys to and in favour of himself and the heirs lawfully to be
d of his body, and to his or their assignees, whom failing," to Lady
Boyle, and a series of heirs afterwards named. The question is,
nder this clause the heir of the marriage had any right vested in him
rl George was not entitled to defeat gratuitously. The peculiarity of
is in the words "his or their assignees," and it is contended that the
nfer on him a power to assign, which means that this is neither more
han a conveyance to him in fee-simple without any restriction. That
a very strange provision in a settlement of this kind, and the last con-
one would be disposed to adopt unless driven to it by the clear lan-
he deed. But looking to the whole scope of the deed I have come to
sion that it cannot be read as a mere conveyance to himself, so as to
as free to dispone as before. The words, "to his or their assignees,"
ink, be held to mean only that in the event of there being no heirs of
ge, Earl George and his assignees should be preferable to any other
er this deed. I am not disposed to say that there is any preferable
i given to any other heir or the heir of any other marriage than that
y Augusta Hay. That is the first point, and it advances us thus far
George is restrained from gratuitously alienating these lands to the
of the heir of that marriage.

xt point is, whether the trust-disposition granted by him in 1825 is a
alienation of these lands; and it requires a careful examination of the
t first sight it certainly looks like a deed for the advantage of the
nd his eldest son; for unquestionably it is a deed for the purpose of
for the repayment of money raised for the payment of the son's debts.
t as its consideration, "I, the Right Honourable George Earl of Glas-
idering that I stand bound in sundry obligations for money borrowed
se of my eldest son, James Lord Viscount Kelburne, which are as fol-
d then various sums are mentioned. Now, this narrative shews that
er was personally bound for payment of all these sums. It does not
at Earl James, whose debts had been paid, was personally bound for
of these sums. In short, the arrangement seems to have been that
ge borrowed this money and paid off his son's debts; and the result
he was the sole debtor in these sums. The deed proceeds further,—
order to provide for the liquidation of the foregoing debts and of any
ts and engagements which I may come under on account of my said
at any time hereafter, so as that my personal estate and executry may
y be relieved thereof, and the lands contained in my new entail as
pidated thereby as possible, I have resolved to grant the trust-deed
tten." Here we must observe that after the marriage-contract, and be-
, Earl George had made a new entail of Hawkhead in 1819, and that
se which he set before him here is to keep the lands so entailed as free
e from all incumbrances. For this purpose he proceeds to convey a
lands to trustees, and one of the parcels of lands mentioned is Stanlie,
part of the estate of Hawkhead, and which he appears very anxious to
en in preference to the other lands conveyed, for the purpose of the
nerally to pay these debts, and after fulfilling that purpose the trustees
nude in favour of his eldest son or of the heir of entail of the estate of
d for the time. After full directions with respect to these purposes
ds to recommend the sacrifice of Thirdpart and other lands before con-
as in any event to save the lands of Stanlie, if that were possible.

deed were made for the purpose of paying the granter's debts by the
f certain lands so as to save his executry, and if the only other purpose
e the remaining lands in entail on the heirs of Hawkhead, the question
er that is not a gratuitous alienation. I am of opinion that it is. It

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is a taking of the lands settled, and selling them for paying the debts of the granter. That is a deed in prejudice of the right of the heir created in the marriage-contract. If Earl James, the heir of the marriage, had taken benefit directly by the settlement of 1825, he might have been barred from challenging it. But so far as we see he takes no benefit. Only one part of the deed is founded on to shew that he took benefit, viz., the clause declaring that the £18,000 secured over Etal shall remain ultimately a charge on that estate. It is said that the £18,000, like the rest of the money, was originally borrowed to pay debts incurred by Earl James, and that this clause relieved him of all liability. But that is not sound. The £18,000 was an existing burden on Etal, which did not then belong to Earl James, but to his father, and it was for the latter, the granter of the deed, to say that it should remain a perpetual burden on Etal, which Earl James received as heir of entail, but under the burden of the £18,000. On the whole matter, it is clear that the deed of 1825 is in fact a gratuitous alienation of the lands settled in 1788, to the prejudice of the heirs of the marriage.

But it is maintained that Earl James's right to challenge it has been cut off by the negative prescription. It is difficult to understand that argument. One circumstance in the history seems to bar the plea of negative prescription, because in 1843, immediately after his father's death, Earl James made up a title to all the lands conveyed by the deed of 1825 as heir of provision under the marriage-contract. No doubt it was said that that title was incompetent, in consequence of some conveyancing for political purposes which had made it impossible to take up the estate as heir of provision under the marriage-contract. But an examination of that conveyancing shews that the title was left, and was meant to stand, exactly as it was before.

But another consideration with regard to the deed of 1825 is of a much more serious character. It was to certain effects a conveyance *inter vivos*, but it was also a *mortis causa* deed. This is made plain by certain clauses which make it a deed of settlement. If it be a *mortis causa* deed unrevoked, and if it, with other deeds, constitute the testamentary settlement of Earl George, and if Earl James takes benefit under any of these deeds, he may be barred from challenging any one of them. There was another deed by Earl George in 1843, the only other unrevoked, by which he disposes of his executry estate; and it seems probable that when he made it he had very much forgotten the deed of 1825; for though the trustees were infeft under that deed they never entered into possession, and never sold any of the lands or fulfilled any one of the purposes of the trust. At the same time, if the deed of 1825 stands unrevoked, it must form part of Earl George's testamentary settlement. It is contended that in the deed of 1843 there is a clause of revocation. It is a peculiar clause, viz., "And in order that these presents may receive the more full effect I hereby direct that the trustees appointed by any separate deeds executed by me shall account for and pay over to my present trustees, for the purposes hereof, any sums which may come into their hands in virtue of such separate deeds, in order that the same may be applied as aforesaid; and, under these explanations, I hereby revoke and recall all other or prior settlements, bonds of provision, or other deeds granted by me in favour of my said younger children of my first and second marriages, or any of them, which may affect my estate, or be contrary hereto, those in favour of my daughter, Lady Fitzclarence, in regard to the property derived by me from the late Admiral Boyle, being always excepted; declaring, however, that the bonds of provision granted by me in favour of my younger children under my powers as heir of entail shall subsist and be effectual until the whole of the provisions hereby granted in their favour shall be paid, when the said bonds shall become null and void, it being my wish and intention they shall hereafter only be valid to the effect of being a security to my said children for payment of their said provisions." The words of revocation are "revoke and recall all other or prior settlements, bonds of provision, or other deeds granted by me in favour of my said younger children of my first and second marriages." I do not think these words can apply to the deed of 1825. The meaning is to recall all deeds in favour of younger children, and nothing else.

So far as there was any previous settlement of his general estate, it was sufficiently recalled by implication. I cannot, therefore, say that the 1825 deed is revoked by that of 1843, which, on the contrary, leaves it a subsisting deed, and one of the deeds of settlement of Earl George.

Now, if Earl James took benefit under the deed of 1843 that may bar him from challenging the deed of 1825. He is made residuary legatee, but undoubtedly under the burden of a number of large provisions to younger children, amounting to £46,000. After certain provisions the fourth purpose proceeds thus,—"Being desirous to preserve in my family the ancient estate of Hawkhead, I hereby direct and appoint my said trustees to procure the entail thereof, which was some years ago executed by me with consent of my said eldest son, duly recorded in the Register of Entails, and a proper feudal investiture completed therein: Further, as the said estate is charged with a considerable amount of debt, contracted by my said eldest son, for which I joined in the securities over the said estate, it is my wish that, after fulfilling the other objects before mentioned, the residue of my said personal estate shall be applied in purchasing up the said debts, to the effect the same may be extinguished, and particularly those affecting the old estate of Hawkhead, the interest of these debts being to be kept down by the interest arising out of any residue of my said funds: And lastly, when these purposes are fulfilled the sum of £16,000 sterling shall be set apart, and be lent out by my said trustees upon good securities, real or personal, and the interest thereon to be received by my said trustees, and added to the said fund, and so continue for the space of five years after my decease, at the end of which period £6000 shall be paid to my said two younger children of my second marriage in equal proportions, and the remainder of said funds, with any additional money that may arise out of my said executry, after fulfilling the objects aforesaid, shall be accounted for and paid over to my said eldest son, whom I wish to be considered as my residuary heir and executor; and he shall then be bound, on the termination of the said trust, to discharge the said trustees, and do every other thing which they may consider to be necessary for carrying out my wishes."

We have it stated that the purposes of this deed were accomplished by the trustees to a certain extent. The debt on Hawkhead and £20,000 of the provisions to the younger children were paid. The executry was not able to pay more,—that is to say, after paying off the burdens on Hawkhead and a part of the younger children's provisions, the balance was very small. It was necessary therefore to throw the rest of these provisions on the proper entailed estates; and, therefore, £20,000, which ought to have been paid out of executry, was laid on these entailed lands, by Earl James as heir of entail applying under the Entail Amendment Act for authority to grant bonds and dispositions in security.

This having been done, the only remaining purpose of the trust was to set apart £16,000 to be accumulated and then divided. But there was not money enough. If there was any balance Earl James was entitled to it. In fact there was a very small balance, and as it was quite inadequate to the last special purpose, it was paid over to Earl James, and he discharged the executors. Now, it is said that he thus took benefit under the deed. Certainly he took very little, if any, because the sum was no more than £1692, 15s. But in a question of this kind the amount of benefit is of very small moment. If a man under any deed takes benefit to the extent of £1 he cannot reprobate the deed.

Then it is said that he interposed to create against himself a much greater liability by consenting to lay the burden of the deficiency of £20,000 on the entailed estate. This is true, and it may be that the interest of that debt is greater than anything he got as residuary legatee. But these bonds of provision are available against the entailed estate without his interposition, not as heritable securities affecting the estate, but as provisions affecting the rents. The way to test whether Earl James took benefit or not is to suppose that the younger children's provisions and the residue taken by Earl James were of the same amount. Then the matter would stand thus,—in place of allowing the executors to pay the residue he would take that in money, and give in place of it a security over the entailed estate. That would be taking a benefit, for it would be taking cash

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and only giving a security in return. What did take place was in effect the same; because he took the £1692, 15s. which ought to have been applied *pro tanto* in satisfaction of the younger children's provisions, the distinct intention of the testator being that these provisions should not be laid on the entailed estate. I am therefore of opinion that Earl James took benefit to the extent of £1692, 15s. under the deed of 1843, and is thereby barred from challenging that of 1825.

But the case does not end there, because the circumstances under which Earl James took benefit are peculiar. There is no doubt that he did so in entire ignorance of the deed of 1825. With him during his life no trustees under that deed ever interfered in any way. In consequence of this ignorance, Earl James during his life would have been entitled to go back on what he had done, and say, "I shall restore what I took under the deed of 1843, and challenge the trust of 1825, as being in fraud of the marriage-contract." But he died without exercising any such right, simply because he was not aware that it was open to him, or that any such deed stood in the way of his exercising his full rights under his father's marriage-contract of 1788. Hence the only other question is, whether his trustees and executors are not entitled now to make an election under the deed of 1843, and either to adhere to what has been done under that deed, or to renounce and restore the benefit, and to open the way to a challenge of the deed of 1828. I am of opinion they are still entitled to do so, and therefore the first question must be answered alternatively. I propose to find and declare in answer to it that, in the event of the parties of the third part electing to abide by Earl James's approbation of his father's testamentary settlements, the residue of the trust-estate under the deed of 1825 falls to be settled on the party of the second part, the present Earl, as heir of entail in possession of Hawkhead; but that, in the event of their electing to repudiate the settlements, the residue does not fall to be so disposed of.

The other questions require no such detailed explanation, depending very much on what has been said in regard to the first. The second question, viz., whether the present Earl, as heir-at-law of his father Earl George, has absolute right to the said residue, must be answered in the negative in any event. If the deed of 1825 is to receive effect the residue devolves on the heirs of Hawkhead; and if not, the present Earl has no right to these lands or residue. But under the third question the executors of Earl James will be entitled to a conveyance of everything remaining under the deed of 1825, if they elect to repudiate and restore.

The fourth question asks whether, in the event of the residue being settled on the present Earl and the heirs of entail of Hawkhead, the first party is bound to settle the lands upon them under the fetters of a strict entail. I propose to find that, in the event of the executors not repudiating, the residue must be so settled, the intention of the testator being very clear.

The fifth and sixth questions may be considered together. Both of them proceed on the assumption that the trust of 1825 is to receive effect. If it does receive effect there is a sum of £16,000 paid off under the deed of 1843. Taking the deeds of 1825 and 1843 as forming one settlement, this was directed to be paid out of the estates conveyed by the former deed. But it has been paid out of executry, and therefore the executors have a claim against the trustees under the trust of 1825 to be reimbursed. But then the present Earl, as representing the entailed estates of Kelburne and others, says that he is entitled out of the £16,000 so brought back to the executry estate to have the entailed estates relieved of the charges laid upon them for the younger children's provisions. The manner in which the figures stand seems to be this:—There were children's provisions to the amount of £46,000, of which £32,000 was paid or provided for, leaving £14,000. But £16,000 is more than sufficient to pay £14,000, leaving a balance of £2000, and the question is how that is to be disposed of under the deed of 1843. Under that deed the purpose unfulfilled was the setting apart £14,000 for five years, and at the end of that period the payment of £6000 to each of the two younger children and of the balance to *Earl James*. The sum of £2000 remains, upon which the parties are preferable

ari passu. The result is that out of the £16,000 the heir of entail gets £14,600 and Earl James's executors £1400. No. 38.

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The other Judges concurred.

THE following interlocutor was pronounced:—"In answer to the first question (First), Find that by the antenuptial marriage-contract made between George Earl of Glasgow and his spouse, Lady Augusta Hay, in the year 1788, the lands therein specially described were conveyed by the said Earl, and so settled as to confer on the heir of the marriage a *jus crediti*, which the said Earl was not entitled to defeat or prejudice by any gratuitous deed; (Second), Find that James Earl of Glasgow was, on the death of the said George Earl of Glasgow, his eldest son, and as such heir of the said marriage; (Third), Find that the trust-disposition executed by the said George Earl of Glasgow in 1825 was a conveyance of portions of the lands settled by the said antenuptial contract as aforesaid, and was a gratuitous deed made *in fraudem* of the said antenuptial contract of marriage, and to the prejudice of the right of the said James Earl of Glasgow, as heir of the marriage; (Fourth), Find that the said James Earl of Glasgow took no benefit by the said trust-disposition of 1825, and was not personally aware of its existence during his own lifetime, the trust-disponees having been infeft, but not having taken actual civil possession of any part of the lands conveyed to them; (Fifth), Find that the title of the said James Earl of Glasgow, during his life, and the title of his trustees and executors, parties of the third part, after his death, to challenge and set aside the said trust-disposition of 1825, as being made *in fraudem* of the said antenuptial contract, and in prejudice of the right of the heir of the marriage, was and is not cut off or lost by the operation of the negative prescription, for this, among other reasons, that the said James Earl of Glasgow, in the year 1843, and after the death of his said father, made up a title in his own person, as heir of provision under the said antenuptial contract, to the lands contained in the said trust-disposition of 1825, under which he obtained and held possession of the said lands until his death on the 11th March 1869; (Sixth), Find that the trust-disposition of 1825, besides being a trust-conveyance *inter vivos* for payment of certain specified debts, was also, as regards its ultimate purposes and the disposal of the residue of the trust-estate, a *mortis causa* deed; (Seventh), Find that the said trust-disposition of 1825 was not revoked, either expressly or by implication, by the trust-disposition and settlement executed by the said George Earl of Glasgow on the 24th March 1843; (Eighth), Find that the said trust-disposition of 1825 was (subject to a right of challenge by the said heir of the marriage or his representatives) part of the testamentary settlement of the said George Earl of Glasgow, and the said trust-disposition and settlement of 1843 and the said trust-disposition of 1825 were the only unrevoked testamentary deeds left by him, and, taken together, contained a complete disposal of his estate, heritable and moveable; (Ninth), Find that the said James Earl of Glasgow was nominated by the said trust-disposition and settlement of 1843 to be the 'sole residuary heir and executor' of his father, and in that capacity received from the trustees and executors acting under that deed certain sums of money and moveable estate, amounting in all to the value of £1692, 15s., *in* consideration of which he

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discharged the said trustees and executors of their whole intromissions, and bound himself to relieve them of all claims against his said father's estate; (Tenth), Find that the said James Earl of Glasgow thus took benefit by the trust-disposition and settlement of 1843, and might have been thereby barred from challenging any part of the testamentary arrangements of his father, and in particular from challenging the said trust-deed of 1825; but (Eleventh), Find that, having taken benefit under and approbated the testamentary settlements of his said father, in ignorance of the existence of the trust-disposition of 1825, and of his right to challenge the same, the said James Earl of Glasgow would have been entitled, if now alive, and his trustees and executors, parties of the third part, are now entitled, to a right of election either to abide by his approbation of the testamentary settlements of the said George Earl of Glasgow, and to allow effect to be given to the provisions of the trust-disposition of 1825, or to repudiate the said settlements and set aside the trust-disposition of 1825 upon condition of renouncing the benefit taken by the said James Earl of Glasgow, and restoring the funds and property received by him as 'sole residuary heir and executor' under the trust-disposition and settlement of 1843: Therefore find and declare that, in the event of the said parties of the third part electing to abide by the approbation by James Earl of Glasgow of his father's testamentary settlements the residue of the trust-estate created by the said trust-disposition of 2d December 1825 falls to be settled upon the party of the second part, George Frederick Rosse Earl of Glasgow, as heir of entail in possession of the said lands and estate of Hawkhead, in the case mentioned, at the period when the purposes of the said trust-dispositions were fulfilled, and upon the heirs of entail entitled to succeed to the said lands and estate, under all the conditions, restrictions, and declarations of the existing entail of Hawkhead: But find and declare that, in the event of the parties of the third part electing to repudiate the said settlements, and to renounce and restore the benefit taken by James Earl of Glasgow as aforesaid, the residue of the said trust-estate does not fall to be so settled and disposed of. In answer to the second question, find and declare that the party of the second part, the present Earl of Glasgow, has not in any event, as heir-at-law of his father, the said deceased George Earl of Glasgow, absolute right to the said residue, or any part thereof. In answer to the third question, find and declare that, in the event of the parties of the third part, as trustees and executors of James Earl of Glasgow, electing to repudiate, renounce, and restore as aforesaid, they have a preferable right to the said residue. In answer to the fourth question, find and declare that, in the event of the said residue falling to be settled on the party of the second part, the present Earl of Glasgow, and the heirs of tailzie called to the succession of the estate of Hawkhead, as found alternatively in the answer to the first question, the party of the first part is bound to settle the same upon the said second party and the said heirs of tailzie, subject to all the conditions and fetters of the now existing entail of the estate of Hawkhead, dated 24th November 1819, and recorded in the Register of Tailzies the 20th July 1843, and to procure the deed of entail to be executed by him to be duly recorded in the Register of Tailzies, and a proper feudal investiture of the said lands under the conditions and fetters of the said tailzie to be

completed in the person of the said party of the second part. In answer to the fifth question, find and declare that, in the event of the said trust-disposition of 1825 receiving effect, the trustees and executors of James Earl of Glasgow, parties of the third part, are entitled to receive out of the said residue payment of the sum of £16,000, being the amount of debts paid out of the executry estate of the deceased George Earl of Glasgow, the payment of which was specially provided for out of estates conveyed by the trust-disposition of 1825. In answer to the sixth question, find and declare that, in the event of the said sum of £16,000 being paid to the parties of the third part by the party of the first part, the party of the second part is entitled to have the said sum of £16,000 applied to the extent of £14,600, but no further, to disburden *pro tanto* the entailed estates of Kelburne, Kilbirnie, Crawford-Lindsay, and Glengarnock, of the sums of £8000 and £12,000 charged on the said entailed estates by two bonds and dispositions in security executed by the said James Earl of Glasgow on the 18th July 1850; and decern and direct the expenses incurred by the parties to the case to be paid by the first party out of the funds in his hands, as the said expenses shall be taxed by the Auditor of Court."

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HOPE & MACKAY, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

JOHN ERSKINE, Pursuer (Respondent).—*Gloag.*
JAMES LEITCH LANG, Defender (Appellant).—*Balfour.*

No. 39.
Dec. 18, 1872.
Erskine. v. Lang
1ST DIVISION.

rocess—Appeal—Competency—50 *Geo. III. c.* 112—16 *and* 17 *Vict.* 0.—By the 36th section of the Act 50 Geo. III. c. 112, it is enacted ; bills of advocation from the Sheriffs and other inferior Judges shall llowed, *inter alia*, with respect "to an interim decree for partial pay-t," "provided that leave is given by the inferior Judge."

y the 24th section of the Act 16 and 17 Vict. c. 80, it is enacted ; it shall be competent to take to review of the Court of Session, *inter* , "any interlocutor of a Sheriff giving interim decree for payment of ey." By the said section it is also enacted that the provisions of Act 50 Geo. III. c. 112, "are, in so far as inconsistent with this tment, hereby repealed."

eld (after consultation with the Judges of the Second Division) that competent to appeal against an interlocutor of the Sheriff giving rim decree for payment of money, without obtaining his leave.

MUIR & FLEMING, S.S.C.—RONALD, RITCHIE, & ELLIS, W.S.—Agents.

ALLAN HUTCHISON, First Party.—*Lee.*
DAVID HUTCHISON, Second Party.—*Kinnear.*

No. 40.
Dec. 20, 1872.
Hutchison v. Hutchison.

estination—Conditional Institute.—The granter of a *mortis causa* settlement med his heritable estate "to the heirs of my own body equally among them, and share alike, whom failing, to A, B, C, and D, equally among them, and share alike, and their respective heirs in fee." The granter died without leaving any heirs of his body, and the settlement was found in his reposi after his death. *Held* that A, B, C, and D were conditional institutes, not substitutes, and had right to the property as disponees, without service eclarator.

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Dec. 20, 1872. Hutchison v. Hutchison.

Destination—Conditional Institute or Substitute—Service.—Opinion (per cur.) that when a person by *mortis causa* conveyance in the ordinary form disponed to the heirs of his body, or the heirs-male of his body, whom failing, to a person named, the person so named (there being no heirs of his body then existing) is a conditional institute; and if no heirs of the body of the granter come into existence, or existing, predecease him, the condition is purified, and the person named is, on the death of the granter, without qualification or condition, disponee, and as such is entitled to use the executory clauses of the disposition for the purpose of feudalising his right as disponee without service or declarator.

Observations on the cases of Gordon of Carleton, M. 14,366—14,368; and Peacock v. Glen, 4 S. 742.

1st Division, with four consulted Judges. B.

THIS special case was presented by Allan Hutchison of the first part, as immediate younger brother of the late Robert Hutchison, and as such his heir of line, and David Hutchison of the second part, the immediate elder brother of the late Robert Hutchison, and as such his heir of conquest.

The following facts were set forth in the special case:—By *mortis causa* settlement John Gilmour disponed his heritable estate to his mother in liferent, and "to and in favour of the heirs of my own body, equally among them, share and share alike; whom failing, to and in favour of David Hutchison, Robert Hutchison, Allan Hutchison, and James Hutchison, my brothers uterine, equally among them, share and share alike and their respective heirs, under a certain burden of a liferent annuity of £90 . . . . in fee and property."

The deed remained undelivered in the granter's repositories till his death, which took place on 21st November 1861.

The said John Gilmour died without heirs of his body, never having been married. He was survived by his mother, Mrs Barbara Gilmour or Hutchison, who is still alive, and also by the said David Hutchison, Robert Hutchison, Allan Hutchison, and James Hutchison.

On 8th January 1872 a service was expede in favour of the said David, Robert, Allan, and James Hutchison, as heirs of provision in general to the said deceased John Gilmour, but prior to the service Robert Hutchison had died abroad (in April 1871). He died without issue, and intestate.

The heir of line to the said Robert Hutchison was his immediate younger brother, the said Allan Hutchison, the first party. His heir of conquest was his next elder brother, the said David Hutchison, the second party. At the date of Robert Hutchison's death no title had been completed to the lands.

The question submitted for the opinion and judgment of the Court was whether the first party or the second party was entitled to the *pro indiviso* share of the lands which was destined to the deceased Robert Hutchison and his heirs.

David Hutchison argued;—No one ever existed who could have taken under the deed before the brothers, and therefore there was no need of service. The deed operated as a direct conveyance of the personal right which vested in Robert Hutchison. There was no conveyance to the granter himself, and on his death the beneficiaries took as disponees, and not as heirs.[1]

Allan Hutchison argued;—The granter of the deed was fiar, and the

[1] Colquhoun v. Colquhoun, July 8, 1831, 9 S. 911, Lord Craigie's opinion; Fogo v. Fogo, Aug. 18, 1843, 4 D. 1063, 2 Bell's App. 195, Ross's Leading Cases, ii. 36; Gordon of Carleton v. His Creditors, M. 14,366—14,368; Mackenzie v. Mackenzie, Session Papers, F.C. 1818-19, No. 190; Peacock v. Glen, June 22, 1826, 4 S. 742.

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others merely substitutes. Robert Hutchison not having served, no right vested in him, and on his death the succession opened to his heir of line under the destination.[1]

The Court appointed the case to be argued before seven Judges.

The hearing took place before the First Division, and Lords Cowan, Benholme, Neaves, and Mackenzie.

At advising, the opinion of the Court was delivered by the

LORD PRESIDENT.—The facts of this case admit of being very shortly stated. John Gilmour by *mortis causa* deed disponed the fee of his heritable estate to "the heirs of my own body, equally among them, share and share alike; whom failing, to and in favour of David Hutchison, Robert Hutchison, Allan Hutchison, and James Hutchison, my brothers uterine, equally among them, share and share alike, and their respective heirs" (under a certain burden), "in fee and property." The deed remained in the granter's repositories, undelivered, till his death. He died without ever having had heirs of his body, and was survived by his four brothers uterine. A service was expede in their favour as heirs of provision in general to the deceased, but before the service was carried through Robert Hutchison died, without issue and intestate, and the service, so far as his right was concerned, was therefore inept.

Robert Hutchison having died without making up any title, a competition has arisen between his heir of line and his heir of conquest, and the question to be determined is, whether the said Robert Hutchison took the fee of the said one-fourth part as heir or as disponee.

The heir of conquest maintains that the only persons called before the four brothers Hutchison, viz. the heirs of the testator's body, never having come into existence, the disposition took effect on the testator's death directly in favour of the Hutchisons as conditional institutes and disponees. But the heir of line maintains, on the contrary, that the effect of the conveyance to the heirs of the granter's body, as the first branch of the destination, was to make the granter himself the institute in the destination, and all the other parties called heirs-substitute to him in any event.

Apart from authority, and dealing with the question as depending on legal principle only, the considerations in favour of the heir of conquest seem greatly to predominate. A *mortis causa* deed remaining undelivered in the hands of the granter produces no change on the title of the property conveyed. The granter being infeft remains the undivested proprietor in fee, and the usual clause in such deeds reserving the granter's liferent is intended only to provide for the contingency of the deed being delivered during his life. The other usual clause, dispensing with delivery of the deed, though found undelivered in the granter's repositories after his death, makes it a delivered deed, or gives it the effect of a delivered deed immediately upon his death. Though therefore the disposition is in form a conveyance *de præsenti*, as every conveyance of heritage (but for a recent statute) must be, still, if it remains undelivered, it is ambulatory, revocable, and absolutely inoperative as much as a testament nominating an executor, till the granter's death gives it the effect of a delivered deed. During his own life the granter of such an undelivered deed plainly takes nothing as his own disponee, his original title being entirely undisturbed and unaffected. Just as little can he take anything in that character after his own death. No doubt, if the granter conveys to himself *nominatim* as the first member of a destination, the well settled rules of conveyancing have fixed that any one who takes after him takes as his heir of provision, and this is not an unreasonable construction of such a disposition, which is read as equivalent to a resignation in favour of himself and a series of heirs. But it seems a violent and unnatural extension of that rule to say that the only disponee must still be the granter himself, where

[1] Gordon of Carleton v. His Creditors, *supra*; Peacock v. Glen, *supra*; Bell's Prin. 1834-39; Menzies (3d edit.), p. 795; Montgomery Bell's Lect. p. 1022; Anderson v. Anderson, June 22, 1832, 10 S. 696, note, p. 701; Bell's Illustr. ii. 425-8.

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the conveyance is simply from him to another party, whether that party be a person named or the heirs of his own body, or any other class of heirs *nascituri*. It may also be possible in particular dispositions, where the granter does not expressly name himself as disponee or first member of the destination, nevertheless to construe the words used as importing the same thing, and expressing the intention of the granter that no person or class named in the destination shall take otherwise than as heirs-substitute of provision to him. But it seems impossible, according to sound principle, to put such a construction on a destination directly to the heirs of the granter's body, non-existent but possible, whom failing, to A, B, and C, where there is nothing else in the deed to lead to such a construction.

It must now be held as settled for all practical purposes that, when by a *mortis causa* undelivered disposition the conveyance is directly to A *nominatim*, whom failing to B, and A predeceases the granter, B takes as conditional institute and not as heir either of A or of the granter. If this be so, it is difficult to understand how the circumstance that instead of a person named, the heirs of the granter's body are first called, should vary the character of the person called in the second place in the destination, when upon the granter's death it is found that no heirs of the body ever existed, and there is no one to stand between the person second named and the estate conveyed.

This case derives its chief importance from the prevalence of an opinion among conveyancers and writers on the practice of conveyancing that the law applicable to such a destination as here occurs is so unsettled and uncertain that it is necessary in prudence so to complete the title of parties standing in the position of the brothers Hutchison as to be valid on either supposition, that there are heirs of the granter or conditional institutes. Some writers have stated the law to be as contended by the heir of line in this case. Among others, Professor Bell in his Principles says (sec. 1839) "When the disposition is to the granter's heirs-male or heirs of the body, whom failing to A, whom failing to B, and the granter survives such heirs and A predeceases, it has been held that the fee is still in the granter, and that B's title is to be made up by service as heir of provision to the granter." This doctrine (which is repeated by the late Professor Menzies in his Lectures on Conveyancing, p. 795, 3d ed.) is founded entirely on the authority of two cases, Gordon of Carleton's Creditors v. Gordon, M. 14,368, and Peacock v. Glen, 4 S. 742, both of which have been a good deal misunderstood.

Kilkerran's report of Gordon of Carleton (though it is more accurate in the statement of the facts than Falconer's) is unfortunately rather meagre. All that can be safely gathered from it is that the deed having disponed the lands to the heirs-male of the granter's body, whom failing to John, whom failing to Nathaniel, and the granter having died without heirs-male of his body, and John having predeceased him, and Nathaniel having served heir of provision in general to the granter, it was objected, in a competition, that he should have served not to the granter but to John, whom the objector called the institute. The decision was that the title was good, because "plainly there was no right ever in John, the first substitute, that could be carried by a service." So far only Kilkerran's report carries our knowledge of the case, and leaves it in doubt upon what ground the Court held the title to be good, as made up by general service to the granter, though it leaves no doubt that the ground of objection urged against the title was bad, viz., that Nathaniel ought to have served heir to John.

As might have been expected, this judgment has been variously interpreted. In the case of Colquhoun v. Colquhoun, 8th July 1831, Fac. Coll., the consulted Judges (Lords J.-C. Boyle, Glenlee, Cringletie, Meadowbank, Corehouse, Mackenzie, Medwyn, Moncreiff, Newton, and Fullerton) state that in the case of Gordon of Carleton "Nathaniel served to the entailer, and that was held sufficient, not certainly because the service transmitted any right from the entailer to Nathaniel, but because it afforded evidence that both the entailer and John Gordon had died without male-heirs, and consequently that the conditional institution in favour of Nathaniel had taken effect." Had this exposition of the ground of judgment in the Carleton case been confirmed, or had it passed

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unquestioned, it would probably have been held to settle the law adversely to the doctrine laid down by Professor Bell and Professor Menzies. But within less than a year—in the course of the arguments in Anderson v. Anderson, June 22, 1832, 10 S. 701—there was brought to light for the first time, by the research of Dean of Faculty Hope, a note by Lord Drummore, on his session papers in the case of Carleton, in the following terms:—"In this case the Lords thought the case the same as if the disposition had been to himself, and failing him by his decease, to his heirs-male. The fee in both cases was absolutely in the disponee, and the decision was unanimous." As to the value of this note, it must be observed, in the first place, that Lord Drummore was on the bench at the date of the judgment, and probably took part in it; and, in the second place, that he was *omnium consensu*, an acute and able Judge, worthy to be the son of the President Sir Hugh Dalrymple, and the grandson of Lord Stair. Generally speaking, no great importance is to be ascribed to loose notes on session papers, even if proved to be in the handwriting of eminent Judges, because there is seldom any reliable evidence that they express the ultimate opinion of the writer, and they may well be either a statement of the result of a first judgment, afterwards altered on reclaiming petition, or notes preparatory to an advising, which may never have taken the form of an opinion, and may, after farther consideration, have been discarded as unsound. But this note of Lord Drummore bears internal evidence of being something much more valuable. It is unmistakably a statement of the import of a unanimous judgment of the Court, and it appears from the session papers of Lord Drummore himself, as well as from those in the Arniston Collection, that there were, presumably at least, no further written arguments on this branch of the Carleton case, and therefore (as we may safely infer from the practice of that time) no attempt to reclaim against or disturb the unanimous judgment. This contemporary authority is preferable to the conjectural explanation of the case given in Colquhoun v. Colquhoun, notwithstanding the great weight of the names subscribed to the opinion of the consulted Judges. Accordingly, in the later case of Fogo v. Fogo, 2 D. 681, the whole Judges, who referred to the case of Carleton, preferred the explanation of Lord Drummore to that of the consulted Judges in Colquhoun v. Colquhoun.

But it does not by any means follow that the Carleton case establishes as a universal or even general rule that a destination to the heirs of the granter's body, whom failing to a person or persons named, is equivalent to a destination to the granter himself *nominatim*, and the heirs of his body, whom failing to a person or persons named. There is nothing in the report of Lord Kilkerran or in the note of Lord Drummore to warrant this sweeping conclusion; and a careful examination of the deed, upon the construction of which the judgment depended, leads to an opposite inference.

The disposition by James Gordon of Carleton, which is, or is intended to be, a strict entail, proceeds on a recital of "the love and favour I bear to the heirs-male lawfully to be begotten of my own body, and the heirs-male *a stirpe in stirpem successive*, whilk failing to the persons after mentioned, my friends and relatives, whom I hereby nominate and appoint to succeed as heirs of tailzie and provision to me in my land and estate under-written, after my decease." The destination is "to and in favours of the heirs-male lawfully to be gotten of my own body, and their heirs-male *a stirpe in stirpem successive*, whilk failing to the persons after mentioned, whom I hereby nominate and appoint to succeed to me as my heirs of tailzie and provision therein to me, and their heirs-male lawfully gotten, or to be gotten, of their own bodies, whilk failing to any other person or persons I please to nominate and design under my hand at any time during my lifetime *ac etiam in articulo mortis*, and the heirs-male gotten or to be gotten of their own bodies, to succeed as heirs of tailzie and provisioun to me therein," &c. There then follows a procuratory of resignation, which authorises resignation to be made in favour of "the heirs-male lawfully to be gotten of my own body, and their heirs-male *a stirpe in stirpem successive*, whilk failzeing, to John Gordon, third lawful son to umquhile Mr William Gordon of Carlestoun, whom I specially burden with this provision, that Nathaniel Gordon of Gordon-

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stoun be sole tutor to him during his minority, and have elected and nominated him to that effect; and appoints the said Nathaniel Gordon the next substitute in this tailzie failzeing the said John, whilk failzeing to John Maitland," &c.

It seems by no means an unreasonable construction of this deed to hold that there was no intention on the part of the granter to make any party a disponee, and that the effect of the deed is to create merely a succession of heirs without any such conveyance as will have the usual effect of converting a substitute into an institute in the event of the institute and the other prior members, if any, of the destination predeceasing the granter. The dispositive clause does not name any persons, but conveys the estate only to the heirs-male of his body, and failing them, to persons who are most carefully and anxiously described more than once as "heirs nominated and appointed to succeed to me." There is no precept of sasine. Any feudalisation of right conferred by the deed must therefore be by resignation, and it is particularly to be noted that in the procuratory of resignation Nathaniel (whose right to the estate was sustained in respect of his general service as heir of provision to the granter) is mentioned only under this form of expression, after John Gordon, "and appoints the said Nathaniel Gordon the next substitute in this tailzie failzeing of the said John." Without mention of his name in the dispositive clause, and with this very peculiar mention of him in the procuratory of resignation, and with no precept of sasine which he could in any event use, it was not wonderful that the Court should deal with Nathaniel as a party who could in no event occupy the position of an institute or disponee, particularly as the only objection taken to his service as heir of provision to the granter of the deed was that he ought to have served to John Gordon as the first party called *nominatim* in the destination—an objection unfounded in the circumstance of the case, but indicating that the objector considered himself precluded by the terms of the deed from representing Nathaniel as in any sense or in any event a conditional institute or disponee.

This seems the most reasonable and consistent explanation of the judgment in the case of Carleton, and it derives much support from the information and suggestions contained in an opinion of Lord Craigie in Colquhoun v. Colquhoun—an opinion in many respects of great weight in this branch of the law. His Lordship says—"It had been provided by the entail of Carleton that the person there called *nominatim* might be served heirs of tailzie to the entailer; and Lord Kilkerran's interlocutor, to which the Court adhered, appears to be chiefly rested on that specialty. The judgment is not recited in the report, probably because the collection was not originally intended for publication, but it is in the words—'Having advised the minute of debate, and considered the disposition and tailzie, finds the title properly made up by Nathaniel Gordon to James Gordon the maker of the entail.'"

For the reasons now stated and explained, the decision in Gordon of Carleton cannot be held to establish that a party called *nominatim* under a destination after the heirs of the granter's body, and without any disposition or other conveyance in favour of the granter himself, does not on the death of the granter without heirs of his body become institute and disponee. In certain exceptional circumstances, and according to the terms of such a deed as the Carleton entail this result may be produced; but nothing short of such exceptional circumstances and expressions of the deed can interfere with the general rule that the first substitute becomes institute upon the institute predeceasing the granter without heirs, or with the application of that rule to such a destination as occurs in the present case.

The other case relied on by the heir of line, Peacock v. Glen, has been also the subject of a good deal of criticism, and also of a good deal of misunderstanding.

In the first place, it must be observed that in Peacock v. Glen the whole controversy regarded the completion and validity of a feudal title, while in Gordon of Carleton the question turned on the vesting of a personal right of fee in Nathaniel Gordon, to enable him to dispone to his eldest son. The finding of the Court was by a majority that "there was no proper feudal title in the per-

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of William Beatie junior at the date of the bond in security in question," therefore they reduced the bond and infeftment thereon.

In the second place, the defect of the feudal title of William Beatie junior existed in the imperfection of the sasine in his favour, in respect of failure to comply with the requisites of the Act 1693, c. 35. This is the only ground of judgment stated by Lord Glenlee, and Lord Robertson, who concurred with him. Lord Alloway dissented from the judgment, holding the feudal title of William Beatie junior to be unobjectionable. The Lord Justice-Clerk and Lord Pitmilly no doubt proceeded to a certain extent on the supposed authority of the case of Carleton. The destination in Peacock v. Glen was to the heirs of the granter's body, whom failing to William Beatie his nephew, and on the death of the granter without issue, William Beatie took infeftment on the precept of sasine contained in the disposition, without service or any other preliminary to connect himself therewith. The two Judges last named held that this title was bad for want of such service, proceeding on what may now be assumed to be a misunderstanding of the case of Gordon of Carleton. But this was certainly not the opinion of the majority of the Court. The case of Peacock v. Glen cannot therefore be relied on as either following the case of Carleton, or as a case in which the principle of that case was accurately ascertained and understood.

The cases of Gordon of Carleton and Peacock v. Glen are not authorities for the heir of line, and authorities of undoubted weight and application as understood and expounded by Professor Bell and Professor Menzies, the whole intention of the heir of line fails. It is based on a rule of construction supposed to be established by these cases, which is in the highest degree artificial and which, by ascribing a non-natural sense to words of plain meaning, would convert a *de præsenti* conveyance of lands into a mere nomination of heirs, with executory clauses for completing the titles of those heirs who may invest themselves therewith by service. This is a perversion of all the ordinary rules of construction of such deeds, and is calculated, as it has been found in practice, to introduce great confusion and uncertainty in the operations of conveyances.

The Court are of opinion that when one by *mortis causa* conveyance in the ordinary form dispones to the heirs of his body, or the heirs-male of his body, whom failing to a person named, the person so named (there being no heirs of the body then existing) is conditional institute; and if no heirs of the body of the granter come into existence, or existing, predecease him, the condition is purified, and the person named is, on the death of the granter, without qualification or condition, disponee, and as such is entitled to use the executory clauses of the disposition for the purpose of feudalising his right as disponee without service or declarator.

The judgment must therefore in this case be pronounced in favour of the heir of conquest and against the heir of line of Robert Hutchison.

THE COURT pronounced this interlocutor:—"In conformity with the opinion of all the seven Judges present at the said hearing, Find and declare that David Hutchison, the heir of conquest to the deceased Robert Hutchison, his brother, has right to the *pro indiviso* share of the lands of Walton, Malletsheugh, and others destined by the disposition and deed of settlement in the case mentioned, to the said deceased Robert Hutchison and his heirs, and decern; and find no expenses due."

HAMILTON, KINNEAR, & BEATSON, W.S.—MACALLAN & CHANCELLOR, W.S.—Agents.

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Dec. 20, 1872. Tough v. Dumbarton Water-Works Commissioners.

CHARLES TOUGH, Pursuer.—*Watson—Campbell Smith.*
THE DUMBARTON WATER-WORKS COMMISSIONERS, Defenders.—*Sol.-Gen. Clark—Asher.*

Arbiter—Process—Defence—Contract—Clause of Reference.—*Held* that an action raised by a contractor against his employer for payment due under a building contract, and for damages from his employer having, as he alleged, illegally taken possession of machinery and materials, was not excluded by a clause of reference in the contract, in respect (1) that it was not clear that the clause of reference gave the arbiter authority to give decree for payment of money; (2) that certain of the questions raised did not fall within the reference; and (3) that the arbiter could not assess damages.

Observed, that if questions arose in the course of the action falling within the reference, the aid of the arbiter must be invoked.

1st Division. Lord Mure. M.

IN August 1869 Charles Tough, contractor, Govan, entered into a contract with the Dumbarton Water-Works Commissioners, by which he undertook to construct a reservoir, and execute other works in connection with the water supply of the burgh of Dumbarton. This contract contained the following clause of reference:—"And in the event of any doubts, disputes, or differences arising concerning the said works, or relating to the quantities or qualities of the several materials to be employed, or to any additions, deductions, alterations, or deviations made in or from the said works, or any part or portion thereof, or concerning the true intent and meaning of these presents, or any of the plans, drawings, or instructions hereinbefore referred to, or in any other matter or thing connected therewith, either during the progress of the works or after the completion thereof, all such doubts, disputes, or differences, shall be, and the same are hereby, submitted and referred to the amicable decision, final sentence, and decree-arbitral, of the said James Morris Gale, whom failing, &c.: Declaring that although the said James Morris Gale may continue and remain the said first parties' engineer, such connection shall not disqualify him from acting as arbiter in the premises, and his decision shall be as unchallengeable as if he were solely unconnected with the said first parties or the said works; and declaring that this submission shall not expire by reason of the lapse of year and day before the decision, interim or final, to be pronounced herein; but that notwithstanding this declaration the arbiter shall have power to prorogate the same from time to time as he may think proper; and the whole parties hereto consent to the registration hereof, or of any interim or final decreet-arbitral that may follow upon the submission herein contained, for preservation and execution."

The contract also contained the following clause:—"Fifteenth, Should it appear at any time to the first parties, upon the representation of their engineer, that the second party is not performing the several portions of the work in a satisfactory manner, or is not using sufficient diligence in carrying on the works so as to have them completed by the time stipulated for, or should the second party become bankrupt or insolvent, then, on giving seven days' notice to him, or any of his foremen, the first parties shall have the option and power of taking possession of the whole or any part of the work, and of carrying on and completing the same, and for that purpose to take and use the plant, tools, and materials of the second party, and to sell and dispose of the same as the absolute property of the first parties." Mr Gale was engineer for the Water-Works Commissioners.

In October 1870 Mr Tough entered into a second contract with the commissioners for removal of peat from the bottom of the reservoir. This contract contained no clause of reference.

In June 1872 the present action was brought by Mr Tough against the

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mmissioners for recovery (1) of £152, 7s. 3d. as the balance of the contract price of the work alleged to have been executed by him under the ntract of 1869; (2) of two sums of £79, 16s. and £742, 1s. 2d. due to him in connection with the contract for removal of peat entered to in October 1870; (3) of a sum of £500 as damages for alleged improper appropriation of the plant belonging to the pursuer; and (4) of other sum of £500 as damages said to have been occasioned by the ilure of the defenders to give the pursuer immediate access to the ound, according to the fair meaning of the contract.

With reference to his claim for damages, the pursuer averred,—(Cond. "In or about July or August 1871 the defenders, without any reason, d without any legal authority whatever, seized the pursuer's plant, and propriated it to their own purposes, and have retained possession of it er since; and at said date they also took the contracts out of his hands." The defenders' answer to this article was,—(Ans. 7.) "Denied, and ference made to defenders' statement. The pursuer voluntarily resigned s contract."

The defenders stated,—(Art. 8.) "In the early part of June 1871 it came apparent that the means the pursuer was taking for disposing of e peat were insufficient, and on the 28th of that month the commissioners received a letter from Mr Gale dated that day, which is herewith oduced, stating that the pursuer had failed to implement his contract removing the peat, and that at the rate at which the pursuer was proding there was no prospect of the reservoir being in a state to be used en to a partial extent during the then approaching winter, and that it ould be necessary to take the work out of the pursuer's hands, and to ake new contracts for its completion. In consequence of this communication the commissioners arranged a meeting with the pursuer, which ok place in Glasgow on 1st July 1871, and the result of that meeting s that on 4th July 1871 the pursuer addressed a letter to the commissioners voluntarily renouncing both contracts." (Art. 9.) "The said letter m the pursuer was considered at a meeting of the commissioners held 7th July 1871, when they agreed to accept of said renunciation, reving the rights of both parties, and under an express denial of an egation made by the pursuer that he was able and willing to proceed th the contracts in terms thereof, or that he had hitherto complied with e terms of the contracts. This resolution was communicated to the purer by letter of Mr Denny, clerk to the commissioners, dated 8th July 71. The pursuer's letter, and a copy of Mr Denny's reply, are herewith oduced. When the pursuer gave up the contracts he had a considerable rtion of the work under the first contract to perform, and the execution it has been contracted for by another contractor, at a cost of between 00 and £1000. The inability of the pursuer to complete his contracts s occasioned serious loss to the commissioners, both on account of the lay caused, and the greatly increased price of labour. At the completon of the works, there will be a large sum due by the pursuer to the mmissioners."

The pursuer further averred,—"It was part of the contract between e pursuer and the said commissioners that the former should execute e work within fifteen months from the date of the acceptance of his fer, and he entered into the contract on the faith of his being able to et immediate access to the ground. According to the fair meaning of e contract the pursuer was entitled to immediate access to the ground, t the defenders wrongfully failed till April 1870, a period of upwards f seven months from said acceptance, to give the pursuer access to the round, other than that on which the filter had to be constructed. The

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pursuer was thereby prevented from taking up the work simultaneously, and from getting the work done in the winter months necessary to prepare the ground for the embankment being completed in summer. In consequence of the delay, the work was thrown into winter which should have been done in summer, when it could have been done at much less cost."

The defenders pleaded;—(2) The action is excluded by the clause of reference in the said contract, and ought therefore to be dismissed.

On 16th November 1872 the Lord Ordinary pronounced this interlocutor:—"Finds that the first plea in law for the defenders has been obviated by the addition made to the summons at the debate: Finds, with reference to the second plea in defence, that the action is not excluded by the clause of reference in the contract, No. 10 of process, in so far as the action relates to claims arising out of the contract entered into between the parties in October 1870 relative to the removal of peat from the reservoir; and, before further answer, sists process for ten days, that parties may ascertain whether Mr Gale is prepared to accept the submission made to him by the contract, No. 10 of process, in relation to the other claims sued for; and, upon that being done, appoints the case to be put to the roll for further procedure, reserving all questions of expenses."

* NOTE.—(After narrating the sums claimed by the pursuer as above)—"With reference to all these claims it is contended, on the part of the defenders, that the action is excluded by the clause of reference founded on in defence, which provides that 'all doubts, disputes, or differences arising concerning the said works, or relative to the quantities or qualities of the several materials to be employed, or to any additions, deductions, alterations, or deviations made in or from the said works, or any part or portion thereof, or concerning the true intent and meaning of these presents, or any of the plans, drawings or instructions hereinbefore referred to, or in any other matter or thing connected therewith, either during the progress of the works or after the completion thereof, shall be, and the same are hereby, submitted and referred to the amicable decision, final sentence, and decree-arbitral of the said James Morris Gale, whom failing by death, non-acceptance, resignation, or otherwise, of any arbiter to be named by the Sheriff of Dumbartonshire, upon the application of either party, as sole arbiter in the premises, whose decision and valuation and award shall be final.'

"(1) This clause is one of a very broad and general description, and it appears to the Lord Ordinary that the decision of the question raised, relative to the final of the sums sued for, is covered by its terms. The sum is claimed as the balance of what is said to be due for work done under the original contract, and the defence, as the Lord Ordinary understands it, is that the work stipulated to be done by the pursuer, and for which the contract price was to be paid, was not completed at the date when the pursuer agreed to give up the contract, that the defenders had to get another contractor to complete the work at a cost of about £900, and that, under the provisions of the contract founded on, they were entitled to set off that sum against the sum now claimed by the pursuer as the alleged balance of the contract price. The dispute, therefore, is one which relates to the execution of the work, and the true intent and meaning of the contract, in the strictest view which has been taken in the reported cases of clauses of reference of this description, and as to which, therefore, the jurisdiction of this Court has, in the opinion of the Lord Ordinary, in this case been excluded.

"(2) But the question raised relative to the removal of peat is in a different position. This was not part of the original contract in which the clause of reference occurs, but was made matter of separate agreement in October 1870, under the specification and letters of offer and acceptance, Nos. 14 and 15 of process, and the Lord Ordinary has been unable to adopt the view contended for by the defenders, that it was a mere extension or alteration of the original contract, and as such subject to the same regulations and provisions. For in the specification to which the pursuer's offer relates no stipulation is made that the

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ale having intimated that he was quite willing to go on with the ion, the Lord Ordinary pronounced the following interlocutor:— ord Ordinary, having heard counsel on the motion of the defenders the action dismissed in so far as it relates to the sums sued for, han those applicable to the contract for excavation of peat, in that Mr Gale is ready to accept the reference made to him under tract, No. 10 of process, finds that the action is excluded by the of reference, in so far as regards the £152, 7s. 3d. claimed as due under the original contract price of the works, and 2d, the ns, each of £500, claimed in name of damages under the summons; the parties a proof of their averments applicable to the removal of it from the reservoir, and to each a conjunct probation; appoints of to be taken before the Lord Ordinary on Thursday, the 9th day ary 1873, at half-past ten o'clock; and grants diligence for citing es and havers: *Quoad ultra* sists process until the result of the n raised in this action relative to the removal of the peat." *

pursuer reclaimed, and argued;—(1) The pursuer's claim for money ler the first contract was not a matter within the province of the because he had no power to pronounce an award for money. If estion had been as to the manner in which the work had been

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of the peat shall be subject to those provisions, and the offer and ice of the new contract contains no reference to the original agreement. l, moreover, as the Lord Ordinary conceives, have been quite open to uer to decline to execute this separate contract, and to the defenders to o accept the pursuer's offer, had the rates appeared to them too high, ave taken in offers from other parties; and the mere fact that they gave uer the refusal of the contract cannot, it is thought, be held to bring it he stipulation of the original agreement.

The Lord Ordinary, having regard to the decision in the case of Pearson, ruary 1859, has felt the question relative to the claims of damage to be l with considerable difficulty, but as the clause of reference in the present nuch more comprehensive in its terms than the clause founded on in the Pearson, and is framed so as to cover not only all disputes or differences oncerning the works, or the true intent and meaning of the contract, but those which may arise concerning 'any other matter or thing connected' e contract, the Lord Ordinary has come to the conclusion that it is so as to exclude the jurisdiction of this Court relative to the damages here ; because, 1st, the question raised relative to the alleged illegal taking on of the plant depends upon the application of the 18th section of the con- id upon whether the progress and condition of the works at the time was to render it necessary and proper for the defenders, on giving due notice to uer, to take possession of the works and of the plant with a view to their ion in terms of the contract; while, 2d, the claim of damage founded on ged delay in getting possession of the ground is, it is thought, one which be regulated by the provisions of the contract relative to the extension ime for its completion. And both of these are questions relative to the of the contract and its execution which it is not unreasonable to sup- parties would intend, by such a clause as that here in question, to refer uperintending engineer.

ore, however, pronouncing any finding to the effect that action is to any xcluded, the Lord Ordinary has thought it right to sist process in order ain whether the referee named is prepared to accept."

NOTE.—As the sum claimed as the balance for work done under the contract is slumped up in the conclusions of the summons with the sums under the contract for removal of the peat, the Lord Ordinary has it better not to dismiss the action relative to those items of the pursuer's which he considers covered by the reference till he is in a position to finally of the question raised relative to the removal of the peat."

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done, the Court might have remitted to the arbiter, but there was no such question here, but merely a claim for a debt due, which was a matter for the decision of the Court alone.[1] (2) The arbiter had no power to assess damages, unless such power was expressly given him in the reference.[2]

Argued for the defenders;—The subject-matter of the action was within the clause of reference, as all matters connected with the contract were there referred to the arbiter.[3] The defence to the pursuer's claim for £152 under the first contract was that he had broken the contract, and it was certainly for the arbiter to say whether he had broken the contract or not. As to the claims for damages, they were also for the arbiter, for the clause of reference was very wide, and included anything done in reference to the contract.

At advising,—

LORD PRESIDENT.—In this case the pursuer, Mr Charles Tough, sues the Dumbarton Water-Works Commissioners for various claims arising out of two contracts which they entered into with him, one for the construction of a reservoir, and the other for the removal of a quantity of peat from the basin of the reservoir. The first contract was entered into in August 1869, and the other in October 1870. The first of these contracts, that for the construction of the reservoir, contains a clause of reference. The second contract, being made merely in the form of a specification, with letters of offer and acceptance, contains no such clause. When the case first came before the Lord Ordinary, his Lordship on 16th November 1872, found that the action was not excluded by the clause of reference, in so far as the action related to claims arising out of the contract entered into between the parties in October 1870 relative to the removal of peat from the reservoir, and before further answer sisted process for ten days, that the parties might ascertain whether Mr Gale was prepared to accept the submission made to him by the contract, in relation to the other claims sued for. Mr Gale intimated that he was quite willing to go on with the arbitration. In consequence, the Lord Ordinary, having again heard parties, pronounced an interlocutor on 3d December 1872, in which he "finds that the action is excluded by the clause of reference, in so far as regards the £152, 7s. 3d. claimed as balance due under the original contract price of the works, and the two sums, each of £500, claimed in name of damages under the summons." But he did not dismiss the action, and he explains his reason, that he thought it better to have a proof, in order to see how much of the claims fell under the first contract, and how much under the second; and he accordingly allowed the parties a proof of their averments applicable to the removal of peat from the reservoir.

I am not able to agree with the Lord Ordinary in the course which he has taken. I do not think that this action is excluded by the clause of reference in regard to any of the claims. It may be that questions may arise in the course of the action, which may fall under the scope of the reference, and if so, the aid of the arbiter must be invoked. It is only to that extent that the jurisdiction of the ordinary tribunals is excluded. This contract does not arm the referee, as scarcely any such contracts do, with sufficient judicial powers finally to adjudicate on the claims of parties. The clause of reference is in these terms:—"And in the event of any doubts, disputes, or differences arising concerning the said works, or relating to the quantities or qualities of the several materials to be employed, or to any additions, deductions, alterations, or deviations made in or from the said works, or any part or portion thereof, or concerning the true intent and meaning of these presents, or any of the plans, drawings, or instructions hereinbefore referred to, or in any other matter or thing connected therewith

[1] Caledonian Railway Co. v. the Greenock and Wemyss Bay Railway Co. Oct. 13, 1871, *ante*, vol. x. 892.

[2] The Aberdeen Railway Company v. Blaikie Brothers, June 17, 1852, 1 Jur. H. of L., 537.

[3] Pearson v. Oswald, Feb. 4, 1859, 21 D. 419.

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either during the progress of the works or after the completion thereof, all such doubts, disputes, or differences, shall be, and the same are hereby, submitted and referred to the amicable decision, final sentence, and decree-arbitral of the said James Morris Gale, whom failing, &c.: Declaring that although the said James Morris Gale may continue and remain the said first parties' engineer, such connection shall not disqualify him from acting as arbiter in the premises, and his decision shall be as unchallengeable as if he were solely unconnected with the said first parties or the said works; and declaring that this submission shall not expire by reason of the lapse of year and day before the decision, interim or final, to be pronounced herein; but that notwithstanding this declaration the arbiter shall have power to prorogate the same from time to time as he may think proper; and the whole parties hereto consent to the registration hereof, or of any interim or final decreet-arbitral that may follow upon the submission herein contained, for preservation and execution." There is no express power given to the arbiter to decern for a sum of money. Whether that power might be implied it is not necessary to determine. Undoubtedly there is no power given to the arbiter to assess a claim of damages betwixt the parties. The clause is of such nature, that, even supposing the whole merits of a dispute to be for the arbiter, it may and probably will require an action at law to give effect to such claims. It appears to me therefore very unsafe to find that the arbitration clause excludes an action.

When we come to the nature of the claims by the pursuer, the unsoundness of the Lord Ordinary's interlocutor is still more apparent. The first claim is for a balance of £152, 7s. 3d., for work alleged to have been actually performed by him under the original contract, which contains the clause of reference. If the answer were that the work was not done, that would probably be a question for the referee. If any question arose as to the manner of its performance that might also be for the referee to decide. But in order to raise a question of that kind some such defence must be stated. I cannot find any objection to payment of this balance, except on the ground of a counter claim of damages on the ground that the contractor deserted his contract and left the defenders to finish the work at an expense of £900 or £1000. That is the only defence, so far as I can see, stated against this claim. Unless the question can be raised so as to bring the defenders' counter claim for loss and damage within the reference I do not see how the claim for £152, 7s. 3d. by the pursuer can be disposed of by the referee.

In regard to another small claim for £79, 16s., it is impossible to say that this falls within the reference, and the Lord Ordinary does not consider it to be so.

Then comes a claim for £742, 1s., which is plainly within the second contract, and cannot fall under the reference.

There remain the two claims of damages for £500 each. I observe, in the first place, that even if the grounds of damages were for the referee, and he alone was entitled to affirm or negative these grounds, the assessment of damages would not be for the referee, and so the action would not be excluded.

But one of these claims is plainly not within the reference. In the 7th article of his condescendence the pursuer avers,—"In or about July or August 1871 the defenders, without any reason, and without any legal authority whatever, seized the pursuer's plant, appropriated it to their own purposes, and have retained possession of it ever since; and at said date they also took the contracts out of his hands. The said seizure and breach of contract were wholly wrongful and unwarrantable. The pursuer has suffered loss, injury, and damage thereby to the extent of £500 or thereby."

The answer is a denial, under reference to the defenders' statement. It is important to notice what that statement is. In the 7th article of their statement the defenders complain that the pursuer was not carrying on the works under the original contract in a satisfactory manner. Nevertheless, according to their own shewing, they made a new contract with him in October 1870. They must, at that date, have been of opinion that he was to go on with the original contract. In the 8th article the defenders continue,—"In the early part of June 1871 it became apparent that the means the pursuer was taking for disposing of the peat were insufficient, and on the 28th of that month the commissioners

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received a letter from Mr Gale dated that day, which is herewith produced, s ing that the pursuer had failed to implement his contract for removing the p and that at the rate at which he was proceeding there was no prospect of reservoir being in a state to be used, even to a partial extent, during the t approaching winter, and stating that it would be necessary to take the work of the pursuer's hands, and to make new contracts for its completion. In sequence of this communication the commissioners arranged a meeting with pursuer, which took place in Glasgow on 1st July 1871, and the result of meeting was that on 4th July 1871 the pursuer addressed a letter to the com sioners voluntarily renouncing both contracts."

That letter was received by the commissioners, and they agreed to accep his renunciation. It is plain that this is not a proceeding under the claus the contract of 1869 which authorises the commissioners to take the work of the hands of the contractor. This was a proceeding by which they took contracts out of his hands,—the result, according to the defenders, being the pursuer voluntarily abandoned both contracts, and that is the justific which they plead in answer to his complaint that they illegally seized his p not in one contract only, but in both. It appears to me that this is not a c falling under the clause of reference at all. If the pursuer is right the defen proceedings were illegal and unwarrantable, and not under any clause of c contract. If the defenders are right that the pursuer voluntarily abandone contracts, just as little can the dispute be brought within the clause of refer Their contention makes the question turn on a new agreement embodied in letters of July 1871. On no possible supposition can this claim of damage made the subject of reference under the clause in the contract of 1869.

In regard to the other claim of damages for £500, for failure to give the suer timeous access to the ground, it may be very doubtful whether this is wi the clause of reference. A great deal will depend on the circumstances. It depend on the meaning of the contract, and in that case it will be necessar go to the arbiter. But in any event this claim of £500 cannot be given e to by the referee, and can only receive effect in this or some other Court.

For these reasons it appears to me that the action is not excluded in regar any of these claims by the clause of reference, though it may be that in the secution of these demands under this action questions may arise which fall w the scope of reference.

I am of opinion that we should recall the interlocutor of the Lord Ordin and find that the action is not excluded by the clause of reference, and remi his Lordship to proceed in the cause. It may be necessary to add, for his L ship's instruction, a reservation in case of any question arising fit for the ref

The other Judges concurred.

THE following interlocutor was pronounced:—"Having heard co sel on the reclaiming note for the pursuer against Lord Mu interlocutor of 3d December 1872, and also submitting to rev a previous interlocutor, dated 16th November 1872, recall the i interlocutors dated 16th November and 3d December 1872: F that the action is not, as regards any of the pursuer's cla excluded by the clause of reference contained in the contrac August 1869: Find that the claims of the pursuer are foun partly on the said contract of August 1869, partly on a subseq contract of October 1870, and partly on an alleged illegal and warrantable seizure by the defenders of the pursuer's plant working materials used by him under both contracts: And v these findings remit to the Lord Ordinary to allow parties a p of their averments *hinc inde*, and to proceed further as shal just and consistent with the preceding findings: Find the pur entitled to expenses since the interlocutor of 3d December 18 allow an account," &c.

THOMAS SPALDING, W.S.—J. & R. MACANDREW, W.S.—Agents.

JAMES BOYD, Pursuer.—*Lord-Adv. Young—Kinnear.* No. 42.
EARL OF ZETLAND.
)RGE C. BRUCE AND OTHERS, Defenders.—*Sol.-Gen. Clark—Marshall.* Dec. 20, 1872.
Boyd v. Bruce and Others.

perior and Vassal—Property—Title—Precept of Clare Constat—Minerals servation.—A was infeft upon a feu-contract by which certain lands were yed to him without reservation of mines and minerals. Upon A's death B was infeft in the lands upon a precept of *clare constat*, which con- d an express exception and reservation of the mines and minerals to the ior. Upon B's death his son C, having been infeft in the said lands, sold . Subsequently D, having served heir in special in the mines and minerals brought an action of declarator of his right to them against the superior he proprietors of the *dominium utile* of the lands, on the ground that they emained *in hæreditate jacente* of A. *Held* that the exception and reserva- f mines and minerals in the precept of *clare constat* was inept, and did not the precept as a warrant for infeftment in the fee of the lands, and there- hat there was nothing *in hæreditate jacente* of A which D by service to ould take up.

1ST DIVISION. Lord Mure. B.

feu-contract, dated the 20th and 22d September 1729, entered into een John Don of Seabeggs, and William Don, his eldest son, on the art, and John Boyd (I.) on the other part, the said John and William sold, alienated, and in feu-farm disponed to John Boyd, heritably rredeemably, the said lands of Seabeggs, and the said John Boyd (I.) luly infeft in the subjects.

hn Boyd (I.) died about the year 1765, and was succeeded by John portioner of Seabeggs, his eldest son and nearest and lawful heir, in that character made up a title to said subjects by precept of *clare t*, dated 25th December 1765, granted by Major Chalmers of Came- iferent superior, and John Pringle, W.S., the commissioner for Sir ence Dundas, to whom the said William Don had sold the supe- y of the said lands of Seabeggs in the year 1762. Upon this pre- the said John Boyd (II.) was infeft in 1766.

hn Boyd (II.) died in or before the year 1814, and was succeeded by Boyd (III.), portioner in Seabeggs, his eldest son and nearest and l heir, who made up titles to said subjects by precept of *clare constat*, l October 10, 1814, granted by the Right Honourable Thomas Lord las (afterwards Earl of Zetland), superior of the lands and barony of eggs, upon which the said John Boyd (III.) was infeft in 1814. In of these precepts of *clare constat* there was a clause professing to ve the mines and minerals to the superior. The clause, which was antially the same in both writs, was expressed in the precept of in the following terms:—"Excepting and reserving always to us, ding to our respective rights and interests of liferent and fee above ioned, the haill mines and minerals within the ground of the fore- lands, with power to set down sinks, drive levels, and work and win ame as we think fit, the said John Boyd, his heirs and successors, g always payd of what damages shall be sustained by them in work- he same, as shall be determined by two neutral persons."

1872 James Boyd, the great-great-grandson of John Boyd (I.), and dson of John Boyd (III.), raised an action against the Earl of Zetland uperior, and George Cadell Bruce and others, the proprietors of the inium *utile* of the lands, concluding for declarator that the pursuer in right of the mines and minerals in the said lands of Seabeggs, on ground that in consequence of the exception of mines and minerals e precept of *clare constat*, under which John Boyd (II.) was infeft, mines and minerals were in *hæreditate jacente* of John Boyd (I.)

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Before raising the action the pursuer obtained service as nearest and lawful heir in general to John Boyd (I.)

The defenders stated, *inter alia*, the following pleas:—1. The action should be dismissed, in respect that the pursuer has not set forth, and does not possess, any sufficient title to sue. 2. The defenders should be assoilzied from the whole conclusions of the action, in respect (1) that the superior was entirely divested of the *dominium utile* of the lands libelled, including the mines and minerals therein, by the unqualified infeftment in favour of John Boyd (I.), the original feuar; (2) that the attempted reservation of mines and minerals in favour of the superior in subsequent renewals of the investiture was wholly unauthorised and inept, and had not the effect of making the mines and minerals an estate separate and distinct from the *dominium utile* of the surface; (3) that in virtue of the renewals of the investiture by the successive precepts of *clare constat* and sasines in favour of the son and grandson of the original feuar, the whole *dominium utile* of the said subjects, including the mines and minerals, was effectually transmitted to and feudally vested in John Boyd (III.), the grandson of the original feuar; and (4) that the same, in virtue of the transmissions above set forth, was now completely and feudally vested in the present defenders.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, Finds that the pursuer has not instructed any sufficient title to insist in the present action: Therefore dismisses the action, and decerns: Finds the defenders entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the Auditor to tax, and report." *

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* "NOTE.—The Lord Ordinary has felt the question of title to sue here raised to be attended with considerable nicety, and if the object of the present action had been to reduce infeftments which stood in the way of the pursuer establishing a claim to the minerals in question he would have had difficulty in holding that a general service was not a sufficient title to sue, because although the decisions in such questions are in some respect contradictory—Horne, Nov. 6, 1741, D. p. 16,117, as contrasted with M'Callum, Feb. 21, 1793, D. p. 16,15—it appears to have been held in the later case of Carmichael, Nov. 15, 1826, that a general service is a sufficient title to challenge an investiture flowing from the party to whom the general service was expede, although there does not appear to have been in that case, any more than here, any objection to the party founding upon the general service entering as heir in special to the ancestor. The present, however, is not an action of that description. It is one of declarator, in which the pursuer seeks to have it declared that the minerals in the property belonging to the defenders, in which it is alleged that the deceased John Boyd, younger in Lochgreen, was last vest and seised, belong to the pursuer as heir of John Boyd; and the title in respect of which the pursuer seeks to have this declared is a service as heir in general of that John Boyd. Now, the Lord Ordinary understands it to be an undoubted rule of law that a general service is inept to carry to the party served right to any lands in which the ancestor died infeft—Ersk. iii. 8, sec. 63. In such circumstances a special service seems to be essential to transmit the right, and as the object of this action is to have it declared that the pursuer is now the actual proprietor of the minerals in which John Boyd, the younger, died last vest and seised, and which are said to have ever since remained *in hæreditate jacente* of John Boyd, the Lord Ordinary does not think that a general service can be held to be a proper title on which to found such an action.

"But there is another ground on which it appears to the Lord Ordinary that the pursuer's title is objectionable. This action proceeds upon the assumption that the minerals are still *in hæreditate jacente* of John Boyd, younger of Loch-

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The pursuer reclaimed, and before the reclaiming note was heard he obtained service from the Sheriff of Chancery as nearest and lawful heir in special of John Boyd (I.) in the mines and minerals in the said lands.

Argued for the pursuer;—Although the exception and reservation in the precept of *clare constat*, under which John Boyd (II.) made up a title, was insufficient to confer upon the superior any right to the minerals which, under the original contract, had been conveyed to John Boyd (I.), yet it was sufficient to limit the infeftment of John Boyd (II.) to the lands alone.[1] This being so, the right to the minerals remained *in hæreditate jacente* of John Boyd (I.), and special service to him gave the pursuer a good title to insist in the action.

Argued for the defenders;—The mines and minerals were not *in hæreditate jacente* of John Boyd (I.), having been transmitted as an integral part of the lands. The mines and minerals, not being reserved in the original feu-contract, could not be so by the precept of *clare constat*.[2]

At advising,—

LORD PRESIDENT.—In this case the Lord Ordinary has found that the pursuer has not instructed any sufficient title to insist in the present action. He has

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pursuer, who died in or about 1765. For it assumes that the precepts of *clare constat* under which the investiture was renewed in 1765 and 1814 were insufficient, notwithstanding the reservation in the superior's favour of the minerals therein contained, to confer upon the superior any right to the minerals which, under the original feu-contract, had admittedly been conveyed away to John Boyd of Lochgreen. And in this latter assumption it is thought that the pursuer is correct; because it appears to have been deliberately settled in the case of Graham, January 27, 1842, that such a reservation in a charter of progress, as which was not in the original titles, was altogether ineffectual to deprive the owner of the *dominium utile* of his right to the minerals, or of any other part of the subject originally feued, unless it distinctly appeared from the deeds by which the investiture was renewed that there had been a new transaction then entered into, under which the parties intended so to alter the investiture. But it is not alleged that there was any such transaction entered into at any of the renewals of the investitures in this case, and the deeds themselves, which are produced, do not bear that there was. Now, these precepts are founded on by the pursuer, in the record, as shewing that the minerals in question are still *in hæreditate jacente* of John Boyd the first, who died in 1765. On a sound construction, however, of the precepts, they appear to the Lord Ordinary to disprove that fact. For if the reservation is ineffectual to entitle the superior to re-assert a right to the minerals as in a question with his vassal—and it was so ruled in the case of Graham—then the minerals must, it is thought, be held to have been ere transmitted, in respect of the infeftment which followed upon the precepts of *clare constat* referred to in the condescendence, first, to John Boyd the second in 1765, and afterwards to John Boyd the third in 1814, by whom the property was sold in 1825. Whether the conveyance then granted in favour of Mrs Munro, and the subsequent transmissions, are apt to carry the minerals to the parties from whom the property was subsequently acquired by the defenders, or whether the minerals are still *in hæreditate jacente* of John Boyd the third, appear to the Lord Ordinary to be the main questions raised upon the merits in the present action. But the defenders cannot, it is thought, be called on to discuss these questions, or to defend the titles on which they rely, in an action at the instance of a party whose only title is a general service to John Boyd the first of Lochgreen, who was not, in the opinion of the Lord Ordinary, the heir last vest and seised in the minerals."

[1] Bell's Prin. sec. 1823.

[2] Graham v. Duke of Hamilton, Jan. 27, 1842, 1 D. 482.

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therefore dismissed the action. This interlocutor is based on two grounds. His Lordship held, in the first place, that as the pursuer had only a general service to the person in whose right he claimed to stand, this was not a good title to sue. The second ground is more important and more special to the present case that by means of this service the pursuer has not connected himself with the subjects which he claims. The first ground has since been obviated. The pursuer has obtained a special service, and we must deal with the case on the footing that the pursuer is served heir in special to John Boyd (I.) in the mines and minerals contained in a feu created by feu-contract in 1729.

The question comes to be, whether by this proceeding the pursuer has so connected himself with these minerals that he is entitled to insist in the declarator that they belong to him against the defenders, who are infeft in the feu without any reservation. The estate created by the feu-contract of 1729 consisted of a parcel of land, without any reservation of minerals, with teinds and other pertinents, to be held of the party who was superior in feu-farm, and for payment of a certain feu-duty. The feudal estate being once created, it was not in the power of the superior to make any alteration on the subjects, the holding, the *reddendo*, or any other of the *essentialia* of the holding, by merely inserting a reservation in a precept of *clare constat* or a charter by progress. Any such attempt would be simply nugatory, and of no avail to alter the value of the estate. No doubt such things may be done by way of transaction between the superior and vassal, but that comes pretty much to the creation of a new feu. What actually happened was this: John Boyd (I.), the original feuar, having died, his son, John Boyd (II.) made up a title by obtaining a precept of *clare constat* from the superior, and took infeftment thereon. In that precept there was inserted after the description of the subjects the words—"Excepting and reserving to us, according to our respective rights and interests of liferent and fee above mentioned, the haill mines and minerals within the ground of the foresaid lands, with power to set down sinks, drive levels, and work and win the same as we think fit, the said John Boyd, his heirs and successors, being always payd of what damages shall be sustained by them in working the same, as shall be determined by two neutral persons." Now, that exception and reservation inserted in the precept of *clare constat* was, in a question with the party who took infeftment upon it, absolutely inept. If the superior had proposed to work the minerals, he could have been interdicted, and any attempt to found on the precept of *clare constat* would have been of no avail. If the vassal had worked the minerals, the superior could not have prevented him. Not only was the reservation beyond the power of the superior, but it was positively of no effect. Consequently John Boyd (II.) was infeft in the feu just as completely as his father was before him. The superior could give no precept except to infeft in the entire feu. This makes it very clear that the notion of the minerals remaining *in hæreditate jacente* of John Boyd (I.) cannot be entertained. The mines and minerals, which have never been separated from the estate, are not a separate subject. They may be made a separate estate, but till they have been formally separated the lands and the minerals constitute one subject, and one only. There is no parallel between this case and that where a distinct subject is reserved. The feu was one and indivisible. Either John Boyd (II.) was infeft in the feu, as one and indivisible, or he was not infeft at all. I apprehend that he was infeft in the feu, as it stood in the person of his father.

The case of the pursuer rests entirely on the ground that the minerals were *in hæreditate jacente* of John Boyd (I.), and are so to this day. To this I cannot give effect, and propose that we should adhere to the interlocutor of the Lord Ordinary.

Lord Deas.—This question involves principles of feudal conveyancing, but principles well settled, and about which there can be no doubt. In the original feu-contract, under which John Boyd (I.) held the lands of Seabeggs, there is disponed to him "all and heal that part and portion of the lands and barony of Seabegs and Muir yrof as the same is presently meithed and marched off to him, being a part of the room and mealling of land possest by Robert Hender

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m, with the teinds of the samen parts and pendicles, and pertinents yrof lying ithin the barrony of Seabegs, parioch of Falkirk, and shire of Sterling." Now, here is no doubt that a disposition of lands includes mines and minerals if they re not specially reserved, and there is no special reservation here. On this feu-ontract John Boyd (I.) was infeft. He died in 1765, and then his son, John oyd (II.), was infeft upon a precept of *clare constat* granted on 25th December 765. In this precept there was a reservation of minerals. Then John Boyd (II.) ied in 1814, and his son John Boyd (III.) obtained a precept of *clare constat*, ated 10th October 1814, upon which he was infeft. In this precept also there as a clause reserving mines and minerals. Now, the question is whether the st John Boyd is to be held to have stood infeft in mines and minerals. There s no doubt that he did, unless the reservation of minerals contained in the pre-epts of *clare constat* was effectual, which it clearly was not. An entry in lands s an entry in the minerals, unless there is a valid reservation of them. There as no valid reservation in this case. In the original feu-contract the minerals ere not reserved. There was no new transaction in regard to them, and, herefore, the reservation of them in the precepts of *clare constat* was utterly ept.

As the case stands, therefore, I am of opinion that the pursuer has not in-tructed any title to sue.

LORD ARDMILLAN and LORD JERVISWOODE concurred.

THE COURT adhered to the interlocutor of the Lord Ordinary.

MURRAY, BEITH, & MURRAY, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

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Dec. 21, 1872
Hill v. Hill.

JAMES HILL, First Party.—*Watson—MacLean.*
ELIZABETH TODD or HILL, Second Party.—*Fraser—Duncan.*

Heritable and Moveable—Succession—Bequest of Interest—Tract of Future ime.—Held that a legacy of the annual interest for a series of years of a capital m bequeathed to another legatee was a moveable right in the person of the gatee and of his heir *in mobilibus*, and that, on the death of the latter, his other was entitled to participate in future payments of interest to the extent a third under the Moveable Succession Act of 1855.

1ST DIVISION. B.

DAVID HILL, of Hillgarden, and tenant of the farm of Hallyards, ecuted, on 6th November 1860, a trust-disposition and deed of settle-ent, by which his whole property, heritable and moveable, was conveyed trustees, who were also in the same deed appointed his executors. The urposes of the trust were declared to be as follows:—"First, In respect hat the main object of this trust is to form a clear capital trust-fund of 6500 sterling, to be disposed of, under the management of my trustees. manner underwritten, and that over and above the said Coupar-Angus eritable properties, the disposal whereof is hereinafter provided for, declare nd enjoin that my brother Robert shall provide funds to my trustees r paying all my just and lawful debts, &c. Second, My trustees shall ake over to my brother Robert the lease of Hallyards for the whole emaining years thereof, and also my whole crop, stocking, household rniture, and moveables thereupon, and my other moveable means and state, wherever situated, and also my heritages, except what is hereafter pecially disposed of, at the sum of £3500 sterling, which he shall be equired to pay over to my trustees as soon after my death as he and hey arrange, and at least within six months; and as this sum, with 3000 I have now in the bank, will form a capital of £6500, which will be he full money-fund under the trust, I direct this amount of capital to be isposed of in manner following, viz., my brother Robert shall have the

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whole interest of £6000 until the youngest son of my brother Dr Andrew Hill attains the age of twenty-one years complete, and at this period the said £6000 shall be divided as follows"—(Then follow directions as to the disposal of the capital of the £6000).

The testator, David Hill, died on 10th November 1860, and his brother Robert Hill, implemented the conditions imposed on him, and drew the interest of the £6000 until Martinmas 1863. He died on 28th February 1864, and was survived by his widow, Mrs Elizabeth Todd or Hill, and an only child, Robert Hunter Hill. Shortly after the death of Robert Hill a multiplepoinding was brought to have it established to whom the right to the interest of the £6000, which might accrue after the said Robert Hill's death, had passed. The Court, on 8th November 1866 (*ante*, vol. v. p. 12), found that the future produce of the sum had descended to the executors of Robert Hill, and the interest was accordingly paid to the factor *loco tutoris* of Robert Hunter Hill to the term of Whitsunday preceding his death, which occurred on 22d July 1871. The said Robert Hunter Hill was a pupil at his death.

On that event, Mrs Hill, as mother of the pupil, claimed to have right under the Moveable Succession Act to one-third of the future interest of the £6000. This claim was opposed by James Hill, the pupil's uncle, and heir-at-law and executor-dative of his nephew, on the ground that the right to the interest extending over a tract of future time was a heritable right in the person of the pupil.

A special case was presented by James Hill and Mrs Hill for the opinion and judgment of the Court upon the following questions:—"(1) Does the interest on the said fund of £6000 from the date of the death of the said Robert Hunter Hill till the majority of Dr Andrew Hill's youngest son form part of Robert Hunter Hill's moveable estate, and is the said Mrs Elizabeth Todd or Hill entitled to participate thereof until the period fixed for division of the capital? Or (2), Is she entitled to participate only in that part of it which had become due at the date of her son's death?"

It was argued for the first party that the estate of interest was a right bearing a tract of future time, and was therefore heritable. The payment of interest from year to year was not payment of a definite sum by instalments, for interest was an estate to arise in the future, to the existence of which a future tract of time was necessary. So this bequest being of a right having a tract of future time it was heritable and not moveable.[1]

It was argued for the second party that the right to interest formed part of the moveable estate of the deceased Robert Hunter Hill.[2] The interest was the yearly profit of a fixed capital sum, and the rights which were heritable because they had a tract of future time were rights which carried a yearly profit to the creditor while they subsisted, without relation to any capital sum or stock.[3] Besides, the bequest in this case was of the "whole interest" until a certain event occurred, and this was to the same effect as if the trustees had been directed to accumulate the interest and pay it in a slump sum when the said event occurred.

At advising,—

LORD PRESIDENT.—This question arises under the trust-disposition of Mr David Hill, in which he makes a kind of bargain with his brother Robert Hill in the following terms—"I declare and enjoin that my brother Robert shall

[1] Stair, ii. 1, 4, and 3, 5, 6; Ersk. ii. 2, 6.
[2] Muirhead v. Muirhead's Factor, Dec. 6, 1867, *ante*, vol. vi. 95.
[3] Ersk. ii. 2, 6.

ıds to my trustees for paying all my just and lawful debts, deathbed l expenses, and the expense of the executry, including the stamp of ›ry of my personal estate, &c. Second, my trustees shall make over ther Robert the lease of Hallyards for the whole remaining years d also my whole crop, stocking, household furniture, and moveables and my other moveable means and estate, wherever situated, and also es, except what is hereafter specially disposed of, at the sum of £3500 hich he shall be required to pay over to my trustees as soon after my ə and they arrange, and at least within six months; and as this sum, 0 I have now in the bank, will form a capital of £6500, which will l money-fund under the trust, I direct this amount of capital to be f in manner following, viz., my brother Robert shall have the whole £6000 until the youngest son of my brother Dr Andrew Hill attains twenty-one years complete." Now, it was held by a previous judg- his Court that there was here given to Robert Hill a legacy of the the £6000, and that the right thus given to him did not expire at but went to his representatives, and so the interest of the sum was the guardians of Robert Hunter Hill, and applied for his benefit. ert Hunter Hill died in pupillarity, and this event has given rise to ›n whether the accruing interest is heritable or moveable. If it is he first party to this case takes the whole of the accruing interest, but veable, then one-third must go to the mother of the pupil.

naintained for the first party that the right which was in the pupil nter Hill was heritable, because it bore *tractum futuri temporis*. This ıestion in a somewhat forgotten region of law. It is certain that some ch bear a tract *futuri temporis* are in law heritable, although in their ›veable. Lord Stair enumerates these rights as reversions, pensions, and I do not think there is any authority for carrying the rule further. ys down the correct principle upon which the rule is founded. He ights which have a *tractus futuri temporis* are also heritable. These of such a nature that they cannot be at once paid or fulfilled by the ıt continue for a number of years, and carry a yearly profit to the hile they subsist, without relation to any capital sum or stock, *e.g.* a ıuity or pension for a certain term of years." Now, it is clear that the ımerated by Stair as heritable answer to this description, that they ıt relation to any capital sum or stock,—that is, either belonging to the the creditor in the obligation. The only authority which throws any this position is Bell in his Commentaries, vol. ii. p. 4. He there says, s having a tract of future time, though of a personal nature, and un- with land, are heritable. The precise character of such a right is, periodical and future, the payments not being the mere fruits and s of a capital or principal debt vested in the person who holds the falling to the creditor as periodical payments, independent of each right to each vesting only at the elapse of the successive terms of A right of annuity is a proper example; so is a liferent of a sum; sband's interest in a bond due to his wife, of which the capital is hers, sts only as they accrue being his." Now, Bell here seems to extend the and the case of a husband's interest in a bond due to his wife is very kind of right we are at present considering, viz., interest on a capital ıt Bell is in error in supposing that it has ever been decided that the interest in his wife's bond is a right bearing a tract of future time, itable right. The case of Clunie's Creditors, quoted by Bell, does not ıat. In his Principles, however, Mr Bell expresses himself more In paragraph 1480 he says,—"Rights having a tract of future time ble; such are liferents; also debts giving a periodical right without ılation to a capital sum or principal, as an annuity. It has been sug- at patent rights and copyrights, as having a tract of future time, seem itable. But this has never been decided." Now, in the first part of ge Mr Bell varies the language of the Commentaries, and uses the same as Erskine. The reference to patent rights is not material to the present

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case, although light is thrown on the subject by the statement of t law in the case of the Advocate-General v. Oswald, 10 D. 969, in wh was decided that patent rights are moveable, and that all accruing pro patent go to the executor. Now, what is said to be heritable in this c the interest of a capital sum, and I am clearly of opinion that it is i of the nature contemplated in the rule. This being so, the second pa case is entitled to one-third of the interest of the £6000.

LORD DEAS.—Without going into the somewhat obscure and abstr of law which relates to rights having a tract of future time, it appears a sufficient solution of the present question is to be found in the ter deed. The testator declares and enjoins that his brother Robert sh funds to the trustees for paying all his (the testator's) just and law deathbed and funeral expenses, and the expense of the executry, inc stamp of the inventory of his personal estate. The deed further pro Robert shall pay over to the trustees £3500, on getting an assignati agricultural lease held by the testator, with the crop and stock and o able estate, and in consideration of what is thus to be done by Robert t directs that Robert shall have the whole interest of £6000 until the son of his brother Dr Andrew Hill attains the age of twenty-one years Accordingly, Lord Jerviswoode, in his interlocutor in the former cas 1866, *ante*, vol. v. 12) finds with, as it appears to me, entire accur under a sound construction of the trust-disposition and settlement of th David Hill it was the intention of the truster to bequeath or direct t to make over the whole interest of the sum of £5000 from the term mas 1863, being the term immediately preceding the death of the tru the youngest son of Dr Andrew Hill shall attain the age of twenty-on the now deceased Robert Hill, brother of the truster." Then he "finc said Robert Hill did, in terms of the provision contained in the first the said trust-disposition and settlement, provide funds to meet th debts and others mentioned in the trust-deed to the extent of £1101, or thereby, and paid or arranged for payment of the whole sum of £3(he was required by the truster to pay over to the trustees of the l finds, with reference to the above findings and to the terms of the tru tion and settlement above set forth, that the legacy or provision of t of the sum of £6000" vested in the said Robert Hill on his survival truster. It was with the representative of Robert Hill, and not wi Hill himself, that the question there occurred, and so Lord Jerisw that the whole interest fell to Robert Hill and his executor. I am nc to that judgment as *res judicata*, but to the grounds of the judgment consider to be those applicable to the present question. In his Jerviswoode goes on to explain,—"It has appeared to the Lord Ord under the sound construction of the deed, when read in relation to tl stances which must be held to have been within the contemplation of in executing it, he intended to make a remuneratory bequest to h Robert, so as in some respects to operate as a compensation to him for den or risk as he might have to undertake in providing funds unde and second purposes of the deed. It is true that there is no declar the interest of the £6000 is to fall to Robert's heirs, but that intere as a whole to Robert, until Dr Andrew Hill's son shall attain twenty special and remuneratory bequest, which Robert was entitled to assign with as his own." Similar views were stated in the Inner-House, p by Lord Ardmillan and myself, and to a certain extent by the Lord There was a *de præsenti* bequest of the whole interest of this £6000; the whole of that interest immediately became part of Robert's perso and descended to his son. This is conclusive of the matter, without e all into the subject of rights bearing a tract of future time.

LORD ARDMILLAN.—I have felt much interest in this curious questic I agree with Lord Deas that there is in the deed, looking to the co

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pon it by the previous decision, enough to guide us, it may perhaps not be o put the case entirely on that footing. I am quite satisfied that by the there was separated from the principal sum a remuneratory bequest of the a interest to Robert; and by the whole interest I mean the right to the s of each periodical payment as it became due, and also the right to the s periodical payments. That is a bequest of the fruits of a principal sum; his it is which brings out a clear difference between this case and that of nuity or pension or other obligations having a tract of future time, without nce to any principal sum. I think it is an obscure and difficult question is the true theory on which these rights and obligations are held to be able, and I am against extending the operation of that rule without nity.

ur Lordship has referred to the case of a patent—Advocate-General v. ld, 20th May 1848. Though the decision is not directly applicable, still ect of rights having a tract of future time was raised in that case. Lord y uses this very clear and plain language,—"Whatever arises *de anno in* m, as matter of emerging substantive right—without reference to a stock pital—as for example, pension or annuity—has been treated as heritable. where there is a fundamental right of property—if moveable in itself—out e use or application of which profits may or may not be realised, it matters or what length of time such profits may continue to be levied—the herit- or moveable character of the subject is to be settled with reference to the ct itself." Undoubtedly, in this case, the £6000 remained moveable, and nk that its fruits partook of its character, and remained moveable also. nere separation of the interest as a remuneratory bequest to Robert did not e the character of the subject. It is true that interest is not an instalment e principal sum, but where interest is given as a whole, and the whole is ated as having a certain value given as a remuneratory value, I am not that each periodic payment of interest may not be regarded in the light of stalment of that entire sum.

the whole, I think it safest to decline to extend to this case the rule which certain rights having a tract of future time heritable.

RD JERVISWOODE concurred.

THE COURT pronounced the following interlocutor:—"Find and declare that the interest on the fund of £6000 disposed of by the settlement of the late David Hill, from the date of the death of Robert Hunter Hill till the £6000 becomes divisible, forms part of Robert Hunter Hill's moveable estate, and that the said interest falls to be divided between the parties to this case in the proportion of two-thirds to the party of the first part and one-third to the party of the second part, and decern: Find the party of the second part entitled to expenses," &c.

J. & J. GARDINER, S.S.C.—JARDINE, STODART, & FRASERS, W.S.—Agents.

No. 44.
Jan. 6, 1873.
Gloag v. Rutherfurd, &c.

IE REV. PATON JAMES GLOAG (Minister of the Parish of Galashiels), Petitioner.—*Gloag.*
WILLIAM RUTHERFURD and OTHERS, Objectors.—*Darling.*

*hurch—Glebe—*29 *and* 30 *Vict. c.* 71 (*Glebe Lands Act*, 1866).—The ing of a minute by a conterminous proprietor, under the 17th section of the ve statute, intimating his willingness to purchase the glebe or any part of it, s not conclude a personal contract of sale between him and the minister, it ng in the power of the Court, at any time before decree of sale is pronounced, impose conditions for the protection of the benefice.

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TEIND-COURT.
Teind-Clerk.

THE Court, on 18th March 1872, granted authority to the minister the parish of Galashiels to feu certain portions of the glebe at certa minimum rates of feu-duty, and approved of a draft feu-charter.

Within thirty days thereafter Mr Rutherfurd and two other conte minous proprietors, in terms of the 17th section of the Glebe Lands A 1866,* lodged minutes intimating their willingness to purchase certa parts of the glebe adjoining their respective properties, being the wha ground authorised to be feued, at such prices as might be fixed by t Court. The case was, as usual, sent to the Lord Ordinary for inqui and his Lordship remitted to Mr Maitland Wardrop, architect, on wha report the minimum rates of feu-duty had been fixed. Mr Wardrop r turned a report suggesting, not only the prices to be paid by the seve purchasers, but also a number of conditions under which he thought t purchasers should be laid for the minister's benefit. The conditio related to access, water supply, prohibitions against building within certain distance of the new manse, and the like.

To this report the proposed purchasers lodged a note of objections, i which, besides objecting to the conditions in detail, they contended th they were entitled to acquire the subjects without any conditions wha ever, excepting those contained in the draft feu-contract. The Le Ordinary (Gifford) ordered the report and note of objections to be print and boxed, and reported the cause to the Court, expressing an opini adverse to the general contention of the objectors. †

* "When the Court shall have made an order or interlocutor granti authority to feu or let on building lease, and fixing the minimum feu-duty rent, any proprietor whose lands are conterminous with the glebe mentioned such order or interlocutor may, within thirty days of the date of such order interlocutor, intimate his willingness to feu or lease or to purchase so much the said glebe at such a rate of feu-duty, or rent, or price as the Court may, on consideration of the whole circumstances of the case, and after directing su inquiry as they may consider necessary, determine; and if to feu or lease, unde taking to grant security over the whole or such part of his estate, in addition the said glebe itself, as to the Court shall seem necessary for the regular a punctual payment of the feu-duty or rent fixed by the Court; and on such in mation, and after such rate of feu-duty and security therefor, or price, shall ha been so fixed, the Court shall, in case of feuing or leasing, interpone its authori to the bond or other writ in security, and decern accordingly, and in case sale shall pronounce a decree of sale thereof in favour of such heritor, on whi he shall be entitled to obtain a charter from the Crown for payment of a blenc duty of a penny Scots, and interpone their authority accordingly: Provide always that such heritor shall not be entitled to obtain an extract of the sai decree of sale until the price shall be consigned in one of the chartered banks i Scotland for behoof of the minister; and in every case of such sale the pric after deduction of all expenses connected with the application to the Court, sha be invested at sight of the heritors and presbytery on such securities and in su manner as the Court of Teinds shall direct, and the interests or proceeds on shall be paid to the minister: And it is provided further, that it shall be lawf for any heir of entail in Scotland to burden the lands and estate of which he she is in possession as heir of entail lying contiguous to such glebe for th amount of such price, or to give security over the same for the annual payme out of the clear yearly rents and profits of the said lands and estate, the interes of such sum calculated at four and one-half per centum, or the amount of su annual payment, not exceeding three pounds per centum of such clear yearl rents and profits after deducting all prior burdens and provisions, as the sam shall be ascertained by an average of the five years immediately preceding th date of creation of such burden or security."

† NOTE.—(After narrating the circumstances of the application)—"Th

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t was argued for them, at the hearing, that their minutes constituted eptances of an offer to sell at a price to be fixed by the Court, and t a personal contract of sale had therefore been concluded, just as in case of the serving of notices under the Lands Clauses Act. Nothing ained to be done but the fixing of the price, and the imposition of r conditions was incompetent. The statute (section 13*) contemplated

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ls of the purchasing heritors contend that they are entitled to purchase hout any conditions whatever, excepting those contained in the draft feu-tract.

The Lord Ordinary does not think that this contention is well founded. thinks that the Court have full power to impose on the purchasers any con-ns necessary or proper for the use, comfort, or amenity of the manse, just as minister might have done for himself in laying out the ground extrajudicially feuing and in settling a feuing plan.

But there is considerable difficulty as to the special conditions which it may uld reasonable to impose. The conditions relate—

(1) To a private access proposed to be reserved for the minister through the nd now to be sold to the conterminous heritors.

The Lord Ordinary thinks that this right, though not absolutely necessary, ht fairly be made the subject of arrangement. The proposed private road or n might run between the proposed purchases by the heritors, and would not judice or injure them.

(2) Such private path would be available for drains, and gas, and water s to the new manse, which the reporter explained must almost necessarily through some part of the ground in question.

(3) Right to sink wells in the ground sold for the use of the manse.

The Lord Ordinary thinks that this wide right ought not to be reserved as inst the purchasers. It might seriously prejudice them, and is not necessary the manse, so far as the Lord Ordinary can gather. The utmost which the d Ordinary would be disposed to give would be a right to the manse to draw er from the existing well by which it is at present supplied.

(4) Restrictions against building on the ground to be sold within a certain ance of the manse and manse garden.

The reporter explained that some restriction against building, immediately he north of the new manse, was really necessary for its amenity, and the d Ordinary thinks that a condition to this effect should be imposed on the chaser of the ground immediately to the north of the new manse.

It may be fairly assumed that the minister, in feuing, would take care to serve the amenity of his manse by not feuing for building too close to it, by special conditions. The minister should not be in a worse condition r that the ground is to be absolutely purchased by the conterminous pro-tors.

The Lord Ordinary has only to add, that if the proposed purchasers are to the ground offered for by them respectively free from the conditions sug-ted by Mr Wardrop, then, in fairness, the prices suggested by Mr Wardrop uld be increased, as Mr Wardrop has estimated the prices as fair prices for land burdened with the conditions specified by him. Immunity from these ions will enlarge the value of the lands.

Throughout the discussion the minister very fairly expressed his readi-s to concur in any arrangement which might be thought proper by the rt."

* "The Court may, by order or interlocutor, and subject to any conditions or rictions they may deem expedient, grant such authority, and shall in such er or interlocutor fix the minimum rate at which the glebe or any portion reof shall be feued or leased for building, and shall authorise and empower petitioner and his successors in office at the sight of the heritors and the bytery, subject to the provisions of this Act, to grant and dispose of the be, or any part or parts thereof, in feu farm, fee, and heritage, for the highest

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that all conditions and restrictions should be fixed before the conterminous proprietors exercised their right of pre-emption, and this was necessary in order that they might know what they were buying.

LORD PRESIDENT.—The objectors, who are conterminous proprietors, proceeding to exercise the right of pre-emption conferred upon them by the 17th section of the statute, contend that they have bound the minister in a personal contract of sale, just as a railway company binds a heritor by serving a notice upon him under the Lands Clauses Act. I am of opinion that that argument rests upon a false analogy. A sale under the Lands Clauses Act is peculiar. It is self-acting, and does not require the intervention of the Court, nothing being required but the fixing of the price, which is done by the Sheriff and a jury, or by a Court of arbitration. Here the initial step is taken by the minister presenting a petition, and the Court are armed with wide powers, because the minister may have views inconsistent with the ultimate interests of the benefice. On the other hand, conterminous heritors may at any stage appear and object, and besides that, they have the right of pre-emption. But section 17 was not intended to conclude, by the mere lodging of a minute, a contract which might injure the benefice. The heritors' right, therefore, is not absolute, and up to the time when the decree of sale is pronounced it is in the power of the Court to intervene for the protection of the benefice.

LORD BENHOLME.—The objectors here plead their right of pre-emption far too high, especially when they contend that the conditions in the draft feu-charter are to regulate the sale, sale being one thing and feuing another.

LORD NEAVES.—The substitution of sale for feuing requires that the conditions shall be reconsidered. If the minister had been exercising his authority to feu, he must have done so substantially in accordance with the terms of the draft feu-charter, but it is for the Court to say what conditions are applicable to the case of a sale.

LORD JERVISWOODE and LORD MACKENZIE concurred.

THE COURT continued the case for the purpose of allowing parties to consider the terms on which the sale should take place.

BURN & GLOAG, W.S.—GILLESPIE & PATERSON, W.S.—Agents.

No. 45.

Jan. 7, 1873. Duncan's Trustees v. Shand.

JOHN MACDONALD and JAMES BALFOUR (Duncan's Trustees), Pursuers.—*Watson—Trayner.*

ISABELLA SHAND, Defender.—*Lord-Adv. Young—Campbell Smith.*

Proof by Writ—Resting Owing—Loan—Donation.—Held that a loan of money was not instructed by letters in which the acknowledgment of the receipt of money was qualified by the statement that it was received in payment of a debt of honour.

Proof—Writ.—In a proof by writ, it is competent, in so far as necessary to understanding letters, to look at those to which they are answers.

Opinion (*per* Lord Neaves) that proof of the receipt of money by the writ of the receiver only raises a presumption of loan in cases where the acknowledgment is contained in a document delivered to the disburser by the recipient as a record of the transaction.

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feu-duties, or in building leases for the highest rent in grain or in money, that can be got for the same, not being less than the said minimum, and that either by public auction or private contract."

Ante, vol. x. p. 984.

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2D DIVISION. Lord Mure. I.

The present action was brought by the trustees of the late John uncan, D.D., against Miss Isabella Shand for payment of the sum of 100, and for which sum the defender granted a promissory-note to e said John Duncan, dated 2d February 1869. The note was in the llowing terms:—"Edinburgh, 2d February 1869.—I promise to pay on mand the sum of one hundred pounds sterling, value received.—ISA-BELLA SHAND." The Lord Ordinary ordered a proof before answer as to e possession of the said note, but the Court, on 19th July 1872, held at the note not having the name of the payee was not a valid docu-ent of debt, and pronounced an interlocutor recalling the Lord Ordi-ary's interlocutor, and finding that the debt sued for could be proved ly by the writ or oath of the defender. In consequence of this finding proof was taken before the Lord Justice-Clerk on the 30th of Novem-r, and was confined to writ.

Among the documents put in were the following:—The pretended omissory-note libelled on. A letter sent by the pursuer James Balfour, .S., to the defender on 5th February 1869, in which he says,—"I beg remind you of the arrangement made yesterday, in terms of which you omised either to pay me £50 of the £100 which you got from Dr uncan, or to find security to my satisfaction for the payment of the first 50 within a month, and the second £50 within two months, and this is to be done not later than Monday morning at eleven. We shall lay taking any proceedings against you till that hour." The defender's ply of the same date,—"I called for Mr Barbour to-day to ask him to come my security to Dr Duncan, but unfortunately he was out. Mrs rbour assured me that I should see him to-morrow, when I hope to me to some arrangement with you. I have received your note." The xt document after this was dated 28th December 1871, and was a mand by Messrs Edmonds and Macqueen, the agents for the beneficiaries der the settlement of Dr Duncan, who was then dead, for payment of e promissory-note.

Miss Shand replied on 10th January 1872,—"I am in receipt of your tter of 28th December regarding the £100 I got from Dr Duncan on the d February 1869. Dr Duncan owed my mother and myself a large m, which he called his debt of honour, viz., for aliment and outlay on his behalf for many years when he was entirely without means and in a te of indigence and starvation; this debt Dr Duncan often said he would repay, but he never did so. I wish now to lay my claims before e trustees, and will thank you to do so, or inform me who they are. I uld well go to Dr Duncan and ask a favour, and I assure you I received it as a matter of right and in a spirit of love and friendship, which could nly be understood between two friends in such circumstances. After at passed between Dr Duncan and myself on the subject of this old bt, I request to be informed who handed my promissory-note to the trustees, as Dr Duncan informed me that, to his great grief and surprise, it was removed from his secret repository without his knowledge or con-nt, and handed to Messrs James and Robert Balfour, W.S., who ttempted to seize the £100 from me the day after I received it, and this, of course, without Dr Duncan's knowledge. Dr Duncan also informed me that the £100 I got from him was a deposit for a student, and never would belong to his children or grandchildren, and that I could keep it r ever if I chose to do so, as it would be only a fraction of what he was e to me." On the following day Messrs Edmonds and Macqueen wrote n these terms,—"We received your letter of 10th inst. Had you received

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the £100 from Dr Duncan on 2d February 1869 in payment of a
is obvious you would not have granted your bill to him. Mi
Balfour, one of Dr Duncan's executors, handed over the bill as
of a debt legally due by you to the deceased, and as forming par
residue falling to his minor grandchildren. In these circumstan
the duty of the trustees to recover payment, and we hope you will
for an immediate settlement, so as to avoid the disagreeable nec
legal proceedings in terms of our instructions." And on the
January the defender wrote in answer,—"In reply to yours
January, I beg to say that I will arrange as soon as possible to
£100, as you consider it imperative in me to do so, notwithstan
fact that Dr Duncan owed me more than double the sum, and
ledged that he did so." And again on the 29th of February,-
sorry I have not as yet been able to remit to you the £100 w
Duncan gave me, but as the money is in safe hands and at good
I request you will allow me the usual period granted for repayn
called yesterday for Dr Bonar to ascertain from him if the Colle
mittee had a claim against me for the £100, but found he was to b
in London for a fortnight. On his return I will see him, and wri
to you."

Pleaded for the pursuers;—Though the writing libelled on b
promissory-note, and therefore incapable in itself of constituting a
is identified in the defender's letter of 10th January, and may be
part of the proof of loan. The whole purport of the correspondei
especially of what was written in 1869, is a dispute not on the
as to whether anything was payable, but as to the manner and
payment. Donation was not alleged by the defender.

Argued for the defender;—The proof of loan must be uneq
without the aid of any presumption. The same latitude could
allowed in the construction of written evidence as in the constru
parole. The so-called promissory-note has been found to be null a
The letter of 5th February 1869 only shews a willingness on the de
part to make some arrangement. There is then a long gap, durin
Dr Duncan died, and the letters written after his death by the
are sufficiently qualified.[1]

At advising,—

Lord Justice-Clerk.—The summons in this case concludes in these
"The defender ought and should be decerned and ordained to make pa
the pursuers, as trustees and executors foresaid, of the sum of £100 ster
for which sum the defender granted a promissory-note to the said
Duncan, dated 2d February 1869, payable on demand, with interest at
of 5 per centum per annum from the date of said promissory-note un
By our judgment of the 19th of July last we negatived this statem
matter of fact, and found that the debt sued for could be proved onl
writ or oath of the defender. In the opinion of the majority of the
that occasion the document dated 2d February 1869 was void and of
under the statute concerning blank writs; but at all events we found
was not an obligatory writing, and could not be considered a promiss
in respect there was no payee mentioned. I had some doubt as to the
the document under the Act 1696, c. 25, but my Lords Benholme an
were of opinion that the Act was applicable. But we sustained the sun
laid on an alleged debt of £100, which could only be proved by the d

[1] See the cases collected and commented on in Spiers' Factor v. Spie
7, 1872, *ante*, vol. x. p. 537.

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rit or oath. A proof by writ has now been led, and the question we have to nsider is whether or not it is sufficient.

The correspondence which has been put in evidence may be explained quite mpetently by the writing referred to, but cannot of itself have the effect of tting up that writing as an obligatory document; and it is incumbent on the nsuers to prove out of the letters so explained some acknowledgment or obli tion in regard to this sum.

I have come to a clear opinion that there is no such proof. The letters int to a very different state of matters. The money was paid to Miss Shand the 2d of February 1869, and on the 5th Mr Balfour, Dr Duncan's agent, rites to her, reminding her of a meeting which had occurred the day before, nd at which she had promised to find security for repayment of the loan. On e same day the defender replies that she had attempted to find a cautioner. ow, Mr Balfour's letters cannot, in a proof by a writ of the defender, be garded as evidence except as explanatory of the defender's letters. But it ems plain that Dr Duncan himself had no intention of taking any security om Miss Shand, and that although Mr Balfour was desirous of changing this satisfactory state of matters apparently Dr Duncan interfered to put a stop to y alteration, for the security was never obtained, and we hear nothing more r the space of nearly two years.

After that time, and after Dr Duncan's death, we find a correspondence be een the defender and the pursuers' agents. Now, the observation which must made on these letters is, that any acknowledgment of receipt of money from Duncan must be taken along with the qualifications which the letters them ves contain. Further, they prove nothing as to the original footing on which Duncan and the defender stood as to alleged loan; and even though they ght instruct a waiver or new obligation to repay on the part of Miss Shand, at is of no consequence here, for that is not the *medium concludendi*. More er, I am of opinion that there is no proof of any waiver, or of a new obliga n. The defender has confidence in Mr Edmond, who advised her that she s legally bound by the alleged promissory-note; and she accordingly inti ates to him her willingness to pay, "notwithstanding the fact that Dr Duncan id her more than double the sum, and acknowledged that he did so." These alifications take this case out of the category of the authorities cited in the cent case of Spiers. The only proof of receipt of money is by these letters, t they also contain statements that it was received on another footing than at of loan; not indeed in payment of a legal obligation, but in satisfaction of debt of honour, fairly entitling Miss Shand to retain. I think the pursuers ve failed to make out their case.

LORD COWAN.—It is material to remember the position in which the case nds. By interlocutor of 19th July 1872 your Lordships, in reviewing the terlocutor of the Lord Ordinary allowing a proof at large, recalled that inter cutor, and found that "the debt sued for could only be proved by 'writ or ath' of the defender." Therefore we are tied up to the question, whether the leged loan has been proved by the writ of the defender, there having as yet en no reference to oath. This being the only question before the Court, I nnot give much weight in this case to the decisions cited by Mr Trayner,— homson v. Geikie,[1] and Brodie v. Muirhead.[2] The principle established in these ses is that where a writing is produced by the claimant in his favour, to the fect of shewing that money passed from the one party to the other, that, in the sence of explanation, will raise a presumption of loan. But what is the result hen this view is taken of the writing founded on? Parole proof is allowed, to ve the defender an opportunity of rebutting that presumption and the circum nces in which the writing had been given and received. The cases on this int were all before us in the case of Spiers. There the majority were of inion that the document founded on was not of a kind which came under the inciple laid down in Thomson v. Geikie; that, in short, there was no docu-

[1] March 6, 1861, 23 D. 693. [2] Feb. 1, 1870, *ante*, vol. viii. 461.

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ment which could form the nucleus of the proof allowed by the Lord O
But these principles have no application to the present case. Had yo
ships found that there was a presumption of loan arising from the d
produced the case would have been that of Thomson v. Geikie. Wh
Lordships found was that the document founded on by the pursuers v
and void as an acknowledgment of debt, and therefore, although the C
tained the summons, it was held that the alleged loan could only be est
by the writ or oath of the defender. The question before us is, wheth
is writ of the defender establishing a loan to her by Dr Duncan on 2d F
1869? All the letters and admissions of the defender only come to this
that date she got £100 from Dr Duncan. This has never been denie
true issue is, whether she got it under an obligation to repay. Your L
has said that we cannot look at the document No. 6 of process at all.
tainly cannot look at it as an independent and substantive acknowled
the debt. But if the oath of the defender had been resorted to it mi
been exhibited to her, and so made part of the deposition. And in like
if the letters of the defender had specially referred to this document,
have formed part of the proof. But this is not the case, and the lette
be judged of from their own contents. Now, in the first place, in lo
the letters of the defender, it is a great fallacy to hold that in order t
stand these letters, we are not entitled to look at the letters on the othe
which they are answers. If the letters on the other side contain s
aliunde of the defender's letters, they cannot be used to prove that part
contents. But we are perfectly entitled to read them, in order to ge
precise meaning of the defender's letters. Again, another principle is
ence to the qualifications contained in these letters. The letters are p
and said to constitute evidence of the admission of a debt. But if the a
is qualified in its essence it must be taken subject to its qualification.
the first point which we decided in the case of Spiers, that the qualifica
tained in the admission by the defender in that case could not be go
In like manner here the letters which are founded on contain such expl
as essentially to destroy the obligatory part of their statements. Wit
to the letter of 5th February 1869 the effect seems to be that although
was willing to make arrangements with Mr Balfour about the £100 th
admission or promise that she was going to pay at that date. She wa
sult Mr Barbour, and to ask him to become her security. That does not
to an admission that there was a concluded agreement that the transac
to be changed into an obligation to repay, with a cautioner.

A single word as to the letters which passed between the defender
Edmond after Dr Duncan's death. Mr Edmond had the document s
to recover payment, and he writes to Miss Shand proceeding upon
missory-note as a formal and binding deed. Miss Shand replies in
"As you hold it to be incumbent on me to pay this sum I must sub
withstanding the fact that Dr Duncan owed me more than double th
Is that an admission of the constitution of the debt? And so with
the subsequent letter of 29th February 1872.

The only issue before us being whether the debt is proved, I am of
that no debt is proved.

Lord Benholme.—I have but little to add, as I substantially agree w
has fallen from your Lordships. The writing dated 2d February 1869
already found not to be a valid document of debt. On the part of Mi
there seems to have been a change of tactics. Immediately after his
Duncan had obtained the writing from Miss Shand he seems to have co
it his duty to put the matter on a different footing, and at all events
some security. But Dr Duncan himself seems to have put a stop to
alteration, for no further demand on Miss Shand is made for nearly thr
nor till after Dr Duncan's death. Then followed a correspondence
Miss Shand and the agents of Dr Duncan's trustees, which is said to c
a substantive obligation on the part of the former, for it is plainly impo

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squent writings to set up an obligation which is *ab initio* null. Now, I
t that the acknowledgment of receipt of money and of indebtedness on the
of Miss Shand, which is contained in these letters, is coupled with such
ifications as entirely destroy the force of the letters as containing a substan-
obligation to repay. It is the sacred duty of the Court not to omit or dis-
d any part of a written admission; and the true meaning of this correspon-
e with Mr Edmond and his firm, especially as brought out in Miss Shand's
r of 15th January 1872, was that, as she was advised by Mr Edmond, in
n she had confidence, that she was in law indebted to Dr Duncan's trustees
r the writing of 2d February 1869, she was willing to make payment, but
under protest that nothing was really due by her. No such legal obliga-
existed, and no new obligation can be said to have been set up by these
n.

ND NEAVES.—The proposition maintained for the pursuers is, that wher-
habili modo, the fact is established that money has passed from one party
other, that raises an obligation to repay, unless it can be shewn that the
y passed on some footing other than loan. I am not aware that any such
ine has been ever laid down. A payment of money must be proved *scripto*.
s are various kinds of writing allowed for this purpose. No better proof
e found than an entry in my cash-book of my having received £100 from
Can it be said that A B or his representatives are entitled to come and
"That is a loan, unless you can prove the contrary: you have it down in
books"?
e true proposition is that where the passing of money is proved in certain
that will infer a loan. The essence of all these cases in which this has
held is, that between the parties a document passed, given by the recipient
e payer of the money as a record of the transaction. The doctrine, as re-
dly laid down, is, that he who gives to another a document, acknowledging
ceipt of money, without qualification or explanation, as a chirographum to
eserved against him, infers an obligation to repay. And this obligation
s not so much from the document in itself as from its possession by the
party. That is the case of Ross v. Fidler,[1] and a whole series of decisions.
e case of Spiers the party getting the money did not give an obligation.
rgument against him was, that he had put his name on a cheque drawn in
vour, which proved that he had got the money, and therefore, it was said,
elled him to prove that he had not got it in loan. According to this, if I
a tradesman a debt which I owe him by a cheque, that infers an obligation
st him, unless he can prove the contrary, to repay me. The majority of
Court held that there was no document of debt to raise any such presump-

the present case, when did Dr Duncan hold a document which proved
pt of money? This promissory-note has been found worth nothing; what-
it is, it is not a document of debt. Do the other letters produced prove an
pendent loan? Or if they do not prove that, do they convert that promis-
note into a good document? Or does it convert them into a good acknow-
ment of debt? I cannot give effect to any of these contentions. And I
ot help adding that I do not think that we are going against the will of the
ued.

THE COURT pronounced the following interlocutor:—"Find that the pursuers have failed to prove by the writ of the defender the constitution and resting owing of the debt sued for: Therefore sustain the defences, and assoilzie the defender from the conclusions of the summons: Find the defender entitled to expenses; and remit," &c.

M'EWEN & CARMENT, W.S.—THOMAS SPALDING, W.S.—Agents.

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[1] Nov. 24, 1809, F.C.

No. 46.

Jan. 7, 1873.*
Ainslie & Co. v. The Officers of State.

HARRISON AINSLIE AND CO., Pursuers.—*Clark—H. J. Moncreiff.*
HER MAJESTY'S OFFICERS OF STATE, Defenders.—*Sol.-Gen. Young—Kinnear.*

Teinds—Valuation—Rental Bolls—Consent of Titular and Heritors.—A sub-commission for the valuation of the teinds in a parish authorised the sub-commissioners to give effect to the practice of payments by rental bolls when the parties consented thereto. In 1629 a report by the sub-commissioners set forth that the parson, who was titular of three-fourths of the teinds of the parish, and tacksman of the remaining fourth, and all the heritors, had consented to the valuation by rental bolls, except the proprietor of the lands of A. The bishop who was titular of the said remaining fourth, was not directly represented.

In an approbation, brought after the lapse of two hundred years, by the proprietor of A, the titular objected to the valuation as having proceeded without the consent of all the titulars and heritors. *Held* (1) that the titularity had been sufficiently represented by the parson, as titular and tacksman; (2) that the silence of the proprietor of A was not a valid objection to the valuation.

TEIND COURT. Teind Clerk.

THIS was an action of approbation of a sub-valuation of the teinds of the lands of Kenmore, in the parish of Kilmelford and shire of Argyll, brought by Harrison Ainslie and Co., the proprietors of the said lands of Kenmore. The report of the sub-commissioners appointed for valuing the stock and teind of the lands within the presbytery of Argyll was dated 1629, and the teinds of the lands of Kenmore were therein valued by rental bolls. At the date of this valuation the Bishop of Argyll was titular of one-fourth of the teinds of the parish, and the Crown had since acquired his right.

The Officers of State opposed the approbation, and pleaded;—(1) The report of the sub-commissioners was invalid, in respect that neither the heritor to whom the lands of Kenmore belonged, nor the titular consented to the valuation of the lands, according to the rental bolls in use to be paid. (2) The report was invalid, in respect the Bishop of Argyll, titular of one-fourth of the teinds, was not called as a party.[1]

The sub-commission, in directing effect to be given to the practice of payment by rental bolls, bore,—"And which rental of teind by the space of fourtie years in victuall nearhand the just avail both parties agree, and none oppose against the samen." The report of the sub-commissioners bore,—"Findes and declares that the land underwrettin perteining to the personnes afterspe'it within the parochyne of Kilmelphoirt hes payed in tyme bygane, payes p'ntly worth and may pay for the p'sonage and great teynd thereof as ane constant rent yeirlie in tyme coming the particulare rentalled teynd boll afterspe'it," &c. . . . . "Because the foirsaides personage and great teyndes have biene rentalled as is befoir spei't, and the same rentall in use to be payed yeirlie attor the space of fourtie yeiris immediately last bypast qh we find to be att the availl. And becaus the said Archbald Lord Lorne, patroun of the said Kirk of Kilmelphoirt, and the said Mr Colline Campbell, p'soun and vicar yrof, as titular of thrie q'rteris of the teyndis of the samen appertaining to the said laick patronage, and tacksmane and possessor of the fourt q'rter of the samen teyndes, called the bishop's quarter, and the saids personne heritoris above nameit compeirit all personallie befoir us, quha and ilk ane of thame co'descendeit and aggreit to ye foirsaids rentalled teynd bollis for the saides personage and great teyndes except the sd. Nei

* Decided June 6, 1869.

[1] Pringle v. Officers of State, 1770, M. 15,754; Thomson v. The Comm Agent in the Locality of Moneidie, 18th June 1834, 12 S. 747.

No. 46.

Jan. 7, 1873.
Ainslie & Co.
v. The Officers of State.

ll of Kendmoir, and because we took trew tryall and informa'oune e sowmes, gerss, and holding of the saides landis, and alse because es heritouris were lawlie summond to have co'peirit befoire us at aine day, to have hard and seine the saids vicarage and small valued in maner abovewrettine."

PRESIDENT.—There are two pleas upon which we have now to decide. e the first and second pleas stated for the Officers of State in the paper dated 13th March 1866. They involve the proposition that the report b-commissioners is invalid, because, while it professes to give the valua- he teinds according to rental bolls in use to be paid, it does not bear to ıpon the consent of the titular and the heritors, and because the Bishop l, who was titular of one-fourth of the teinds, was not called. The ıe sub-commission which directs effect to be given to rental bolls is a rwardly expressed,—"And which rental of teinds by the space of fourtie victuall nearhand the just availe both parties agree, and none oppose he samen." The construction which the Officers of State put upon this t is not competent to give effect to a practice of paying by rental bolls, ere be a positive agreement by all parties. I think this is too strict, and ther clauses of the commission have not been subjected to the same strict- onstruction. If there has been an agreement by the parties truly in- that is sufficient. The silence of one of the heritors will not render the ineffectual after it has been allowed to stand for a long time. The nissioners report that 40 bolls are the actual value of the teinds, "as it ds;" and further that the patron, and Colin Campbell, the parson, who as titular to three-fourths of the teinds and to the other fourth as , and the heritors, with the sole exception of Neil Campbell of Kend- eed to the valuation. They were all of one mind that 40 bolls repre- e true value of the teinds. Now, I think it would be a bold thing to this was not a valuation which could be approved by the High Com- It would not have been a sufficient objection that Mr Campbell did nt, if the approbation had been brought immediately after the valuation . The difference that it has not been presented till after a long time a worse objection. I think, therefore, that it is bad on the face of it, ls no good ground for refusing to approve of the sub-valuation. The f the titular, or rather of the owner of a portion of the titularity, for one-fourth of the teinds which were held by the bishop, is the other . Now, I do not know that it is necessary for us to decide that a by sub-commissioners may be good although the titular be not a party, may state that I think it has already been decided by the case of Thom- case of Pringle is a still higher authority to the same effect. Here it is e to say that the titular is not represented. The mere formal citation is red. The interest of the titular—that is, all his interest in the teinds lly represented by the parson, who had the sole interest in three-fourths tacksman of the remaining fourth, and so had the beneficial interest in e. Proceedings before the sub-commissioners are not to be treated as those of a court of law. The sub-commissioners were not lawyers, but entlemen, who were chosen on account of their knowledge of county It would be inconsistent with the way in which sub-valuations have ted to require formal regularity. I am therefore of opinion that both as should be repelled.

her Judges concurred.

THE COURT repelled the objections.

MACALLAN & CHANCELLOR, W.S.—W. H. SANDS, W.S.—Agents.

No. 47.

Jan. 10, 1873.
Stiven v. Brown's Trustees.

WILLIAM STIVEN (James Young's Factor *loco absentis*), Pursuer.—*Sol.-Gen. Clark—Mackintosh.*
ARCHIBALD YOUNG, &c. (James Brown jun.'s Trustees), AND OTHERS, Defenders.—*Marshall—M'Laren.*

Succession—Mutual Disposition—Revocation.—A person having purchased certain subjects took the disposition to himself and his wife in conjunct fee and liferent, for her liferent use allenarly, and to himself and his heirs and assignees in fee. Thereafter the husband and wife executed a *mortis causa* disposition containing the following clause:—"Reserving always to us during our joint lives our own liferent right and use of the premises, with full power to us at any period during our joint lives to alter, innovate, or revoke these presents in whole or in part." *Held* that the husband, being absolute fiar under the first deed, was entitled to revoke the mutual disposition after his wife's death.

Succession — Conditional Institution — Substitution.—A person conveyed a heritable subject to his children "equally among them, and the lawful issue of their bodies, and failing any of them by death, without lawful issue of their bodies, to the survivors equally." *Held* that this was a conditional institution of the grandchildren, and not a substitution.

1ST DIVISION. B.

JAMES BROWN, merchant in Dundee, was infeft in the following properties:—1. Subjects in Couttie's Wynd, Dundee, in virtue of a disposition to himself and his wife, Isobel Maiden, in conjunct fee and liferent for her liferent use allenarly, and to himself in fee; and (2) Subjects in the Cowgate of Dundee, in virtue of a disposition to himself.

On 23d August 1821 the spouses granted this disposition of the subjects in Couttie's Wynd:—"We, considering it to be our duty in our own lifetime to settle our affairs in such a manner as to prevent all disputes after our death, have resolved to grant these presents in manner underwritten. Therefore, and for other good and onerous causes, we do hereby give, grant, assign, and dispone to and in favour of Janet Brown and Isobel Brown, our daughters, equally between them, and the survivor of them in liferent, for their liferent use allenarly, and to their heirs in fee, all and whole." The deed contained the following clause:—"Reserving always to us during our joint lives our own liferent right and use of the premises, with full power to us at any period during our joint lives to alter, innovate, or revoke these presents in whole or in part; to sell, alienate, and dispone the subjects and effects hereby conveyed, in any manner we may think proper."

Mrs Brown having died in 1825, James Brown, on 29th July 1828, executed another disposition in the following terms:—"I, James Brown, weaver in Dundee, for the love, favour, and affection which I have and bear to my sons and daughters after named, do hereby give, grant, assign, and dispone to and in favour of Janet Brown, spouse of Archibald Young, and Isobel Brown, both my daughters, equally betwixt them and the survivor of them in liferent, for their liferent use only, but excluding the *jus mariti*, &c., and to the lawful children of the said Janet Brown and Isobel Brown equally amongst them, declaring that the children of the said Janet Brown and Isobel Brown respectively shall have right only to the share which would have belonged to their mothers, whom failing, to the heirs or assignees of the said Janet Brown and Isobel Brown respectively in fee, all and whole" the Couttie's Wynd subjects.

In 1831 James Brown granted the following disposition of the subjects in Cowgate:—"I, James Brown, do hereby give, grant, assign, and dispone to and in favour of William Brown, James Brown, and Peter Brown, my sons, and Margaret Brown, Isobel Brown, and Janet Brown or Young, spouse of Archibald Young, clock and watch-maker in Dundee, my

es due and payable furth of the subjects before conveyed, but
ıll, burden, or otherwise dispose of their shares of said subjects
'es, for onerous or gratuitous causes."

Brown died on 2d February 1832, being survived by five child-
ıree of these died without having any issue.

Brown, one of the children of James Brown, married Archibald
nd died intestate in 1837, leaving five children. Of these James
'as served as heir to his mother. James Young being abroad,
Stiven, accountant, was appointed his factor *loco absentis*.

Brown jun., the son of the disponer, survived, and made up a
ıeir to the subjects in question. He thereafter, by trust-disposi-
settlement, disponed the subjects to trustees.

ım Stiven, the factor for James Young, brought the present action
ɜ the title made up by James Brown jun., and his trust-disposition,
ljudge. The defenders were the trustees of James Brown jun.,
four remaining children of Mrs Janet Brown or Young.

ıursuer pleaded;—3. The several shares of the said subjects
by the pursuer being still *in hæreditate jacente* of the said Janet
r Young, and the said James Young being nearest lawful heir of
ı to her under the different deeds above set forth, the pursuer, as
r *loco absentis*, is now entitled to complete his title thereto by
r otherwise *in habili modo*. 4. The pursuer, as factor *loco absentis*
is entitled to make up a title in the person of his ward to the
indiviso shares of the said heritable subjects which were conveyed
id Janet Brown or Young, but which have been included in the
the said deceased James Brown jun.

ɛfenders pleaded;—3. The pursuer is not entitled to insist in any
nclusions of this action in so far as regards one-half *pro indiviso*
bjects in Couttie's Wynd (second described in the summons), in
-(1) That the settlement of 1821, on which that claim depends,
ked and superseded by the settlement of 1829; (2) that by said
nt of 1829 the only right conferred on Janet Brown or Young
of liferent allenarly to a specific portion of said property; and
the fee thereof was by said settlement given to all her children

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Jan. 10, 1873. Stiven v. Brown's Trustees.

and assoilzies the defenders from the conclusions of the libel, and decerns: Finds the pursuer liable in expenses, of which allows an account," &c.*

The pursuer reclaimed, and after hearing counsel the Court pronounced this interlocutor:—"Recall the said interlocutor *in hoc statu;* and on the condition of the pursuer paying to the defenders the expenses incurred by them since the date of the reclaiming note, sist process, and give the pursuer an opportunity of amending his title or expeding another title, as he may be advised."

Thereafter the parties gave in a minute stating that they had agreed that the case should be decided on the footing that the objections to the service of the pursuer were not to be insisted in.

The pursuer argued;—The deed of 1821, conveying the Couttie's Wynd subjects, being a mutual deed by James Brown sen. and his wife, could not have been revoked by the subsequent deed of 1829, executed by James Brown after his wife's death. As in right of his mother, James Young was entitled to one-half *pro indiviso* of these subjects. In virtue of the

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* "NOTE.—. . . . . (2) The ground on which the pursuer claims, as *loco absentis* to James Young, the one-half part or share of the subjects in Spalding's or Couttie's Wynd, Dundee, is that James Young has right thereto as heir of provision to his mother, under the mutual disposition and settlement of James Brown sen., and Isobel Maiden, his wife, dated 23d August 1821. As regards this claim also, James Young has, on the assumption on which it is made, no title to sue, not having expede any service to vest in him the person right conveyed by that deed to his mother. But there is a more formidable objection to his claim. The disposition and settlement of 1821 was superseded and revoked by the disposition and settlement executed by James Brown sen. on 29th July 1829; and the subjects were thereby conveyed to Janet Brown and Isobel Brown in liferent, for their liferent use allenarly, and to the lawful children of the said Janet Brown and Isobel Brown respectively, equally among them, in fee. The pursuer contended that it was incompetent in James Brown sen. to revoke the mutual settlement of 1821. The Lord Ordinary is of opinion that James Brown sen. was entitled to do so, because the settlement of 1821 was not a mutual remuneratory deed between the spouses, and because the destination of the subjects remained, notwithstanding its execution, entirely within the control of James Brown sen., the proprietor thereof.

"(3) The pursuer insists in this action, in so far as regards the subjects in the Cowgate of Dundee, on the ground that James Young has right to one-fifth part thereof, as heir of provision to his mother, Mrs Janet Brown or Young, under a disposition and deed of settlement of James Brown sen., dated 6th December 1831. Even if this claim were founded upon a correct construction of that deed, James Young cannot, *in hoc statu*, insist in this claim, as he has not completed his title as heir of provision. But there is a more formidable objection to his claim, founded on the terms of the settlement. By that deed Mr Brown conveyed the subjects to his six children *nominatim* 'equally among them, and the lawful issue of their bodies, and failing any of them by death, without lawful issue, to the survivors equally, their heirs and assignees.' James Brown sen. died last seised and infeft in the said subjects. His daughter, Mrs Janet Brown or Young, never completed her title to her share thereof. The destination by the settlement is to her lawful issue, and it vests, in the opinion of the Lord Ordinary, the one-fifth share destined to Mrs Janet Brown or Young and her issue, in her whole children equally. He considers that the term 'issue' is synonymous with the terms 'bairns' and 'children,' and that the whole children of Janet Brown or Young are thereby designed—Carnegie, 13th Feb. 1677, Dict. 12,840; Herries, 26th Nov. 1806, Hume's Dec. 528; Wilson, 14th June 1811, Hume's Dec. 534; Waddell v. Pollock, 19th June 1828, 6 S. 999; Kibble v. M'Donald, 16th Feb. 1832, 10 S. 341."

he property in Couttie's Wynd, thereby conveyed, as heir-at-law of his
Irs Janet Brown or Young. Now, undoubtedly, he would be entitled
n if the deed of 1821 stands unrevoked by that of 1829. The only
therefore, with regard to this claim of the pursuer is, whether this
ed of 1821 was effectually revoked by the subsequent deed executed
Young's grandfather, James Brown, on 29th July 1829. No doubt
of 1821 was a mutual deed, though it is not so called in the deed
; there is a mutual disposition, and there are two parties to the deed,
own on the one hand, and Isobel Maiden, his wife, who concurred;
two dispone certain subjects, including those now in dispute, to their
, Janet Brown and Isobel Brown, equally between them, and the sur-
hem in liferent, for their liferent use allenarly, and to their heirs in fee.
ous, however, that if one only of two parties to a mutual disposition of
is in right of the property disponed, the fact of the other having con-
the disposition will not give that party any right to the subject, unless
words of contract in the deed by which such a right is properly and
ly created. In this deed there are no words expressive of such a con-
ould disable the real proprietor from exercising all his rights over these
nothing of that sort appears except that the names of the spouses are
in the disposition. When we look at the state of the title, it is be-
question that the fee of these subjects was the individual and particular
of the husband. It stood in his person upon an infeftment proceeding
conveyance in June 25, 1816, "to and in favour of the said James
nd Isobel Maiden, his wife, in conjunct fee and liferent, for her liferent
arly, and to the said James Brown, his heirs and assignees whomso-
ee." Under that conveyance, and infeftment following thereon, there
the slightest doubt that James Brown was the absolute fiar, and that
rn's right was a bare liferent. In such circumstances it may have been
point of form that she should concur, but it was not necessary, and such
ence can never constitute a contract to give the liferentrix a higher
n was hers under the conveyance and infeftment. I am clearly of
hat the deed of 1821 was a testamentary and revocable deed, and was
y revoked by James Brown's subsequent deed in 1829, and, therefore,
pursuer's claim cannot prevail on this point.

e pursuer lays claim to one-fifth part of a second class of subjects; and
n depends upon the construction of a deed of 1831 executed by the

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only to uplift and discharge the rents due from their shares of these subj also to sell, burden, or otherwise dispose of their shares of the subjects. is no positive rule settled in law, as far as I know, for the construction of this kind—no technical rule at all events—and, therefore, we must what was the meaning and intention of the maker. The defender's co is that this constitutes an institution of each and all of the testator's c and that their issue are substituted to them. Now, I never met with tion as a result of such words as these. Upon reading them first, wha veyed to one's mind is that this is conditional institution. It was natu the possible predecease of some of his children should be in the conte of the maker of this testamentary writing, and that provision should for that event. This seems to have been well done here if we read thi as importing a conditional institution,—that is to say, if we take it as —"I convey to my children or the lawful issue of their bodies, if the cease me, and to the survivors if any predecease without issue, and to th *i.e.*, to the heirs and assignees of the disponees." I think this appli whole class of persons mentioned in the dispositive clause of the deed.

But another and still more favourable view may be taken from a consi of the succeeding clause which I have alluded to. When a testator substitution, he no doubt leaves the first institute *dominus* of the prope the estate is open to the diligence of the institute's creditors. Still, he wish to incite the institute to defeat the substitution. I have never s done. But it is clear here that, supposing he had meant substitution, incite his daughters, the institutes, to defeat the substitution by provid without their husbands' consent they shall be entitled to sell, burden, wise dispose of their shares of the subjects disponed. He has cut off the the husbands, who might have interfered in the interest of children, an created every facility for defeating the supposed substitution. That, makes this second point clear—that conditional institution, and not subs was the disponer's intention. Apart from this last consideration, ho think the matter quite beyond dispute, that, on a construction of the conveyance, conditional institution must be inferred. I am, therefore, f ing in substance to the Lord Ordinary's interlocutor.

The other Judges concurred.

THE COURT pronounced the following interlocutor:—"Find that the disposition dated 23d August 1821, made and gra James Brown sen. and his spouse, was validly and eff revoked by the disposition executed by the said deceased Brown sen. on 29th July 1829; and therefore find that t suer is not entitled to one-half *pro indiviso* of the subj Couttie's Wynd, Dundee, in terms of the said disposition c but reserving his right and interest in the said subjects un said disposition of 1829: Find that the pursuer is entitled fifth part *pro indiviso* of the subjects in the Cowgate of conveyed and settled by the disposition executed by the s ceased James Brown sen. on 6th December 1831, togeth the rents thereof, from the death of the said James Bro on 2d February 1833, so far as received by the said defe their constituent, the said James Brown jun.: . . . . And the parties to be further heard as to the application of th findings: And in regard to the question of expenses, exce far as previously disposed of, find no expenses hitherto i due to or by either party."

HILL, REID, & DRUMMOND, W.S.—FYFE, MILLER, & FYFE, W.S.—Agents.

had become the property of the manufacturer as a trade mark, and that
se was entitled to use it.
ict.—In an application for interdict against the use of a trade mark,
t it was not necessary to prove actual injury sustained, but merely
e ground for the apprehension of injury.

Singer Manufacturing Company of New York presented a petition 1st Division.
Sheriff of
Lanarkshire.
M.
heriff-court of Lanarkshire against Messrs Kimball and Morton,
nachine makers in Glasgow, for interdict against the respondents,
and Morton, selling, offering, or exposing or advertising for sale
machines not manufactured by the Singer Manufacturing Com-
Singers, Singer machines, or Singer sewing machines, or by any
ame similar or only colourably different from the name of the
ers' machines.
etitioners stated,—"The Singer Company have carried on business
g machine makers for many years, at least since the year 1863, and
d their machines as Singer sewing machines, and the said machines
versally and exclusively known in the market as Singer sewing
s, and under that name are extensively sold and of great repute.
; the respondents have recently commenced to manufacture and
. are advertising and offering for sale, machines not manufactured
aid Singer Manufacturing Company as 'Singers,' 'Singer machines,'
er sewing machines,' with the object and effect of leading and in-
he public to believe that the said machines are manufactured by
company, all to the loss, injury, and damage of the petitioners."
s Kimball and Morton in their answers pleaded want of title, and
elevancy, and stated;—"For twenty years or thereby prior to this
rious parties in Great Britain and elsewhere had manufactured
d sewing machines on various principles, and among others on
as known or described as the 'Singer principle,' and for that or its
ion no patent existed applicable to Great Britain. That for four
by years the defenders had done so in Glasgow and Dundee.
ey never advertised or represented their machines as the pursuers'
s, or as made or sold by the pursuers. That the only advertise-
nich the defenders recollect of issuing was one of which a copy

No. 48.

Jan. 14, 1873. Singer Manufacturing Co. v. Kimball & Morton.

Messrs Kimball and Morton appealed to the Sheriff (Glassford Bell), who adhered to the decision of his Substititute in the following interlocutor, which states the result of the proof:—"Finds that the question at issue substantially is, whether the pursuers are entitled to be protected in the exclusive use of the word 'Singer' as a trade mark, designating a particular description of sewing machine made and sold by them, or whether the defenders, being admittedly entitled to make and sell sewing machines of the same description as the 'Singer,' are at liberty to offer such machines to the public as 'Singer' sewing machines, manufactured by the defenders themselves: Finds that the individual pursuer, Isaac Memitt Singer, who is a partner of the pursuers' company, seems to have been the inventor, about twenty years ago, of the machine called the 'Singer,' and to have sent it into the market from the first as the 'Singer': Finds that the pursuers, the Singer Manufacturing Company, of New York, have been in existence since 1863, and no other makers of sewing machines gave out to the public that they made 'Singer' sewing machines till the defenders did so in March 1870, soon after which the present action of interdict was raised against them: Finds that the machine sold by the pursuers as the 'Singer' was never patented either in this country or America, but certain principles or processes which were applied in the construction of the machine were patented in America, and these patents have all expired: Finds that the pursuers' 'Singer' machine has not been always the same in construction, but has been improved from time to time, and has obtained such reputation that they now dispose of about 180,000 annually: Finds that the defenders, prior to March 1870, introduced a sewing machine of similar construction to the 'Singer,' which they sold as the 'Lion;' but finding that it did not succeed under that name, they then announced that they made and sold the 'Singer': Finds that it is in evidence that various parties believed that no 'Singer' machine was made except by the pursuers, and that when they bought a 'Singer' they took it for granted that it was the pursuers' manufacture, understanding, in the words of one of the witnesses, that 'the name "Singer" was used to signify the manufacturer and not the machine': Finds that there is no averment in the record that the pursuers had made any unfair or fraudulent representation regarding the sewing machines sold by them calculated to mislead the public, and so to bar the pursuers' title to complain of any infringement of their right; but finds that even if the objection were open, which at the debate before the Sheriff it was contended to be, there is no evidence of any such unfair dealing by the pursuers: Finds, in point of law, that the name of the manufacturer of a particular article, if the name be *ab initio* attached to the article with the view of distinguishing it from all others, and if for a succession of years it be sold exclusively by the manufacturer, or parties in his right, under that name, may become property as a trade mark, and though third parties may be entitled to manufacture and sell the same article they are not entitled to do so under the said name, seeing that they may thereby mislead the public, and this is *a fortiori* the case when the person using the name of the original manufacturer is himself of a different name: Finds that, in the whole circumstances of the present case, the pursuers have such property in the name 'Singer,' and are entitled to the interdict craved: Therefore, and under reference to the annexed note, dismisses the appeal, and adheres to the interlocutor appealed against."*

* "NOTE.—It is not very easy to distinguish this case from that of Wotherspoon and Co. v. Currie and Co. decided in this Court in February 1870, or

The respondents then appealed to the Court of Session, and argued;— Before a word could be claimed as a trade mark the claimant must

No. 48.

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n the recent case of Wotherspoon against Currie, decided in the House of rds on 19th April last.[1] In both of these cases it was the use of the name of a ce (Glenfield) by a rival maker of starch that was interdicted, and here the rdict is sought against the use by the defenders of the name of a person as scriptive of a sewing machine made by the pursuers, and by which it has ays been distinguished. In the former cases the starch was actually made Glenfield by the defenders, who had premises there, but this was held not be sufficient, for, in the words of Lord Westbury, 'long antecedent to the erations of the defendant the word "Glenfield" had acquired a secondary sigfication or meaning in connection with a particular manufacturer; and, in short, d become a trade denomination of the starch made by the plaintiff. The word Glenfield" therefore, as a denomination of starch, had become the property of e plaintiff. It was his right and title in connection with starch, and the quesn was, had the property been invaded by the defendants?' Here, in like manr, the word 'Singer,' long before the operations of the defenders, had acquired signification in connection with particular manufacturers, viz., the pursuers, d the word, therefore, as the denomination of a sewing machine, had become eir property. In the case of Burgess, 3 De Gex, Mac. and G., p. 896, it was marked on the bench that 'where a person is selling goods under a particular me, and another person not having that name is using it, it may be presumed at he so uses it to represent the goods sold by himself as the goods of the pern whose name he uses.' It was ingeniously argued here for the defenders that there were no patent rights involved there was nothing to prevent any one aking a 'Singer' sewing machine, and selling it under that name. But whilst e first portion of this proposition may be true, the second is fallacious. The fenders may no doubt make sewing machines, as similar to the 'Singer' as posble, but they are not entitled to sell them as 'Singers,' because so far from that me having been a name universally acknowledged as generic in the trade, it is, the contrary, a name which has all along been appropriated by the pursuers, d which the public has been taught to associate exclusively with them. On is ground injunctions have been passed in England against persons selling pills Holloway's (Bevan's Reports, vol. 53, p. 209), or blacking as Day and Mar's (Tudor's Leading Cases, p. 482), even although they were so sold by a *bona de* Holloway or Day and Martin, but not the original vendors, whose pills and lacking had acquired a celebrity under their names. The simple rule is that a ader who, in ordinary circumstances, might be quite entitled to use a particular ark or name, cannot be allowed to adopt it if that would cause the goods to ear the same name that has already been appropriated by a rival trader, d which had not been in general use previously, or was a term of such comon application as to be patent to all. The distinction indeed hinges on this st consideration. In the Scotch case of Robert Wotherspoon and Co. v. Gray d Co., November 10, 1863,[2] it was held that the pursuers were not entitled to n interdict against the defenders using wrappers having on them the words 'Gray and Co.'s Victoria lozenges,' merely because the pursuers had previously en in the habit of selling lozenges in wrappers having the words 'Wotherspoon d Co.'s Victoria lozenges.' The Court thought that as it was quite a common ing to apply the name 'Victoria' to all sorts of goods, such as shawls, perfumery, d fancy articles, the first application of the name to an article well known in e trade gave no exclusive right to the party using it, and that Gray and Co.'s Victria lozenges would never be mistaken for those of Wotherspoon and Company. t it is clear that the word 'Singer' is of a much less broad and generic aracter, and was never applied to distinguish any article of commerce till the nsuer applied it to a sewing machine, and all the concomitant circumstances e unfavourable to the defenders. Whether the judgment of Vice-Chancellor

[1] L. R. 5 Eng. and Ir. Ap. 508. [2] *Ante*, vol. ii. p. 38.

hesitation by the House of Lords. Neither is the judgment very re with that of Millington v. Fox, Tudor's Leading Cases, p. 487, where, it was proved that the terms 'Crowley' and 'Crowley Middleton' were used as descriptive merely of particular qualities of steel, their use b fendant was interdicted at the instance of a plaintiff who had always words on his trade mark. In short the following sentence of the Lord lor in the well known case of Seixo, January 1866, 1 Chancery Appeal seems to embody the essence of the law on the subject:—'If the g manufacturer have, from the mark or device he has used, become kno market by a particular name, I think that the adoption by a rival trad mark which will cause his goods to bear the same name in the market i much a violation of the rights of that rival as the actual copy of hi Now, the pursuers' trade mark, as may be seen on 23/32, 38/27, and vari productions, describes them as the 'Singer Manufacturing Company,' the defenders have done is to announce that they are as much a 'Singe facturing company as the pursuers, and that they supply, not the 'Lio other sewing machine made on the same principle as the 'Singer,' but 'Singers.' This, in the first place, does not seem upon the proof to b for at least the materials used are frequently different; but in the next Currie was not allowed to announce that he sold Glenfield starch, thou actually made at Glenfield because another party had previously app the name, why should the defenders, who have no connection with an or place of the name of 'Singer' be allowed to neutralise the pursue mark, and lead the unwary into the belief that they might purchase fr a machine with which no other name than that of the pursuers was ev connected, and which they might naturally suppose was made by them not enough that the defenders simultaneously publish that their 'Sin made by themselves; so did Currie and Company regarding the sta point of fact, they have not 'Singer' machines to sell any more than t Holloway's pills, or Day and Martin's blacking; they have only Kim Morton's, and they cannot be allowed to sail with them under the colours.

"In Mr Upton's valuable treatise on the law of trade marks will 1 a succinct digest and review of nearly all the authorities on the subject, and American, and as the result of the whole the author lays down the proposition as law, which appears to be entirely applicable to the presen 'That the honest, skilful, and industrious manufacturer, or enterprising m who has produced or brought into the market an article of use or consump has found favour with the public, and who, by affixing to it some nam device, or symbol, which serves to designate it as his, and to distinguis all others, has furnished his individual guaranty and assurance of the qu integrity of his manufacture, shall receive the just reward of his honesty, industry or enterprise, and shall, in no manner, and to no extent, be de the same by another who, to that end, appropriates and applies to his pro the same or a colourable imitation of the same name, mark, device, or sy that the public are or may be deceived or misled into the purchase of ductions of the one supposing them to be those of the other.'"

[1] Wheeler and Wilson Manufacturing Co. v. Shakspear, 39 L. J. Ch.

ertain principle—and not as the manufacture of any maker in
ır. The name was only used in that sense here, as descriptive of
hanical construction of the machine. "Singer" meant a machine
rell known "Singer principle." In other cases about trade marks
ıs objected to was that the stamp on the articles manufactured
n copied. All that was claimed was the right to use the name
" as shewing the construction, not the manufacturers of the
. When the right of exclusively making an article was lost the
the name was lost too.[1]
ed for the petitioners;—The machines manufactured by them were
in finish and material to those of other manufacturers. Every
provement was adopted and incorporated, and the confidence of
lic had been gained for the machines which bore the name of
." "Singer" meant machines manufactured by this company, not
machines constructed on a certain principle. The name "Singer"
trade meant the manufacture of the Singer Company. If a
" machine were ordered from a sewing machine agent it would
ach of contract on the agent's part to send any machine except
ıufactured by the Singer Company. The name was their property,
ı a guarantee to the public of the quality of the machine. The
ecognised the same as belonging to an article manufactured by
It was not necessary to prove damage. A reasonable appre-
of damage would be enough to entitle them to interdict.
lvising,—

PRESIDENT.—The application for interdict in the Sheriff-court, presented
Singer Manufacturing Company of New York, was based upon two
ts in point of fact. The first was that that company, since the year 1863,
d their machines as Singer sewing machines, and that the said machines
ersally and exclusively known in the market as Singer sewing machines,
er that name are extensively sold and of great repute. The second aver-
that the respondents, Messrs Kimball and Morton, have recently com-
to manufacture and sell, and are advertising and offering for sale, machines
ufactured by the Singer Manufacturing Company, as "Singers," "Singer

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that it becomes in a certain sense the property of a particular individual pany in that trade, or, in other words, becomes the trade mark of that ind or company; and if the evidence of that appropriation of the name to de the manufacture of a particular manufacturer is clearly made out, it is good a trade mark, and one as exclusively and effectually appropriated t as if it were a trade mark not consisting of a word at all, but of some pa device in drawing. We had not very long ago in this Court a case illustrated very well the general rule as applicable to trade marks—the Dixon v. Jackson, Jan. 29, 1867, *ante*, vol. v. p. 326, in which Mr Di Govan, or rather his trustees, complained that whereas a certain quality c iron was always marked "Govan" with a star, another trader had n marked his iron with the name of the place where it was manufactured star added, and they complained of his use of the star as an innovation o trade mark. That case did not come to ultimate judgment, but it was ver ously considered upon the question of interim interdict, and the Court g an interim interdict upon the ground that there was a *prima facie* case of i tion of a trade mark, leaving it to be established upon the passing of th that the star had been so appropriated by Mr Dixon of Govan as exclusiv represent his peculiar make of iron as distinguished in the trade from any But whether it be a star or any other device, or a name, as in the present the result is the same. If it be exclusively appropriated for a series of and has obtained a certain exclusive meaning in the trade, as signifyi goods or the productions of a particular manufacturer, then it is his prop a trade mark, and no one else is entitled to use it. Now, it appears to m for a series of years, and certainly I think back to the year 1863, as aver the petition, everybody in the trade has understood that a Singer machi Singer sewing machine is a sewing machine manufactured by the Singer facturing Company. I think that is the fair result of the evidence. hardly been denied that for that period the fact has been so. But then ence is made to an earlier period in the history of the use of this word, as ing that the meaning thus acquired by the word Singer arose from false sentations made by Mr Singer, and afterwards by the Singer Manufac Company, or some other company that preceded them, as to the right Singer as having a patent or patents which enabled him, for a time at exclusively to manufacture what was called the Singer machine. Now, no Mr Isaac Singer, who appears to be still a partner of this company, so fa as 1852, was under the impression that he had made an original inventio he expected to obtain a patent for it, but in that he was disappointed. It out that the straight needle with vertical action, which he conceived t novelty invented by himself, had been anticipated in other sewing ma and the consequence was that he did not obtain a patent for that. It ap however, that he went on to manufacture the article which he thought s was an invention of his own, and that in the course of that manufact effected various improvements on it, for some of the details of which he di ceed in obtaining patents. But I am not prepared to say that there evidence in this case to shew that either Mr Singer or any person associate him in business committed any fraud in the way of holding out to the that they held patents which they did not hold. I do not think there is su evidence of that, or that the use of the word Singer, as applicable to ma made by him and his company, was caused by their false representations of rights belonging to him. On the contrary, it rather appears to me that t of the name grew up and matured just in consequence of Mr Singer and connected with him in business having constantly gone on making this h machine which he thought originally was a novelty, and improving it in kind of way that occurred to them in the progress of their business. It that way, I apprehend, that the name "Singer" came to have what is n established meaning, and I cannot see that there is anything in the hist that appropriation of the name to prevent the Singer Manufacturing Co now from asserting right to it as their trade mark. It is said, no doubt, part of the defender, that to interdict him and all other manufacturers of s

ry fresh witness seems to give a different account, and at last it all
ith this, I think, that one of the defenders' witnesses, a Mr Thoms,
he is asked what is the Singer principle—"A machine made on the
ciple is one made in imitation of the pursuers';" so that the only
ıat is involved in the making of Singer machines by persons other
ırsuers is, that they simply imitate as far as they can the machines
.e pursuers. Now, this is plainly no principle at all in the only sense
he statement can be available to the defenders. If the defenders'
re called Singers, and if they imitate both the thing and the name,
ıre doing the very thing complained of, and the very thing the pur-
ɛntitled to complain of. But the supposed hardship in not being
use the name of "Singer," because no other word, or at least no
; form of expression, will sufficiently convey the idea that they make
achines upon this principle, is not very credible, when one comes to
› fact that for a long series of years prior to 1870 nobody felt such
ınce from the want of the use of the name "Singer" as to try to make
It was left entirely to the use of the pursuers. Other people were
wing machines of all kinds, and, I have no doubt, were making sewing
like the Singer, or as like them as any machines could be made, but
lled them Singers, because it was just as easy to describe the machines
›ther way and to recommend them in some other way. Nay, the
themselves, during the first three years that they carried on business
left the pursuers' employment, never used this name of Singer, and yet
; manufacturing and offering to sell every kind of sewing machines, and
ıestionably manufacturing machines very like the Singers at all events,
ere not identical with those that were at the same time being manufac-
the pursuers; so that down to 1870, nobody, not even the defenders
s, experienced any evil from not using the name of "Singer" as de-
of one portion of their manufacture. This is so very clear in point of
it is quite needless to refer to the evidence further than to say that the
Mr Morton, himself confesses very candidly that prior to 1870 nobody
ıited Kingdom used the name of Singer except the pursuers' company.
; to me, therefore, that the first averment upon which the petition for
is founded is quite satisfactorily established. But, then, the pursuers
averred—and it is quite necessary for their case that they should do
the defenders have sold or offered for sale machines not manufactured

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ground for such an application. Now, how does the matter stand here? There can be no doubt that Messrs Kimball and Morton are very desirous, as they express it, to break down the American monopoly enjoyed by the pursuers, and to make and sell Singer machines, the name being a great favourite with the public. They want to make and sell Singer machines, because the name is a very taking one, and because the name "Singer" carries off machines, and produces a greater sale than any other name going; and accordingly, while they do not in direct terms profess that they are selling machines made by the pursuers, they do say they are selling Singer machines. No doubt they also state that they are making them—that is quite true—but if they did not state that, and did not prove that they could make them and make them well, of course they would not succeed in extending their business. Their great object is to be known in this trade as people who make as well as sell Singer machines, and if they did not succeed in that they would not succeed in their object. But the question comes to be whether they are entitled to use this word "Singer" merely because they say that they are themselves the makers of the machines which they so christen. Now, in one point of view, that is certainly not representing to the public that the machines which they sell are made by the pursuers. It is not so direct a misrepresentation as that, but that is just the thing that is complained of in this action, namely, the use of the term "Singer," which with the public carries a certain guarantee of excellence in the machine that is sold, and the appropriation of which, therefore, by the defenders is an invasion of the pursuers' trade mark. We have not any very direct evidence before us of persons who have been actually deceived or misled by what is done. There was one example referred to in the person of the name of Cole, but the pursuers have not taken much trouble to lead evidence of that kind, and I think they were justified in refraining from doing so. It is difficult evidence to procure, and would unquestionably have extended the bulk of this proof, bulky enough as it is, to a much greater extent; but they rest upon this, that what these defenders are doing in christening their machines of their own manufacture with the name of "Singer" is calculated to injure the business of the pursuers by the use of the trade mark which is exclusively appropriated to them, and that, I confess to my mind, is quite sufficient. I do not think it is necessary that they should go the full length of their statement when they say that this has been done with the object and effect of leading and inducing the public to believe that the machines are manufactured by the said company. It is sufficient to my mind if it is calculated to have that effect; and that it is calculated to have that effect is certainly a most reasonable conclusion from the evidence that is before us. Upon the whole matter, then, I am of opinion that the interlocutors of the Sheriff and Sheriff-substitute are well founded, and ought to be adhered to.

Lord Deas.—It is not disputed by the defenders that since 1863 the pursuers have been and still are selling sewing machines under the name of Singer machines or Singer sewing machines. The only defence pleaded is that the name "Singer," or "Singer machines," or "Singer sewing machines," is not understood or intended to mean machines made by Singer and Company, but is used and understood to mean, machines of a particular construction such as are made by Singer and Company. Consequently the main contention both of Mr Macdonald and the Lord Advocate, very properly, was that the import of the proof, taken in connection with the statements and representations of the pursuers, is that the name "Singer" designates not the maker but the construction. Now, there do seem to be some peculiarities in the construction of the machines made by the Singer Company, and the pursuers have themselves represented very strongly that there are such. But assuming this to be so, the question, I think, still remains, Is it these peculiarities of construction which the name "Singer machine" is used to denote, or is it that the machines are made by the Singer Company?

Now, it appears to me that the burden of the proof goes to instruct that although there are peculiarities in the construction of these machines, the substantial thing which the name describes, and the consequent weight the name

be any protection at all.

next question is, whether in using that name the defenders have for the purpose of increasing their own sale and diminishing the the pursuers, and to the probable loss and injury of the pursuers. It t be necessary, however, to prove that that was their object, if it that such has been the effect. At same time, it is scarcely conceivable was not their object, for Mr Morton, the defender, says—"We thought entitled to use the word 'Singer,' as we followed the same principles, used it to increase our trade." And how could it increase their trade, by representing that these machines were Singer machines? No doubt ntage of that might occur in either of two ways—either because the s made by the defenders were of the same construction, or because they de by the same makers. But then if the result of the proof be, as I is, to shew that what so enabled the defenders to increase their trade belief of purshasers that these machines were made by the Singer Com- at fact is conclusive upon that point.

not think it necessary, in this case, to go much into the question of a reasonable apprehension of injury will entitle a party to an interdict. re many cases in which that will very clearly be so,—cases of apprehen- ersonal injury, or of danger to life, or of great and perhaps irreparable loss ain thing is allowed to go on. There are cases of that kind, in which there o doubt that a reasonable apprehension is enough, and I do not say that, in this kind, a reasonable apprehension that the pursuers might suffer great what they complain of was allowed to go on might not be sufficient; t I do say is that it is not necessary to go upon that doctrine here, the proof seems to me, beyond all question, to shew that there is, and n, loss and injury to the pursuers in their trade by this assumption of de mark or trade name. If we had been in an action of damages, it ave been necessary to have had specific instances, and to have brought ies who bought the machines to say whether they were imposed upon; sort of particularity is not necessary in order to enable us to arrive at lt that there ought to be an interdict. We may not have the materials rtaining what the damage was, but I think we have here abundance of s for being satisfied, taking the whole evidence together, that the defenders by using this name, and that the pursuers did lose in consequence. ngly, I am entirely of opinion, with your Lordship, and the Sheriffs in t below, that it is proved that the name of Singer had been adopted

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or by the Singer Manufacturing Company. It is not proved that the name indicated any special peculiarity in principle or construction.

With the natural eagerness of competitors, and the usual complacency manufacturers, it seems that the respondents, Singer and Company, have, different times, and in language copious and complimentary, described machine as marvellous in point of invention, as well as matchless in point construction. But, after reading all the proof, I have formed a clear opini that the name "Singer" has been applied and recognised by the public and the trade, not primarily and mainly as denoting any particular principle or pe liarity of construction in the machine, but as denoting the fact that they w made by Mr Singer or by Singer and Company. To give his own name to machine which he made himself was natural and legitimate; and as the ma facture was a great success, the public accepted the name, and the trade rec nised it as a distinctive and well-understood designation. To the public name was a designation; to the maker, a trade mark. I may mention that th is clearly instructed by the testimony of M'Kellar, p. 31; Stirling, p. Hunting p. 34; Stockwell, p. 35; Huxley, p. 37; Hunt, p. 39; Nicoll, p. whose testimony is clear and important; Tait, p. 43; Woodruff, p. 65; Fothergill, p. 67. These are witnesses for Singer and Company. But one the witnesses for the appellants, Kimball and Morton—a Mr Parker—p. says, "by a Singer machine I understood a machine made by the Singer C pany." On this point there is no doubt.

An invention is protected by a patent. When the patent has expired protection is gone. But a maker's name cannot be assumed by another with a deception and a wrong. Here it is the name that is assumed. In this of the facts I have no difficulty in finding sufficient foundation for adhering the interlocutor of the Sheriff and the Sheriff-substitute, both of whom h stated their views clearly and ably, unless there is some rule of law opposed the pleas of the manufacturers.

If it be true, as I think it is, that the name of "Singer," being that of manufacturer, was known and understood in the trade as denoting the mach which he manufactured, then the use of that name, by applying it to a com ing and rival machine not made by Singer, is, in my opinion, a usurpation a wrong. The authorities referred to by the Sheriffs are most important, p ticularly the case of Wotherspoon v. Currie (the Glenfield starch case), and th case of Seixo, decided by Lord Chancellor Hatherley in 1866 (1 Chan. App 192), and the case of Ainsworth v. Walmesly in 1866, decided also by the noble and learned Lord.[1] These are a body of weighty and appropriate authority The only authority apparently adverse is the case of Wheeler and Wilson, November 1869 (Law Jour., Ch. Rep., vol. xxxix. p. 36). If that decision considered apart from the special circumstances of the case, and if it is urged opposed to the decision in the case of Wotherspoon, I must, with the greate respect for Vice-Chancellor James, hold that the more recent judgment of th House of Lords in the case of Wotherspoon is of higher authority. But th case of Wheeler and Wilson was the case of an expired patent, a case where th machine was distinguishable rather by the novel invention to which the pate applied than by the name of the maker as a guarantee of construction a durability, and there may perhaps have been special circumstances to sustain explain the judgment. In any view of it, I do not think that it affords a s foundation for a decision in this case, which is quite different, where the eviden of appropriation and application is so strong, and where the law is so clear laid down by the House of Lords in the cases already mentioned, and partic larly in the recent case of Wotherspoon v. Currie. Our judgment must be accordance with that high authority if the facts are clear, and on the facts have no doubt.

I have little now to add. Singer and Company have no monopoly of the vention, and no exclusive right to make or to sell the machine. Any one m

[1] 35 L. J. Ch. 352; 1 L. R. Eq. p. 518.

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it. Any one may sell it. But there must be no deception, no sailing false colours, no unfair and delusive assumption of a trade mark, or of a appropriated and known as a trade mark. The name of "Singer" has, the circumstances and with reference to the usage and understanding in- ed by the proof, been, in my opinion, so applied to and associated with achines manufactured by Singer and Company, as to be equivalent to a mark; and Lord Chancellor Hatherley says, "You shall not, by using a mark, pass off your goods as the goods of the owner of the trade mark. he adds, "is not a man's name a still stronger trade mark than anything an well be devised?" This Court is not giving support or encouragement n recognition to a monopoly of these machines. The Court is protecting anufacturer against a usurpation, an unfair and inequitable and illegal use manufacturer's name, which he has adopted, and the public have recog- and understood, as a trade mark.

is is not an action of damages. It is an application for interdict. It would been more satisfactory if we had been informed by witnesses that they had lly been deceived, and that they had purchased from the appellants as ger's machine" a machine not made by Singer. But, in an action not for ges but for interdict, not for redress but for prevention, I do not think that ant of such evidence is fatal to the petition for interdict; for I am satis- oth of the intention and of the tendency of the appellants' proceedings to re the public into the acceptance of the machines as made by Singer and any, though not so made.

terdict, or in England injunction, against a proceeding calculated and in- d to injure has frequently been granted. There are some peculiarities distinguish the English procedure by injunction; but the clear authority rd Westbury in the case of Edelsten in 1863 cannot be overlooked. A nable apprehension of injury created by the wrongful conduct of the appel- is, by the law of Scotland, sufficient to sustain a petition for interdict. ntention and the tendency must be clearly proved. But if proved, preven- is better than cure; and to crave interdict is wiser and fairer than to await sult and sue for damages.

RD JERVISWOODE concurred.

THE COURT pronounced the following interlocutor:—"Recall the interlocutors of the Sheriff-substitute and Sheriff of date the 20th February and 4th June 1872: Find that for a period of at least seven years prior to the petition for interdict being presented in the inferior Court the name 'Singer' has been in the sewing-machine trade used and appropriated exclusively to designate and identify the sewing machines made by the pursuers: Find that the defenders have recently sold and offered for sale machines made by themselves under the name of 'Singers,' 'Singer machines,' and 'Singer sewing machines': Therefore grant interdict as craved, and declare the same perpetual, and decern: Find the pursuers entitled to expenses both in this and the inferior Court; allow an account," &c.

J. W. & J. MACKENZIE, W.S.—D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—Agents.

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Forbes & Co. v. Border Counties Fire Office.

PETER FORBES AND COMPANY, Pursuers.—*Sol.-Gen. Clark—R. V. Campbell—Readman.*

THE BORDER COUNTIES FIRE OFFICE, Defenders.—*Millar—Mackintosh.*

Insurance—Conditions.—A and Co., a firm of manufacturing chemists, consisting of A, B, and C, obtained in name of the firm a policy of fire insurance on their works, which contained a condition that the policy should "cease to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by will or operation of law, unless notice thereof be given" to the insurance company. After an agreement had been entered into by the partners to transfer the works to B, and after a notice had been published in the "Gazette" that A had retired from the firm, and that the business would in future be carried on by B and C under a different name, but before notice had been given to the insurance company, a fire took place.

In an action raised in name of the old firm against the insurance company under the policy, *held* that the irritancy had not been incurred, in respect that the main interest under the policy had continued to be from the first in B, and that the conditions on which the right of the new firm to a transfer of the work depended had not yet been purified.

2D DIVISION. Ld. Ormidale. I.

ON the 15th of July 1871 a policy of fire insurance for £1500 was granted by the Border Counties Fire Office to Messrs Peter Forbes and Company, Port-Dundas Oil Works, Port-Dundas, Glasgow, manufacturing chemists and paraffin oil makers, over the said works and their contents.

The policy, which bore to be granted "subject to the conditions on the back hereof," contained the following warranty,—"Warranted that no naphtha be stored in any of the aforesaid buildings, and that the 'flash point' of the burning oil is not below 100 degrees, and also that the oil light in numbers 1 and 2 be enclosed in gas lanterns." And one of the conditions endorsed was as follows,—"The policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by will or operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favour of such other person be declared by a memorandum endorsed hereon by or on behalf of the company."

By a fire which occurred on 19th December 1871 damage was done to the property insured to the extent of £840, as set forth in a fire claim made against the defenders six days later. Payment was refused, and the present action was brought to recover this sum.

Various pleas were stated in defence, but only three were ultimately insisted in, viz., (1) breach of the said warranty, in respect that the condition No. 2 quoted from the policy in the answer to article 2 of the condescendence was violated by the manufacture and storing of the spirit and crude oil condescended on, both having a "flash point" considerably lower than 100 degrees; (2) violation of the condition above-mentioned; and (3) that the amount claimed in respect of damage was grossly excessive.

The Lord Ordinary allowed a proof, the purport of which, on the matter of warranty, is sufficiently disclosed in his Lordship's note.

On the question raised by the condition as to change of ownership, which was endorsed on the policy, the proof was to the following effect:—On 25th August 1869 a memorandum of agreement was signed by (1) Joseph Townsend, manufacturing chemist, Glasgow; (2) James Burgess Readman; and (3) Peter Forbes, chemist, Glasgow,—which bore that "(1) The first and third parties having taken out a patent for

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; mineral and other oils it has been agreed that the process shall ted by the third party, who shall take on lease such premises in ghbourhood of Port-Dundas as shall be approved by the first party, purpose of refining oil produced from shale or other minerals, and : entitled to use said patent free of any royalty. (2) The first and parties agree to provide the third party with capital to the extent 00, either in cash or by way of cash-credit, or by bills, to be dis- l as may be arranged, for the purpose of working said business; : third party agrees that he shall take the advice of the first party ig up the machinery and the general conduct of the business. (3) . be in the power of the first and second parties, or either of them, nate to the third party, on or after 1st October 1870, their inten- withdrawing the capital agreed to be advanced to the third party, ieir option to claim the right of being assumed as partners in the s, from the commencement thereof and for such further period as ien be mutually fixed, and the shares of each party shall be equal. ring the period from the commencement of the business up to 1st r 1870 the third party to be allowed to draw a salary at the rate) per annum. The second party shall be employed in the counting- lepartment, at a salary of £100 per annum; but no profits shall be from the business during the above period. In the event of the d second parties becoming partners in the business any profits hall be added to the capital stock of the partners in the proportion n the previous article. In the event of the business being broken provided for in the succeeding article, the assets, after liquidating gations undertaken by the first and second parties, shall belong vely to the third party."

lisposition dated 12th November and 20th December 1870 the y occupied by the company was conveyed by John Parker, with cial advice and consent of Peter Forbes, as taking burden for Peter and Company, and by the said Peter Forbes for his own right and , to and in favour of the said Joseph Townsend, who was there- ifeft. On the latter date Townsend granted to Forbes and Read- back-letter acknowledging that, "notwithstanding the terms of said ion, the property therein mentioned, being part and portion of ds of Hundred Acre Hill, is held by me as trustee for behoof of n of Peter Forbes and Company, oil manufacturers, Port-Dundas, h you and I are partners, and that I shall be bound when required t all deeds necessary for vesting said property in you and me as s for behoof of said firm."

ers from Mr Townsend to customers of the company were produced, between September 1869 and October 1870, as well as after the late, and written from the works of the firm. Thus on 22d Sep- 1869 he wrote to Mr Newall,—"I have sent you, per rail to-day e paid), a small sample of our oil, which I have every confidence swer as a lubricant, also for jute, also for woollen goods, where the i goods does not require to be bleached. When the goods are l they are much softer, free from smell, and its saponifying pro- is sufficient for milling purposes. The colour is bad, but the is all right. It can be got better in colour, but the quality is not l or pure. I have tried on my machinery, and it acts first-rate. being an interested party, may be blind to its defects. If you will get it tested on one of the lubricating machines I will esteem it a ivour. We are busy building works to go a-head and expect to ding in six weeks; and when in full operation we could turn out om 5 to 10,000 gallons." On the 8th of November following he o Mr Parker,—"I am sorry to be under the necessity to intimate

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to you that all the casks must be removed on or before to-morrow for you are well aware we cannot go on with our operations. Mr wick will explain more fully. Excuse me having to write as Yours truly, *pro* P. F. and Co., J. TOWNSEND." On the 13th of the month he wrote to Mr Pallinson as follows,—"I may state to yo the firm will be carried on in the name of Peter Forbes and Co. partners thereof will be Mr Forbes, Mr Readman, and myself, so t sending letters or invoices as so connected with the business p address as above; but anything not connected with the refining p write me." It was proved and admitted that on 15th July 1871, date of the insurance, Mr Townsend had advanced to the company £70 in money, and that his obligations were close on £20,000 besides. Mr Readman had made an advance of £500, and Mr Forbes had put into the concern nothing but a patent and his skill as a manufacturing chemist.

On the 28th November 1871, about three weeks before the fire took place, a minute of agreement was entered into between Peter Forbes of the first part, Joseph Townsend of the second part, and James Burgess Readman of the third part, which proceeded on the narrative,—"Whereas the second party, by disposition by John Parker, with the special advice and consent of the first party, in his favour, dated 12th November and 20th December 1870, acquired and is now infeft in the Port-Dundas Chemical Works aforesaid: Whereas the first and third parties have certain rights and interests therein: Whereas the first party, under the firm of Peter Forbes and Company, and of which firm he is sole partner, has been carrying on the business of paraffin oil maker and manufacturing chemist at said works: Whereas the second party has made payment to the first party of the sum of £400 sterling in consideration of his having agreed to execute these presents, and has also made certain advances and payments to or on behalf of the first party in connection with said business . . . . Whereas the third party has continued to act as cashier, the understanding that he should be assumed a partner of the said firm of Peter Forbes and Company: And whereas it has been agreed that the business of the said firm of Peter Forbes and Company, and the name and goodwill thereof, and the said certificate of allowance of provisional protection, should be transferred to and vested in the second party, and that the first and third parties should renounce in favour of the second party any right, title, and interest they may have in or to said works and said business, or in connection therewith." It was therefore agreed "First, As from and after the 20th day of November 1871, the first party with consent of the third party, shall transfer and make over to the second party the business carried on by the first party under the firm of Peter Forbes and Company, and the whole assets and goodwill thereof, and all right and interest in and to the said works; as also the right to use, in such manner and in connection with such business as the second party may think proper, the name or firm of Peter Forbes and Company, and the first party shall abstain from using the said name or firm of Peter Forbes and Company in any manner of way: And as from and after the said 20th day of November 1871 the first party shall retire from, and the first and third parties shall cease to have any connection with the said firm of Peter Forbes and Company or the said business. Third, The first party shall subscribe a notice, in such terms as the second party may select, intimating that the first party has ceased to have any connection with the firm of Peter Forbes and Company, and that the business has been transferred to the second party, which notice shall be published in the "Edinburgh Gazette," and such Glasgow newspapers as the second party may select, and shall also be sent to all creditors of the firm of Peter Forbes and Company. Four

reto." The liabilities referred to in the fourth article amounted , and there were forty-one outstanding contracts for oil, vary- cask to 390 casks, besides two large contracts with the Glas- ompany to supply a certain number of gallons per month for nding 20th January and 20th July 1872.

December 1871 the following notice appeared in the "Edin- ette," but was never sent to the creditors or customers of -"The subscriber, Peter Forbes, retired, as on the 20th day of last, from the copartnery of Peter Forbes and Company, carry- iness as paraffin oil makers and manufacturing chemists at as Oil Works, Port-Dundas, Glasgow, and the business will in arried on by the other subscribers, under the firm of the Port- l Company, who will receive payment of the debts due to, and he debts due by, the firm of Peter Forbes and Company.

:ackenzie,
itchell Chadwick, } witnesses. { "PETER FORBES.
"JOSEPH TOWNSEND.
"JAMES BURGESS READMAN.

w, 11th December 1871."

l Ordinary, on 5th November 1872, pronounced the following r:—"Finds, as matters of fact—(1) that by the policy of in- elled it was expressly conditioned that the policy should cease ce as to any property thereby insured which should pass from l to any other person other than by will or operation of law, ce be given to the company (the defenders), and the subsistence rance in favour of such other person be declared by memoran- sed on the policy by or on behalf of the company; and (2) that y insured by said policy had, on or before the 18th of December n the fire by which it is alleged to have been damaged or occurred, passed from the insured to some other person or per- vise than by will or operation of law, and that the subsistence rance in favour of such other person or persons has never been y a memorandum endorsed on the policy by the company: assoilzies the defenders from the conclusions of the summons, s: Finds the defenders entitled to expenses, reserving the

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The pursuers reclaimed, and argued;—The condition endorsed on the policy must be strictly construed, since it acted indirectly as a restraint

"1. The Lord Ordinary not being satisfied on the proof that there was any breach of warranty referred to, has not sustained that defence. The *onus* of proving that there was a breach lay upon the defenders, and this being so, the question is, not whether the evidence is such as to make the matter doubtful, but whether it clearly and conclusively establishes that there was a breach of the warranty. The Lord Ordinary has been unable to satisfy himself that the proof has done so. It may, he thinks, be taken as established that during the time the pursuers' works were in full operation from three to five barrels of spirit were daily manufactured, and that in the general case there was a removal of the spirit from the premises once only in three days, when the barrels of spirit had accumulated to twelve or thirteen. The pursuers contended that this being in accordance with the fair and ordinary mode of business in such works, it could not, in the true sense of the warranty in the policy, be said that there was any storing of the stuff; and the pursuers have also contended that the spirit manufactured by them was not 'naphtha.' Now, while the Lord Ordinary thinks that these are not unreasonable views of the matter, he finds it unnecessary to rest his judgment on them exactly as so stated, inasmuch as it appears to him that the defenders have failed to prove with sufficient clearness that there had been any such storing of the stuff, whether it is to be taken as naphtha or not, at the time the fire took place as to amount to a breach of the warranty in the policy, and thereby render it void. The defenders did not in reference to this matter examine on their side any of the workmen or others who had been engaged in carrying on the operations in the pursuers' works. They relied on the statements of the pursuers themselves and of their witnesses. But, according to the statement of Mr Townsend, who says he was at the work almost the whole day which preceded the night on which the fire occurred, and left it only at half-past six in the evening, there could not be more than a barrel and a half, or at most two barrels of spirit in the premises at the time, and it had been run into a tank for the purpose of being barrelled afterwards. The Lord Ordinary can find no contradiction of this statement, and he is not satisfied that it can be held to substantiate what it lay upon the defenders to make clear, that there was any storing of naphtha in the true sense of the warranty of the policy when the fire occurred.

"2. The Lord Ordinary has arrived at a different opinion in regard to the second point relied on by the defenders. He thinks it has been sufficiently established that the property insured had, between the date of the policy and the occurrence of the fire, passed from the insured to another person or persons, and that the subsistence of the insurance in favour of such other person or persons was not declared by a memorandum endorsed on the policy by or on behalf of the defenders. It is not pretended that any memorandum such as that referred to was ever endorsed on the policy, but the pursuers contended that the property insured cannot in the circumstances be held to have passed to any other person or persons than the insured, and that if the contrary could be held, then this was sufficiently made known to the defenders, whose fault it was, and not the pursuers', that the necessary memorandum was not made in the policy.

"In regard to the latter branch of this contention, the Lord Ordinary need merely remark that it appears to him to be not only without support in the proof, but altogether inconsistent with the evidence adduced for the pursuers themselves, and their whole reasoning and pleas on the subject, which were to the effect that in truth and substance there had been no change in the ownership of the property after the insurance was effected. This, then, is the question the Lord Ordinary has had to deal with under the second head of the defence. The parole testimony of the pursuers' witnesses on the point is, in the opinion of the Lord Ordinary, far from satisfactory, being indeed in many respects glaringly inconsistent and contradictory. The Lord Ordinary has, therefore, considered it fortunate that he has had before him written documents of the description quite sufficient in his judgment, independently of the parole evidence, to support the conclusion he has arrived at.

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a alienation.[1] Townsend was originally, and at the date of the policy, partner of the firm; but even supposing he were not, as the policy is

"The policy of insurance itself bears that the insured are 'Peter Forbes and ompany,' and that the property mentioned in the policy is the 'insureds' wn.' Who, then, were the 'insured' on the 18th of July 1871, the date of he policy? And did the same person or persons continue to own the property nsured when the fire occurred on the 18th of December 1871? These are the estions which the Lord Ordinary has had to consider and determine. The nswers' contention was that in truth and substance there had been no change f ownership of the property insured between the date of the policy and the ate of the fire. It was not said that if in the circumstances it could be held hat there was such a change, it had been effected by 'will, or operation of law.'

"The only conclusion the Lord Ordinary has been able to come to on the ritten evidence, taken in connection with the statements and admissions of the nswers themselves, which they of course cannot be heard to disclaim, is that, hile according to the terms of the policy the property insured must be taken o have belonged at its date to the firm of Peter Forbes and Company and the en only partner of that firm, no such firm or partner existed at the date of the re, and that consequently and necessarily it follows that the property insured nd, at or before that date, passed to some other person or persons, who, the rd Ordinary thinks, must be held to be Joseph Townsend and James Burgess eadman, both or either of them trading under the name and firm of 'The ort-Dundas Oil Company.' There is no question (1) that the individual eter Forbes was, if not the sole at least the managing partner of Peter Forbes nd Company on 15th July 1871, the date of the policy; and it is not altogether nimportant to keep in view that, according to the evidence in the case, Peter orbes had been educated and brought up as a practical chemist, that he had xperience in such works as those in question, and that he had the chief if not he sole management of them. It may not unreasonably be assumed that the efenders, on accepting the risk and granting the policy in question, had it in iew that the property insured belonged to, and was to be under the care and ontrol of, such a person as Peter Forbes, or at least some person well qualified, om practical knowledge and experience, to manage so very perilous and risky ubject with due skill and caution. Accordingly, the Lord Ordinary observes hat in the present case the report, No. 35 of process, made on the works in uestion to the defenders when the insurance was applied for, expressly bears that the work is tidily kept, and the management is first class.' But (2) the ndividual Peter Forbes, it is not disputed, and at any rate is sufficiently esta-lished, ceased to be a partner of Peter Forbes and Company and owner of the roperty insured some time before the fire occurred. This is stated distinctly y himself, and is not contradicted by any one. It is, besides, put beyond all oubt by the 'Gazette' notice of 15th December 1871, three days before the re set out in the fourth article of the defenders' statement of facts; and that otice, it will be observed, was subscribed not only by Peter Forbes, but also y Joseph Townsend and James Burgess Readman, who, of all others, must ave known best how the matter truly stood. (3) This 'Gazette' notice appears o be also conclusive, to the effect that at and after its date, 11th December 871, which was a week before the fire, the business of Peter Forbes and Com-any was thereafter to be carried on, not under that firm, but the firm of 'The ort-Dundas Oil Company.' And (4) the very formal agreement (No. 200 of rocess) entered into and subscribed by Peter Forbes, Joseph Townsend, and ames Burgess Readman, makes it also clear that, prior to the 20th November 871, when Peter Forbes retired, and Peter Forbes and Company ceased to exist s a firm, Peter Forbes had been the sole partner of Peter Forbes and Company. his agreement expressly says so, and by the first head of it Peter Forbes, 'with he consent of the third party,' that is, James Burgess Readman, 'transfers and

[1] Phillips on Insurance, p. 73, sec. 107; Parsons on Contracts, ii. 355 and 51; Mercantile Law Amendment Act, 1856, sec. 7.

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in favour of Forbes and Co., it must take the circumstances of the firm a they stood, in especial the contingent right of Townsend and Readman t enter. The condition only refers to a separation of the right to the pro perty and the right to the policy, and both were transferred together b the agreement of 4th December 1871. The pursuers were entitled to reasonable time to give notice to the insurance company of any chang in the firm, and were anticipated in so doing by the fire itself. But, i point of fact, the dissolution was not carried out at the date of the fire, a that Forbes was then really a proprietor, though under obligation t transfer.

Argued for the defenders;—At the date of the policy the managemen of the business was in the hands of Peter Forbes, and the risk had bee increased by his leaving the firm. This was an important change, suc as was contemplated in the condition endorsed on the policy, and n notice thereof had been given.

At advising,—

LORD JUSTICE-CLERK.—In this case, which turns upon the construction of policy of fire insurance, the Lord Ordinary has found—(reads the Lord Ordinary interlocutor, quoted *supra*). I somewhat doubt whether, even if the view whi the Lord Ordinary has taken of this clause and of the facts be right, that woul have been the appropriate finding, for I think it would have been necessary f the company to prove, and consequently for the Court to find, to whom the pr perty had passed, before the clause could come into operation. But I am opinion, on the whole matter, that the Lord Ordinary has mistaken the state

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makes over to the second party (Mr Townsend) the business carried on by t first party (Peter Forbes), under the firm of Peter Forbes and Company, a the whole assets and goodwill thereof, and his right and interest in and to t said works; as also the right to use, in such manner and in connection wi such business as the second party may think proper, the name or firm of Pet Forbes and Company, and the first party shall abstain from using the said nam or firm of Peter Forbes and Company in any manner of way: And as from a after the said 20th day of November 1871, the first party shall retire from, a the first and third parties shall cease to have any connection with the said fi of Peter Forbes and Company or the said business.'

"The Lord Ordinary has found it impossible, in the face of the writings whi have now been noticed, to decide differently from what he has done. He ca not take it from the defenders, or any of them, that they subscribed and becam parties to such writings without reading them. Nor can he, upon that or a other ground suggested in the parole proof, deny to these writings their legi mate effect. He conceives it would be most dangerous and contrary to all soun principles to do so, or on that footing to hold that the conditions in the poli in question, or any of them, are to be disregarded and denied effect to.

"3. In the view, as now explained, which the Lord Ordinary has taken the defence just noticed, and which the Lord Ordinary has held to be sufficie of itself to entitle the defenders to absolvitor, it is, of course, unnecessary inquire whether the only remaining plea which was relied on by the defende to the effect that the pursuers' claim is excessive, or if excessive at all, to wh extent it is so, is maintainable. He may remark, however, that, were it nec sary to go into this inquiry, he is not satisfied that the pursuers' claim could maintained to its full extent. He may say, in particular, that, according the admission of Peter Forbes himself, the 'hydro extracter,' for which t pursuers claim £100, was not covered by the policy.

"In regard to the matter of expenses, there can be no doubt of the defende right to them generally, but whether subject to any and what modification respect of the numerous pleas taken by the defenders in the record as clos some of which were ultimately given up, is a question which the Lord Ordina has thought it right to reserve until after the Auditor's report has been made.'

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in this case. It does not appear that the property which was insured ed to any other person than the original insurer in the sense of that nd I shall very shortly go over the facts and state the grounds on which at that opinion.

gument was addressed to the Court for the purpose of shewing that the question would not have operated, even if the subject of the insurance parted with, provided the policy followed the transference of the pro- It was contended that a clause of that kind operated an entirely different m a prohibition of an assignation of the policy itself; and, if I understood ment rightly, it was this, that the policy remained assignable, and that ently the assignee was the insured in the sense of the clause, and there- long as the property and the policy went together, into whose hands hey came to be, the clause would not apply. This certainly is not the which I should have read the clause on the first impression of it, but in r which I take of the case it is not necessary that we should give any opinion upon that somewhat ingenious argument. In my opinion the of Peter Forbes and Company at the date of the insurance were sub- y the same persons that were partners when the fire took place, or at all Townsend, who was evidently the person mainly interested in this matter, held the title of the property which was insured, in his own name, but back-letter in trust, was truly the party interested, and is entitled to

This is quite clear upon a short review of the circumstances under he insurance was effected. Peter Forbes was a chemist, and the holder tent for the purpose of manufacturing paraffin oil, or the products of oil. This patent apparently was the main capital which he had to put s concern. Mr Townsend was a person with considerable funds, and Mr n appears to have been a young man with considerable chemical know- nd he was conjoined in this project. In 1869 an agreement was entered which this company was started under the name of Peter Forbes and y. Peter Forbes was the only ostensible partner, but Mr Townsend, who ne the main bulk of the funds, was to advance the money necessary to start ere was a provision in the fourth article that Peter Forbes was to be £200 a-year, and that Mr Readman was to be allowed £100 a-year; that ts whatever should be drawn from the concern down to the 1st of October nd that both Townsend and Readman should have the option at that becoming partners. Now, the meaning of that is perfectly plain. nd was unwilling to risk his capital in the capacity of partner, by which ld have been liable for all the debts that might have been incurred by the , until he saw what the nature of the concern was to be and the amount ess which it might command. But no profits were to be drawn by any d Forbes in reality was simply a salaried manager during the tentative which was to elapse. But I think it is as clear as possible that when r 1870 came round Mr Townsend saw his way sufficiently to become a . There is no regular deed of copartnery, nor was it necessary that there be. But we have the disposition by Parker to Townsend on 12th ber and 20th December 1870, by which the title of the property occupied company, and at that time in the possession of Peter Forbes, or at least y him for the purposes of the concern, was made over absolutely by to Townsend. There is also a back-letter, dated 20th December 1870, in Mr Townsend, referring to the disposition, acknowledges that the pro- o conveyed "is held by me as trustee for behoof of the firm of Peter and Company, oil manufacturers, Port-Dundas, of which you and I are s, and that I shall be bound when required to grant all deeds necessary ting said property in you and me as trustees for behoof of said firm," and addressed to Forbes and Readman. The correspondence which is produced rily leads to the same result. There is a variety of letters which can only l on the footing that Townsend then became a partner. For instance, on ovember 1869, which is before the date of the back-letter, he writes to Mr on,—"I may state to you that the firm will be carried on in the name of Forbes and Company. The partners thereof will be Mr Forbes, Mr

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Readman, and myself, so that in sending letters or invoices as so connected with the business please address as above." And in a variety of letters to his business friends he goes on to speak of the firm and the conduct of the business as a matter in which he, along with his partners, was directly interested as a proprietor, and in no other capacity. So stood matters when the insurance was effected on the 15th July 1871. The title to the subjects stood in the name of Mr Townsend. Further, it is proved that Mr Townsend had advanced not merely the amount which he originally undertook to advance, but that he was at the date of this insurance, in advance to the extent of something like £20,000. Mr Readman had made a partial advance, I think of £500, and Mr Forbes had put nothing into the concern. Therefore at the date of the insurance I cannot doubt that Mr Townsend had a substantial interest in the insurance, and it does not occur to me that if a fire had taken place at that time any one would have drawn the insurance money except Mr Townsend. His advances were not replaced; he was proprietor of the subjects, holding them, no doubt, first, for the company, but I rather think he would have been entitled to hold the whole concern until these advances had been replaced. The fire took place in December 1871, and the defenders object that they are not bound to pay under the obligation because there had been an agreement which in fact they had nothing whatever to do with, and of which they had no cognisance necessarily, by which there was a new arrangement of the firm of Peter Forbes and Company. If that had been fully carried out I should not have thought that it made any difference upon the question that we are now discussing, because my opinion is that Mr Townsend himself was substantially the insured. I have no idea that the mere change of firm, or even the change of interest of the partners in the firm, would bring that clause into operation upon any construction of it. Certainly if the firm had been dissolved altogether, so that it no longer existed as an operative *persona*, the interests of the partners in the concern would subsist and they would substantially be individually the insured, or the firm subsisting at the winding up would be entitled to recover the amount insured. In the present case, however, I should have doubted whether the transfer was complete before the fire under any circumstances. There is an agreement no doubt dated in November, under which Mr Forbes undertakes to transfer and make over to the second party the business carried on by the first party under the firm of Peter Forbes and Company, and the whole assets and goodwill thereof, and his right and interest therein. He undertakes to do that, and in consideration of the obligations undertaken by him, the second party (that is to say, Mr Townsend) has made payment to the first party of the sum of £400 sterling, and has undertakes to relieve the first party of all the debts and liabilities contracted by the first party under the firm of Peter Forbes and Company. I rather think from what we see that that still remains to be done. The obligations amount to over £20,000, and Mr Townsend, before he could have the benefit of this agreement, or demand his transfer, must shew that he has implemented this part of the agreement, and cleared the business of the debts that were upon it. The matter is not complete. The fire takes place in December and before this has fully come into operation. No doubt there was a "Gazette" notice that the firm was dissolved, but the firm would still continue until the conditions of this agreement had been fully implemented. But putting that aside altogether, and supposing that this had been an operative agreement from the first, my opinion would still remain that Mr Townsend was substantially the insured; that he continues to have the substantial interest in the policy; and that the property which was thereby insured has not been in substance passed from the insured to any other party, and that therefore the clause does not apply.

A second plea was taken, that the policy had been infringed by storing the naphtha on the premises.

There is no such plea on record. It would be competent still no doubt for the parties to add to the plea. They say the matter came out on the proof, but of this we must be satisfied. Now, I have read the proof, and I am very clearly of opinion that no storage in the sense of the provision in the policy ever took place. All that is said is that they went on keeping the naphtha in barrels for

, or three at the most, until a cart-load had been obtained, and then it away. I do not think that that was storing in any reasonable reading lause in the policy. Here there was nothing but the reasonable and convenience of manufacturing, and not any violation of the provisions dicy.

e whole matter, I have come to be opinion, in the first place, that there n no transference of this property from the insured to any third party, the second place, that there was no storing of naphtha in the sense of ision of the policy.

COWAN.—On the second point to which your Lordship has adverted I concur in the views stated by the Lord Ordinary and by your Lordship. ır question which has been raised involves a matter of great importance ing policies of insurance against fire. As a condition embodied in a ontract, that condition is entitled to fair reasoning in its construction, en it is clearly proved not to have been complied with, it will receive l effect to which every condition in such a contract is undoubtedly

The Lord Ordinary has fairly put the question whether or not the n in question has or has not been shewn to have been brought into n so as to affect the subsistence of the insurance in favour of the pursuers. n question not of law, but of evidence; and my view on a clause of this that it must be shewn in any action brought under the policy that the n was not clearly fulfilled in order to liberate the insurance company. insurance company are entitled to have the matter put in issue whether ne facts come up to the statement that is necessary to be established in bring this provision of the policy into operation. I cannot enter into distinction attempted at the outset of the argument by Mr Campbell, nce to the difference between the policy and the condition here, as le simply to the transfer of the property. I think it very clear that, g that the condition had been shewn to have been brought into opera- have nothing more to do with the question as to the supposed possible gnation of the policy and its subsistence, although that condition has ly shewn to have been brought into operation by the transfer of the . Was the company, at the date of the policy in July 1871, composed se who were substantially, and to all real effects, the same as at the date re? That is really the question, and I cannot avoid the conclusion that litors of this company would have been entitled to claim payment debts from Mr Townsend, as the party principally interested in this

I think he could not have resisted the claim of the creditors, and I must have been dealt with as a partner not only in July 1871, because nsidering the original agreement in 1870, when an option was given to October 1870 to declare whether he would be a partner or not, and finding did declare himself to be a partner under these documents, had it been y for the determination of this cause my view would have been to have th him as a partner *ab initio*, he having adopted the contract and become e interested in the business, not merely at July 1871, when the policy ned, but as having been a partner all through, and liable to the creditors mpany. I assume that the Lord Ordinary is wrong in thinking that the rtner at the date of the policy was Forbes. On the grounds which your p has so fully explained I think Mr Townsend was the principal although Mr Forbes was also a partner. But it is said that Forbes se in November 1871, a few weeks or days before the fire. Now, the n is, whether the agreement in November 1871, in which Forbes ed himself out, should affect the interests of the company, composed of Townsend, in recovering the value of the buildings under the policy, ne fire took place a few days afterwards? On this my opinion is that the cial interest having been in Mr Townsend throughout, any arrangement the partners by which Forbes went out could not affect the substantial ght of Townsend as a partner to insist on payment of the sum insured ne fire took place. The Lord Ordinary observes that the subsistence of

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Forbes as a partner was the essence of this contract, because he was the man who had the practical knowledge of the business, while Townsend was only the man of capital. There may be a great deal of reasoning in that; and had the condition in the policy been that Forbes, being a man of skill, was to remain as a partner, I could have felt the force of the argument on his retirement as substantially affecting the insurance. But there is no such condition in the policy. It is merely suggested that Forbes was a man of more skill than Townsend, and that his retirement greatly increased the risk of the company. I cannot take that off the hands of the insurance company, for I do not see anything in the policy entitling them to plead it, though it may be made the subject of observation.

On the whole matter, I concur in the views of your Lordship.

LORD BENHOLME.—I concur generally in the views that your Lordship has expressed. I think that at the date of the policy Mr Townsend was in fact the substantial owner of this concern. He was the moneyed man. Originally, he had not in point of form been a partner; he seems to have withheld his name in a formal way until a certain period, but at that period he had a right to become a partner, and there is sufficient evidence that he declared his acceptance of that position before the date of the policy.

The only objection seems to be grounded upon the supposed irritancy of the insurance on the retirement of Forbes. Now, I agree with your Lordship in thinking that the retirement can hardly be held to have been completely effected; but I do not think that sufficient to bring this insurance under the irritancy of that clause. Here was a company at the date of the policy, and the substantial partner was Mr Townsend; he remained so at the date of the fire, and, considering the kind of interpretation which we must supply to so stringent an irritancy as this, it cannot, in these circumstances, be held that the right to the subject in the policy had been alienated and transferred in terms of that clause.

I also agree with your Lordship as to the storing. I think in substance there was no storing.

LORD NEAVES.—I have arrived at the same conclusion with your Lordship. When this case was opened to us I was much impressed with the strange aspect of the pursuers' case, because there seemed to be a great unwillingness to grapple with the facts, and a great desire to get the case decided upon an alleged plea of relevancy, which was stated and supported by a number of American authorities as was said. I never could understand that plea, and upon thinking it over repeatedly I have arrived—with some modesty no doubt—at the conclusion that the reason why I have been unable to understand it is, that it is unintelligible. Some clauses were founded on as in use in America, which are not the same as this clause, and because this clause was not that clause it was said this is irrelevant. Now, it appears to me—and it is only because the plea was stated that I think it necessary to advert to it—that there is no foundation whatever for assailing the first part of this agreement,—I mean the stipulation that the policy of insurance is to cease to be in force in a certain event. If the event contemplated has occurred, the words that are used are explicit and unambiguous; and I must take the liberty of repeating what I formerly said—that there is no room for construction at all unless there is ambiguity. It is only when there is some ambiguity that construction comes into play. That is distinctly laid down by all the authorities, and by none more clearly than by Mr Erskine. Words may be so plain that they do not admit of construction. And if anything can be plain, it is that condition in the first part of the policy that the policy ceases to be in force if a certain event occurs with reference to the property there described. Nothing can be plainer than that. What room is there for construing these words, "the policy ceases to be in force"? There is none whatever, and the argument as to its only preventing something that was not attempted to be done was unintelligible to me then, and is so still. Therefore the question arises in the way in which your Lordship put it, viz., whether the case has arisen in which the policy ceases to be in force from the property having

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ɔm the insured to any other person. If it has not so passed the clause apply. I think it is quite plain on the documents how the matter he original agreement gave Townsend and Readman an option at a me, viz., in October 1870. They were then to intimate to Forbes their of withdrawing the capital, or, in their option, claim the right of being as partners, in which case (if they claimed that right) it was a right to rs from the commencement of the company. In December 1870 it o me that Mr Townsend did declare that option.

l not withdraw his capital, on the one hand, and, on the other, he de- at he and Mr Readman were then partners of the concern in the most erms. He bought the property and granted a back-letter in which he that it was held by him as trustee for behoof of the firm of Peter Forbes pany, "of which you and I are partners (that is, of which you, Forbes man, and I, Townsend, are partners), and that I shall be bound, when to grant all deeds necessary for vesting said property in you and me as &c. If that did not complete the exercise of the option contained in ment I do not see what would have done so. In subsequent docu- rbes is spoken of as sole partner. It may have been that he was the g partner—the ostensible partner—but that will not alter the fact that me, by a solemn deed,—the deed which regulates the right to this sub- was declared that the property was held for them. That means that l was a partner from the first, and the principal partner—the person the property—and was mainly interested. The premium of insurance ıeld as having been paid by him; it came out of his pocket, and all es in the interest of these partners afterwards do not appear to me to case under the very peculiar words of the clause which declares that ion is only to take effect as to any property which shall pass from the any other person. The insured appears to me to include Townsend, y view, the property did not pass to any other person, for the with- Forbes could not, in my opinion, have been a thing contemplated by e.

ference to the storing of the naphtha, I agree in what your Lordship

ıestion of the amount due under the policy was alleged by the to be definitely fixed by a letter which was sent to them by the on 30th December 1871, and which was in these terms:—"We, rbes and Company, insured by policy No. 2143 with the Border Fire Office, Dumfries, agree to accept the sum of £500 sterling scharge of our claim for loss by fire, which occurred on the 18th r 1871, against the company; and we further agree to indemnify pany against all expenses arising out of this claim for loss, and ıst any claim which the Port-Dundas Oil Company should pre- st the company as the new firm owning the works. We also our policy No. 2143 to the company for cancelment, Peter ıd Company retaining the salvage.

"*Per pro* PETER FORBES and Co., PETER FORBES.

Symon, witness, 136 Buchanan Street.

the Port-Dundas Oil Company, hold ourselves bound by the ɔeptance and agreement. THE PORT DUNDAS OIL CO.

Symon, witness. Glasgow, 30th December 1871."

llegation was denied by the pursuers.

ɔurt held that the letter could only be regarded as an attempt to whole case, and pronounced the following interlocutor:—

ɔall the interlocutor complained of, and decern against the ɛfenders in terms of the conclusions of the summons: Find ıe pursuers entitled to expenses," &c.

T. F. WEIR, S.S.C.—PHILIP, LAING, & MONRO, W.S.—Agents.

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Hellon v.
Hellon.

STEPHEN HELLON, Pursuer and Respondent.—*Scott.*
MRS MARY M'CRIMON OR HELLON, Defender and Reclaimer.—*Mai*
Rhind.

Husband and Wife—Divorce—Mora.—Held that a husband who, whil
dent in Australia, had been cognisant of his wife's adultery at home for ten
before raising an action of divorce, was not barred by *mora*, since the adulte
continued till close on his return, immediately after which the action was
Mora as a bar to an action of divorce must be such as to infer a *remis*
juriæ.

2D DIVISION.
Ld. Ormidale.
R.

THIS was an action of divorce for adultery brought by the purs
shipmaster at Glasgow, in the circumstances which are thus detail
the Lord Ordinary's note:—

"The parties were married in Glasgow in June 1852. The wife
is the defender, had her residence in Glasgow at the time of the ma
and she has resided there ever since. The husband, who is the p
of this action, appears to have been at the time of his marriage, an
since, a seafaring man. It also appears that the pursuer, soon aft
marriage, went to Australia, leaving his wife in Glasgow. It ha
been said, and the proof shews, that there would be no ground for
that, in going to Australia, the pursuer intended to abandon his
He went there apparently with the laudable desire of bettering h
tunes; and it has been proved that he for some time correspondec
his wife; that, on at least one occasion, he sent money to her
Australia, and also that he had expressed a desire that she shoul
him there. In place, however, of doing so, the defender, within th
four years after the pursuer had gone to Australia, went to reside
man called Henderson Carrick, a married man, but who had sep
from his wife, and that she and that individual have until recentl
together, chiefly in Glasgow, as man and wife. It is proved that
children have been born of the intercourse between the defend
Carrick.

"On the other hand, the Lord Ordinary thinks that the proof
ciently shews that the pursuer came to the knowledge of his wi
defender's, misconduct, about ten years before the institution
action. But then the proof also sufficiently shews, in the Lord Ordi
opinion, that the pursuer was, during the time which intervened be
his becoming aware of the misconduct of his wife and his institutin
action, engaged in the prosecution of his calling, in the comma
vessels trading between various ports in Australia, Tasmania, and
Zealand. The Lord Ordinary thinks he may also assume from the
evidence that it would have been very difficult, if not impossible, f
pursuer to have returned to this country sooner than he did, w
serious injury to his business and pecuniary prospects. He return
the spring of this year, and the present action was raised in July
after.

"The Lord Ordinary may further add, as a circumstance which a
to him to be clearly enough established by the proof, that the de
had it always in her power to ascertain, if she had desired, from th
tions of the pursuer, all necessary information in regard to his
abouts. There is no foundation whatever, so far as the Lord Or
can discover, for the statement in the defences, that the defend
made inquiries about the pursuer, and that the result of her inquiri
satisfied her that he was dead. No attempt indeed was made by t
fender to support this statement by evidence of any kind, and she d
adduce any proof at all."

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lefender pleaded;—(2) Having married Henderson Carrick in the ble belief that the pursuer was dead, her connection with Carrick be regarded as adultery. (4) *Mora.*
atter plea was not taken till the day on which the proof was led. a proof the Lord Ordinary pronounced the following interlocu- Finds facts, circumstances, and qualifications proved relevant to at the defender committed adultery with Henderson Carrick, ied in the record and proof: Finds her guilty of adultery accord- therefore divorces and separates the defender, Mary M'Crimon or from the pursuer, Stephen Hellon, his society, fellowship, and y in all time coming: Further, finds and declares that the defen- forfeited all the rights and privileges of a lawful wife, and that pursuer is entitled to live single or marry any free woman, as if never been married to the defender, or as if she were naturally tc.*
lefender reclaimed, and argued;—There is here *mora* of ten years e time when the husband came to the knowledge of his wife's in- and the duty was laid on him to get rid of her, if he did not ather to run the risk of seeming acquiescence.[1] It made no dif- that he was abroad, provided he was aware of the defender's mis- . A husband may sue for divorce though he be resident abroad.[2] case, the defender is entitled to her expenses.[3]
ed for the pursuer;—*Mora* must be such as to imply *remissio in-* Further, it is not of such length as is contended for by the de- or she continued her cohabitation with Carrick till shortly before

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OTE.—(After the narrative given above)—In these circumstances, the 's adultery is beyond all question, and it has not been disputed. The a in defence which was attempted to be supported in argument by the 's counsel was that of *mora*, and the relevancy of this plea, in the sense it is explained by Professor Bell (Prin. sec. 1531), as meaning such y as may be held to import acquiescence on the part of the injured , or, in other words, *remissio injuriarum*, was not contested. But it ntained by the pursuer's counsel that there was no room for the plea in mstances of the present case, and the Lord Ordinary, being of opinion pursuer is right, has pronounced judgment in his favour accordingly. opinion that the absence of the pursuer in Australia, in the prosecution rdinary and lawful calling, when he first received intelligence of his sconduct, is sufficient fairly to account for the delay which occurred in g the present action, without imputing to the pursuer that he acqui- such misconduct, or holding that he is now barred from obtaining the and appropriate redress against the misconduct, on the principle *remissio m.* The cases of A B v. C D, 20th July 1853, 15 D. 976, and Duncan nd, 9th March 1809, F.C., relied on by the defender, were essentially in their circumstances from the present, and cannot therefore be held cedents in point. In these cases the injured parties stated no reason- issible excuse for the great delay they had allowed to occur after they e to the full knowledge of all the circumstances, and the bringing of ion; and besides, in the case of Duncan the injured husband, after to the knowledge of his wife's misconduct, continued for some time r to cohabit with her."

v. C D, July 20, 1853, 15 D. 976; Duncan v. Maitland, March 9, C.; Timmings v. Timmings, 1792, 3 Hag. Eccl. Rep. 83 (Lord Stowell); r v. Mortimer, 1820, 2 Hag. Cons. Rep. 313 (Lord Stowell).
lds v. Shields, Dec. 1, 1852, 15 D. 142.
nyss v. Wemyss, March 20, 1866, *ante*, vol. iv. 660.
's Prin. sec. 1531.

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the pursuer's return, and any delay between the date of the cessation thereof and the raising of the present action was very short.

At advising,—

LORD JUSTICE-CLERK.—I am clearly of opinion that the Lord Ordinary is right, and that the authorities which have been cited are not applicable to the case. If it had been necessary to decide the point, it would have been very doubtful whether a husband living in Australia should be held bound, as soon as intelligence reached him of his wife's infidelity, at once to bring an action of divorce against her in his absence from the country. He may do so no doubt, but it is a delicate matter to entrust to the management of another at a distance so great. But the present case turns on a different point altogether. Here the wife's course of adultery continues down to 1871, only a short time prior to the husband's return to this country, so that if condonation implied "*mora*" be alleged, it can only be for the interval between the cessation of the adulterous conduct and the date of raising this action, a period much too short for the purpose. Connivance would rather be the inference unfavourable to the pursuer, but in the present case I think that not proved.

As to expenses, the wife is entitled to a reasonable sum. The husband was for ten years aware of his wife's course of life, and allowed it to go on without objection; so that I do not wonder that the action was defended.

The other Judges concurred.

THE COURT adhered.

A. K. MORISON, S.S.C.—MENZIES & CAMERON, S.S.C.—Agents.

No. 51.

Jan. 16, 1873.
Chisholm-Batten v. Cameron.

MRS JEMIMA CHISHOLM OR CHISHOLM-BATTEN AND EDMUND CHISHOLM-BATTEN, Condescenders and Respondents.—*Kinnear—Mackay.*
Rev. DONALD CAMERON, Objector and Reclaimer.—*Watson—Trayner.*
R. R. SIMPSON, Common Agent in the Locality of Kilmorack.

Teinds—Locality—Valuation—Surrender—Prescription.—By a final decree of locality in 1817 the lands of a heritor were localled on for stipend to the extent of £40, being the full amount of the teinds taken at one-fifth of the proven rental. In 1863 the heritor obtained a decree of valuation of his teinds, which fixed them at £32, and subsequently obtained a decree of reduction of the decree of locality, qualified by the condition that it should subsist as the interim rule of payment of stipend until a new decree of locality was obtained.

In a subsequent locality, *held*, in a question between the heritor and the minister, that the former was not precluded by the forty years' payments of £40 from surrendering his teind at the sum fixed by the decree of valuation.

Question, whether the reduction of the former decree of locality was necessary.

Observations on the Locality of Madderty, July 9, 1817, F.C.

2D DIVISION. Lord Gifford. Teind Clerk.

THE present question arose in the course of making up a final locality of the parish of Kilmorack. The circumstances are thus stated in the Lord Ordinary's note:—"Previous to 1863 the lands of Aigas and others, now belonging to the condescender Mrs Chisholm-Batten, were held with the teinds thereof unvalued. In 1817, by final decree of modification and locality, these lands were localled upon for stipend to the minister to the extent of £40 per annum, which appears to have been one-fifth of the proven rental of the said lands, or rental upon which the then heritor was held confessed. This sum of £40 per annum was paid by the heritor as stipend under this decree of locality for more than forty years. At least this is the allegation of the minister, and the Lord Ordinary, for the pur-

s. 6¼d. per annum, being, as he avers, unaware of his rights; but in
he minister raised action for the full sum of £40 allocated by the
ecree of locality of 1817, and in this action the minister was suc-
—See this case reported 24th February 1869, 7 Macph. p. 565.
urt held that, notwithstanding the valuation, and notwithstanding
tional reduction of the locality following thereon, the old locality
' must subsist as a rule of payment until a new locality was settled.
ree of reduction pronounced in 1863 expressly bore that the 'said
of locality must stand, continue, and endure, as the interim rule of
it of the minister's stipend, aye and until a new decree of locality
ned, and an extract thereof delivered to the minister at the pur-
xpense.' So standing circumstances, the present new process of
itation, modification, and locality was brought on 28th January
n which the present final locality is now being settled, and the
n now was, for what sum Mrs Chisholm-Batten's lands should be
upon in the final locality in the present process. Mrs Chisholm-
has raised the question quite distinctly by seeking to surrender,
alued teind, the annual sum of £32, 2s. 6¼d., and she insists that
not be localled upon to any greater extent. The minister objects
surrender, and maintains that in respect of prescriptive payment
isholm-Batten must still be localled on for £40 per annum, not-
nding her decree of valuation."

present question related solely to the final locality, for the Lord
y had already decided, by judgment dated 25th July 1872, that
isholm-Batten must continue *ad interim* to pay the £40 till the
ality is settled.

ondescender pleaded;—(1) The condescender, as proprietrix of the
belled, is entitled, with consent of her said husband, and her hus-
r his interest, to have the surrender of the valued teinds of said
ustained, and to be relieved from any further or additional pay-
n respect thereof, and also to be freed from payment of further
s in the present or any future locality of the stipend of the parish
orack. (2) The condescenders are entitled to have effect given to
ree of valuation of 19th March 1863 in the allocation of stipend in

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ously for more than forty years from the date of said decree in 1
minister is in right to the stipend so allocated, and is entitled to i
payment of said stipend in time coming. (3) The condescende
entitled to have her surrender sustained to the effect of reducing
portion of stipend allocated upon her said lands by the foresaid
and paid by her and her authors for more than forty years.

The Lord Ordinary pronounced the following interlocutor
November 1872 :—"Sustains the revised condescendence and s
for the said Mrs Chisholm-Batten and her husband of the whol
parsonage and vicarage, of her whole lands, embraced in the d
valuation of 19th March 1863, amounting, the said valued tei
surrendered, to the annual sum of £32, 2s. 6d. four-fifths of a p
conform to said decreet of valuation and revised surrender, N
process: Finds that, in respect of said lands and of the surrender
now sustained, Mrs Chisholm-Batten and husband fall to be
upon in the final locality now being made up only for the said
£32, 2s. 6d. four-fifths of a penny sterling, being the valued tei
said lands, and remits to the clerk to rectify the locality acco
Finds Mrs Chisholm-Batten and husband entitled to expenses in
sent question, but subject to modification," &c.*

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* "NOTE.—The circumstances of this case are in some respects pec
the point raised does not seem to be governed by any reported case,
authority precisely applicable. . . . . .

"*Prima facie*, an heritor who has obtained a valuation of his teinds i
to surrender the valued teind, and can be asked to pay no more than th
of the valuation. It rests with the minister to shew why Mrs Chisholm
who in 1863 had her whole teind duly valued at £32, 2s. 6½d., should
in all time coming to pay nearly £8 more, or £40 in all.

"The minister accepts this *onus*, and founds his claim on the allega
under the final decree of 1817, which stood unreduced till 1863, a
events for a period of more than forty years, Mrs Chisholm-Batten and
decessors paid £40 per annum, and he maintains that in virtue of the
scription Mrs Batten must continue liable for that sum, whatever the
of her teinds may be. In support of his plea the minister refers to
which, notwithstanding old decrees of valuation, heritors have been fou
in prescriptive overpayments—the chief case being that of Madderty,
1817, F.C. 371.—See this case and cases there referred to; also Bai
Minister of Polmont, 3d July 1832, 10 S. 752. A judgment of the
Lord Ordinary in the Locality of Row, dated 4th July 1871, was also
to, in which effect was given to prescriptive overpayment. In this case
sent Lord Ordinary fully considered the whole question and all the au
and his judgment was acquiesced in.

"In all these cases, however, the prescriptive overpayments founde
lowed the decree of valuation,—that is to say, an heritor holding a
valuation of the High Court, and which therefore could not be dereli
by overpayment, paid notwithstanding in excess of the valuation for
prescriptive period. The Lord Ordinary, as at present advised, contin
of opinion that the minister and benefice may by prescription obtain
feasible right to such overpayment, the same being in reality a payme
stock over and above the valued teind.

"It humbly appears to the Lord Ordinary, however, that such cases
application whatever to the present case, where the alleged prescript
payment did not follow upon, but preceded the final and unchallengeab
of valuation.

"It is indeed a mistake in the present case to say that there was
payment at all. The payment of £40 a-year was not an overpayment,
fifth of the proven rental,—that is, it was the exact amount of the

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The minister reclaimed, and argued;—A modification and locality standing for forty years gives the benefice a permanent right to the sum localled. The case of Madderty is the same as the present, since there had been there also overpayments for more than forty years prior to the decree of approbation, and the judgment of the Court was founded on this being dereliction of the subvaluation.[1]

Argued for the condescender;—A decree of locality is not such a title as is required by the Act of 1617 as to the positive prescription. There can be no dereliction, since before 1863 there was nothing to derelinquish. And in 1817 £40 may have been a fair estimate of the teind due, so that there is no proof of any ground on which the heritors could have objected to the said sum. This is the first case in which a positive prescription of teinds beyond their real value, and thus an encroachment into the stock, has been alleged by a minister whose teinds have not been inter-

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teind, and it was paid as such. There was no room for maintaining overpayment until 1863, when the teinds were valued for the first time at a lower sum, and it would require forty years' overpayment after 1863 to establish any right to overpayment in the benefice.

"The action of valuation was brought for the very purpose of fixing the exact value of the teinds, and to give the heritor the right to draw his own teinds. Supposing that the teinds had been actually drawn prior to 1863, the drawn teind would always exceed in amount the valued teind, and the valuation was brought for the very purpose of reducing it to its true and actual amount.

"Still farther, in a process of valuation the teind is struck at one-fifth of the net teindable rental as at the date of the valuation. Now, it may very well be that the teindable rental of the lands of Aigas had fallen off between 1817 and 1863, so that while a fifth of the teindable rental in 1817 was £40, the fifth of the teindable rental in 1863 might be only £32, 2s. 6¾d. The minister is no more entitled to found upon the byegone high rental of the lands as a reason for having more teind than is actually due than the heritor would be entitled to found upon that circumstance as a reason for drawing more rent than the lands will actually bring.

"Lastly, the Lord Ordinary thinks that the decree of 1863, being in point of fact unchallenged and unreduced, he must give effect to it in settling the final locality in the present process. It is just possible, though the Lord Ordinary does not think it likely, that forty years' prescriptive payment prior to 1863 might have been a good defence in the valuation against the value being struck at a less amount. But this was not pleaded, and final decree of valuation was pronounced. The Lord Ordinary cannot by way of exception set aside the final decree of valuation as he is now asked to do.

"The view now taken supersedes all the other questions raised on record. These questions relate chiefly to the years which must be reckoned in making up the prescriptive period, and in particular whether certain minorities are to be deducted, and whether the full sum was paid in certain other years. The question of minority is rather a difficult one, the absolute title being taken by the minor's tutors or curators in their own name, and the lands being so held by them for a time, and then conveyed to the minor. The Lord Ordinary inclines to think that as it appeared on the face of the title, though not in the dispositive clause, that the lands were really held for the minor, the exception of minority would apply. The present judgment does not, however, rest on this ground, but solely on the decree of valuation of 1863, as above explained.

"The Lord Ordinary has modified the expenses awarded, on the ground that the heritor has been unsuccessful in the discussion on the interim locality, the minister having succeeded in maintaining the interim locality at £40 per annum."

[1] Cases of Madderty, Baird, and Row, cited in the Lord Ordinary's note; case of Kilernan in 1 Connell, 249; City of Edinburgh v. Montgomery, Oct. 16, 1872, *supra*, p. 14.

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fered with by the incumbents of other parishes. There is a great difference between the proven rental (or rental confessed on) in a process of locality and the "constant rent," which is the result of a valuation.[1]

At advising,—

LORD JUSTICE-CLERK.—I have formed a very clear opinion that the Lord Ordinary is right. The question is, whether the minister, on the ground of immemorial usage or prescription, is entitled, notwithstanding the valuation, to have in the present locality effect given to the former locality, in respect that for more than forty years £40 has been paid out of the lands belonging to Mrs Chisholm-Batten. The argument for the minister is ingenious, but, I think, based on a fallacy. The decision in the case of Madderty does not present any difficulty in arriving at this conclusion. In that case a subvaluation was obtained in 1629, and a subsequent locality in 1661. The heritor continued to pay in conformity with the locality and in excess of the subvaluation. In 1760 a process of approbation was brought, and the Court gave effect to the subvaluation, but the heritor still continued to pay the old stipend. Some time after the question occurred whether the minister had acquired a prescriptive right to the overpayments. The Court held that the decree of approbation could not be dis relinquished, but that the minister had by the previous overpayments acquired a prescriptive right to the excess above the subvaluation.

This case is quite different. The decree of locality in the former process was a decree finding, for the purposes of that locality, that the present amount of the fund out of Mrs Chisholm-Batten's lands available for stipend was £40 per annum. The liability of the proprietor to the minister is to account for a certain proportion of the annual rent. The original enactment, 1633, c. 15, bound the heritor to pay one-fifth of the present rent; and although in the process of locality it was found quite reasonable to strike that liability at an average, still the principle is that the heritor pays year by year according to the present rent. But when the heritor leads a valuation, then his liability is altered. He then is to pay according to the constant rent. He was formerly bound to pay a proportion of the present rent; after the decree, he must pay the constant amount fixed by the decree. In this case, the minister's possession, prior to the valuation, was perfectly consistent with the rights of the heritor, whose position was precisely the ordinary one of an heritor whose teinds are unvalued. There then was no conflict either of title or possession, and consequently no ground on which prescription can run.

I have some doubt, looking to the case of Maxwell, Shaw's Teind Cases, p. 143, whether, when there is a new augmentation and a new allocation of the whole stipend, the former decree of locality is not superseded without any process of reduction. Lord Glenlee's opinion was to that effect, although it is the ordinary practice to set it aside by a reduction, when it is inconsistent with the rights of parties in the new locality. There is, however, a reduction here, and the real question is, whether prescription has run in favour of the decree of locality of 1817, to the effect of preventing the heritor using his right of surrendering his teinds at their value. I am of opinion that the possession which the minister has had has not been adverse to the heritor's right, but entirely consistent with it, and that there is therefore no room for prescription.

LORD COWAN.—This case appears to me to be free of difficulty. In the interval between the two localities of 1817 and 1867 the objector, Mrs Chisholm-Batten, obtained in 1863 a decree of valuation of her teinds from the High Court; and, in order to surrender thereon, further obtained—whether unnecessarily or not need not be here decided—a reduction of the locality of 1817. By

[1] Locality of Fern (Common Agent v. Munro, in 1 Connell, 252, and Nov. 21, 1810, F.C.); Loc. of Nenthorn, noticed in 1 Con. 251; Mags. of Edinburgh v. Lasmonth, Dec. 3, 1857, 20 D. 190—in which see Lord Curriehill on Acts 1633, c. 17 and 19, at p. 202; 1 Connell, 458; Maxwell v. Anderson Blair, July 3, 1816, F.C.; Oswald v. Martin, Nov. 21, 1835, 14 Sh. 32 (Lord Mackenzie, p. 35).

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hat decree the stipend localled on the objector was £40, being one-fifth of the proven rental on which this heritor was held confessed. The decree of valuation has found the value of the objector's teinds at £32. It is now proposed to surrender the teinds as thus valued; and the question is, whether this can be competently done, having regard to the payment of a larger sum as stipend under the locality of 1817. I have always understood that a heritor's right to surrender his teinds could not be disputed, as soon as he has obtained a valuation, and finds that he is to be localled upon to an amount which exceeds the whole value of his teinds. No stronger illustration of this can be found than the decision in the case of Sir John Maxwell v. Anderson Blair, 3d July 1816, F.C.; and it is, as then decided, no objection that there has been, previous to the surrender, payment of stipend exceeding the surrendered value. On the other hand, I am not inclined to dispute that there may be cases in which payments in excess of the value of teind for the space of forty years may confer on the minister a right for time to come to demand that the excess shall continue to be paid. This may happen when the valuation of the sub-commissioners is derelinquished, but only so long as there is no approbation by the High Court, which is equivalent in its effects to a direct valuation by the High Court itself. Some doubt has been thrown on this subject by an examination of the case of Madderty. My view of that case had always been that the decision went on the fact that forty years after the approbation by the High Court there had been overpayments. But it is now pointed out that there had been a derelinquishment of the subvaluation by overpayments for more than a century prior to this decree of approbation. But whatever we may think of the soundness of the case of Madderty, it is not necessary to found on it here; for in the present case there is no valuation whatever extant before that of 1863; before which date the "constant value," which is required by the Act of 1833 to be ascertained by the sub-commissioners, could not be obtained; while in the locality of 1817, all that was necessary was to inquire into the "present value" of the teinds by taking one-fifth of this rental proved or admitted by the heritor. When the heritor was localled on for stipend to that extent he was called on to pay no more than by law he was bound to pay. There was no overpayment whatever. It is plain, therefore, that there are no *termini* in the present case for any counter-possession; not only that, but it is quite possible—nay, it must be taken to be so—that in 1817 £40 was a fifth of the rental, was the true value of the lands aye and until 1863, when the lands were for the first time judicially valued.

LORD BENHOLME.—By the law of Scotland, whenever an heritor, whose teinds have not hitherto been valued, obtains a decree of valuation, if he thinks that what he has been accustomed to pay is in excess of the valuation, he is entitled to surrender his teind, and that whether there is free teind in the parish to meet the existing augmentation or not. If there is free teind, the minister will get no relief by an alteration of the locality, shifting the undue burden from one heritor on to another. If there is no free teind the right of the heritor to surrender remains just the same. The only difference is that in the first case the Court will, as was done here, allow the locality to stand as an interim rule of payment, till a new locality is obtained shifting the burden on to other heritors. But if the minister has been drawing the full teind of the parish, so that there can be no shifting of the burden, the heritor can still escape from overpayment by surrendering his valued teind. The title on which the minister has drawn the overpayments is not one on which the positive prescription can run.

In the present case there has been discovered a fund of free teind more than sufficient to relieve the heritor of this burden of £8. Had it not been for the augmentation, the remedy would have been to have reduced the former locality and kept it up as an interim rule, until the burden was shifted. Then Lord Ovat would have had to pay the excess. But surely the circumstance of there being free teind in the parish does not prejudice the right of Mrs Chisholm-Batten to surrender her teind. The Court has no right and no jurisdiction to compel any payment out of the stock. If any order of payment in the shape of

No. 51. a decree of locality turns out to be in excess of the teind the heritor is enti to get quit of it by surrendering his teind.

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LORD NEAVES concurred.

THE COURT adhered.

MURRAY & FALCONER, W.S.—M'EWEN & CARMENT, W.S.—R. R. SIMPSON, W.S.—Ag

No. 52. MARGARET CATHERINE IRVINE AND OTHERS, Complainers.—*Balfour Darling.*

Jan. 18, 1873.
Irvine v. Robertson.

CHARLES ROBERTSON, Respondent.—*Pattison—Trayner.*

Possessory Action—Burgh—Sea-shore—Property.—Proprietors in a bur barony of ground adjoining the sea-shore, whose titles gave them no right th but that of access, and who had assisted in reclaiming from the sea *ex ad* of their properties a piece of ground which had remained unenclosed for than seven years, *held* in a possessory question to have a sufficient title, out the intervention of the Crown, to object to any part of the said pi ground being enclosed by another proprietor whose property and titles we a similar position to theirs, although he was proceeding with the sanction magistrates, who themselves had no title to the sea-shore.

2D DIVISION. Ld. Mackenzie. R.

MARGARET CATHERINE IRVINE and Others were proprietors of ce tenements in Commercial Street, Lerwick, in Shetland, adjoining Vic Wharf, and the present note of suspension and interdict was brough the former for the purpose of prohibiting Robertson from erecting buildings or other structures upon an area or piece of ground within burgh of Lerwick forming or used as part of Commercial Street a the access from said Commercial Street to the Victoria Wharf and sea-shore, as also from enclosing the said ground or any part there placing on or inserting in the same or any part thereof any obstruc or impediments to free access or passage over the same, as also breaking up or interfering with the same in any manner of way having him decerned and ordained instantly to remove the paling rec erected by him on the said piece of ground, and any other impedi or erections recently placed by him thereupon, and to restore the ground to the condition in which it was prior to the erection of the paling.

The facts, as brought out by a proof on commission were thus stat the Lord Ordinary's note:—"The area or piece of ground, extendi 1409 square feet, which has been taken possession of and enclosed w paling by the respondent, with the view of building upon it, was a time part of the sea-shore of Lerwick, situated opposite the propert the complainers and respondent. Within the last forty years it has gradually reclaimed from the sea in consequence of the deposit of ru upon it from time to time by the inhabitants of Lerwick. As i reclaimed it was used and possessed by the inhabitants of Lerwick f purpose of drawing boats upon it, and also as a public access and thor fare to the sea-shore, and, after it was constructed, to the Victoria P Wharf, which is the public pier of Lerwick. The market cross w course of time erected, and markets were held upon it. In 1866 an drain ran through it to the sea, past the market cross, and it became the deposit of town refuse and otherwise, a nuisance to the neighb proprietors and their tenants. In consequence of this a committee parochial board, as the local authority, was appointed, which durin year called a meeting of the neighbouring proprietors whose proj were connected with the drain, and these proprietors gave the com

y to build a sea-wall along its northern boundary, to enclose the
d to fill up and level the ground, and voluntarily agreed to assess
res for payment of the necessary expense. The said improvements
cordingly executed, and the expense paid by these proprietors,
g the complainers, in proportion to their rental. Since 1866 the
ce of ground, which is of considerable size, and extends partly
Commercial Street and the sea and partly between the properties
of the complainers and of the respondent and the sea, has
d open and unenclosed, and it has been used by the inhabitants
ıblic thoroughfare and access between Commercial Street and
and the Victoria or public pier of Lerwick, and also for other
purposes, such as holding markets, carrying on sales by auction,
ring boats thereon.

wick is a burgh of barony, erected under the statute 35 George III.
It has no property, and, as the town-clerk depones, the burgh has
s or revenue except the small sum derived from the town-crier's
ich is a mere trifle. It was not disputed by the respondent that
gh has no right of property in the said piece of ground.

respondent, who is proprietor of a piece of ground on the north
Commercial Street, on which a house and shop have been built,
right of property in the said piece of ground or in the sea-shore.
rt of his property which consists of a shop projects into Com-
Street so as to diminish the width of that street for about 23 feet,
or thereby feet to between 6 feet 9 inches and 7 feet 3 inches.
lesirous of improving his property, he offered to the magistrates
n-council to remove his shop, which covers 348 square feet, so as
he street opposite the rest of his premises of its full width, pro-
ıe magistrates consented to his appropriating a part of the foresaid
ed area of ground adjoining his premises on the north and west,
ending to 1409 square feet,—that is, more than four times the size
ground occupied by his shop. The magistrates and town-council
consented, and the respondent having enclosed with a paling the
ce of ground, with a view to building upon it, the present note of
ion and interdict has, for the purpose of preventing this being
een presented by the complainers, who are proprietors of subjects
d by or in the immediate vicinity of the said piece of ground, some
ı being also inhabitants of the burgh of Lerwick."

he commission being reported, the Lord Ordinary, on 2d July 1872,
nced the following interlocutor:—"Sustains the reasons of sus-
ı: Suspends, prohibits, interdicts, and discharges in terms of the
suspension and interdict: Declares the interdict granted perpetual,
cerns: Further, decerns and ordains the respondent instantly to
the paling recently erected by him on the piece of ground within
gh of Lerwick, shewn in green upon the sketch or plan produced
ıe note of suspension and interdict, and any other impediments or
ıs recently placed by him thereupon, and to restore the said ground
condition in which it was prior to the erection of the said paling;
ntinues the cause in regard to the remaining conclusion of the
suspension and interdict, and also as regards the question of
es." *

NOTE.—(After the narrative of facts quoted above)—The Lord Ordinary sidered the titles produced by the complainers, and by the respondent, is of opinion that none of them have any right of property in the said ground. The magistrates and town-council having no right of property could not confer any right upon the respondent. But it is maintained

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The respondent obtained from the Lord Ordinary leave to re
Argued for him;—The magistrates had the power to authorise tl
spondent to proceed with the erections he proposed to make, and
arrangement with him was manifestly for the benefit of the burgh.
enclosures did not interfere with the access to Victoria Wharf. The
of land in question must be held to belong to the burgh and to be
the management of the magistrates. The complainers have no ti
prevent the proposed alterations so long as they have free access
wharf.[1] The Crown alone has a right to interfere. He also fo
on the General Police Act, sections 160 and 162.

Argued for the complainers;—The magistrates or the burgh ha
title to any land within its boundaries, since the charter of the
contains no grant thereof. The General Police Act does not apply
present case, and was not originally founded on by the respondent.
complainers have a good title to object, especially in a possessory

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by the respondent that the complainers have not only no title, but no ri
interest to insist in the present note of suspension and interdict. Th
Ordinary cannot adopt that view. The complainer, William Robertson, i
prietor under a title from the Crown of a part of the shore in the imm
vicinity of the piece of ground in question, with access thereto from the
The complainer, Mr Heddell, and Heddell's trustees, are proprietors, a
crown title bears, of certain houses, and of a piece of ground extending
feet, and lying between these houses and the shore of the sea; others
complainers are proprietors of heritable subjects in the vicinity, and three
complainers, besides being proprietors, are inhabitants of the burgh of Le
The Lord Ordinary considers that the complainers have a right and inte
prevent the respondent from taking possession, without any right or title
part, of the ground in question, and to maintain the existing state of pos
which has endured for forty years and upwards, or at all events for a
much exceeding seven years. This right and interest arises from their
proprietors of the ground adjoining or in the immediate vicinity of the sea
from their having assisted in and paid for reclaiming the ground from th
and from the use and occupation thereof as an access to and from the s
public quay, which they have had not only as proprietors but as inhabita
common with the other inhabitants of the burgh. Such an interest is, it i
ceived, sufficient to entitle them to insist in the present application, more
cially seeing that the respondent is a mere squatter, without any right o
whatever to support his claim, and that he is by his operations attempti
disturb the existing state of possession. The complainers have, the
Ordinary conceives, just as much right as the respondent has to take pos
of the ground in question. The true title to the ground appears to be i
Crown, subject only to the uses and rights acquired by the inhabitants
burgh. But this does not, it is thought, deprive the complainers of their
and interest to maintain the possession which they have had of the grou
question, and to resist the change of possession attempted by the responde

"The widening of Commercial Street, by the removal of the respondent's
would no doubt be advantageous to the street, but that advantage cannot,
Lord Ordinary is right in the view which he takes, be obtained in the m
attempted, seeing that the proposed acquisition of ground and erection of
ings thereon by the respondent is not supported by any title either i
magistrates and town-council or in him, and cannot but be injurious to the
and properties of the complainers.

"The respondent did not and could not acquire from the magistrate
town-council, as commissioners of police, any right to take possession o
build upon the ground in question. The respondent did not attempt
debate to maintain his case upon this ground."

[1] Cameron v. Ainslie, Jan. 21, 1848, 10 D. 446.

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nly as being proprietors adjoining the piece of ground in dis-
lso some of them as inhabitants of the burgh.[1]
ing,—

WAN.—The buildings or other structures sought to be interdicted in
of suspension are proposed to be made by the respondent, Charles
"upon the area or piece of ground, within the burgh of Lerwick,
een upon the sketch or plan produced." This ground forms part of
rected into the burgh of barony of Lerwick by crown-charter in 1818.
ion of an area of considerable extent, situated between the principal
mercial Street) and the sea, and adjoins the respondent's house pro-
e west and north. This ground the respondent, following up an
t entered into with the magistrates and council, has enclosed, and
of erecting buildings on it, and so appropriating it as his private
nd the question is, whether in this possessory question he is entitled

nary inquiry regards the property of this ground,—in whom it is
to whom it belongs, and the right which the respondent can vin-
under his title-deeds, or in virtue of any grant or contract with the
of the burgh. A preliminary objection is indeed taken by the
to the title of the complainers to institute these proceedings to any
this objection cannot be satisfactorily considered until the inquiry as
erty of the ground has been gone into.
ter of this burgh, granted by the Crown in 1818, under the autho-
statute 35 Geo. III. c. 122, contains no grant of land. It confers the
rs of jurisdiction upon the magistrates and councillors, therein allowed
d; and it specifies the boundaries of the burgh, extending down to
the north, and embracing within these bounds the area of ground in
At one time the sea appears to have at high tides covered the whole
een the sea and the houses on the shore side of Commercial Street,
he house of the respondent; but in course of time, and more recently
ns, the expense of which was mainly defrayed by subscriptions from
ants, the shore has been protected from the encroachment of the sea
e erection of a sea-wall, and the formation of what is called on the
ia Wharf. The ground thus gained from the sea has formed an open
een Commercial Street and the wharf, and in the centre of it, near
cial Street, is erected what is called the market cross. This has been
possession for many years. The cross was erected in 1835, but the
e operations was in 1866.
ng so, it seems clear, in the first place, that the magistrates of the
no proprietary right in this piece of ground. Ground gained from
st be viewed as belonging to the Crown, unless it has been conveyed
parties. This is clear in itself; but the litigation that existed in
arrated in the title-deed of William Robertson, on pages 12 and 13
t print, has fixed by decision of this Court that the space recovered
a does belong to the Crown. The question then is, whether the title-
e respondent confer upon him any right to it.
s, which are derived from the Crown, contain the following descrip-
ll and whole the shop, cellars, and loadberry lying below the street
mercial Street, &c., with the ground on which the same is built,
nents, and privileges appertaining or in any way known to apper-
long thereto,"—including, as appears from the older titles quoted in
ion, free "ish and entry from the lowest of the ebb to the highest
" Under this title neither the respondent, who only acquired the

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of St Monance v. Mackie, March 5, 1845, 7 D. 582; Boucher v.
Nov. 30, 1814, F.C., and 2 Bell's Ill., p. 2; Campbell v. Brown,
813, F.C.; Scott v. Orphan Hospital, Nov. 18, 1835, 14 S. 18;
alrymple, Nov. 3, 1740, M. 13,527; Forbes v. Morrison, Dec. 3,
. 134.

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subjects in 1870, nor his predecessors, are alleged to have had possession o intermediate space between the subjects thus described and the sea. ground, on the contrary, is proved to have been used by fishermen for bes their boats, probably on the ground of a supposed right to do so und statute of 29 Geo. II. c. 23, and as a place for deposit of rubbish, and for purposes and uses causing nuisance. This led to the interference of the authority, under the Nuisance Removal Act, and to the operations a expense of the proprietors previously mentioned, in the erection of the se and Victoria Wharf. Hence, under his title-deeds, the respondent an authors have no special right to, and have had no possession of this gr He cannot claim it as being in any sense an adjunct to his premises, an operations are certainly an interference with the existing state of possessio

Thus, on the ground of proprietary title, whether in the respondent or magistrates, there is no room legally for holding the ground capable of appropriated to the exclusion of the public. But it is alleged that the sa obtained from the magistrates ought to be regarded as sufficient justificat the erections contemplated by the respondent, and the excambion of groun posed to be made under their sanction. That the removal of that portion house projecting into Commercial Street would be a manifest improvement c be questioned. It is the appropriation of the public ground on the west and of his present premises, as an exchange, to which objection is taken; and as what the respondent urges is, that the sanction of the magistrates is all th required, and that in giving such sanction they did no more than what they been accustomed to do in times past. From the minutes of the town-coun date 31st March 1871, it would appear that in carrying through other im ments of the street, "parties sacrificing their property for the public interes invariably been allowed compensation by an extension of their boundari ward;" and holding the removal of the respondent's shop, as far as it encro on Commercial Street, to be (as it certainly would) a great public improve they resolved "to give their sanction and consent to the proposed extens the respondent's boundary," subject to certain conditions therein stated. resolution was adopted, notwithstanding the objections taken by the p complainers. It will be observed that the magistrates do not assert any to the ground in question, or propose to give a conveyance thereto. All t done is to give their sanction and consent to the extension of the boundary if the ground in question is not the property of the magistrates and counc of the Crown, their consent can be of no avail in justification of the respon act in appropriating the ground. Nor is there any room for vindicatin procedure when objected to by the Crown, or by parties having interest, b of similar consent and sanction having been given to encroach on the ground to others. As to this matter, further, the proof suggests some imp observations.

For (1) in no instance have the magistrates and council interfered effect of giving permission to any of the feuars to appropriate ground, seaward of the properties belonging to them, whereas what is now propos braces a large space lying not merely seaward, but laterally to the west respondent's premises, stretching towards the market cross; and (2) thi ground was enclosed towards the sea, and made part of the embankment the Victoria Pier, with the express sanction of the magistrates and counc by means of money raised by the subscriptions of the public, as before tioned. Thus, in the report of the committee of town-council, dated as e October 1859, it was recommended "that the space lying between V Wharf and Mr Irvine's new house, and below Mr Foubister's shop, now u a place for sheltering fishermen's boats, should be properly levelled and adamised," so as to be connected with Victoria Wharf. Then in July when subscriptions were in course of being obtained for this purpose, stated to a joint meeting of the town-council and commissioners of poli the convener of the committee, that if the south side of Victoria Whar improved by the erection of the sea-wall which had been proposed, a amount of support would be obtained; and upon that statement it was re

ı regard to the extension originally proposed of Victoria Wharf, and the
›w the late Mr Irvine's property, preparations be made for commencing
ɛ early next spring," and accordingly, in 1866 the sea-wall was built, and
nd levelled and connected with the rest of the ground adjoining to Victoria

After this it seems not a little strange that sanction should have been
› the appropriation by the respondent of ground gained in this manner
ə sea for the public behoof. Nor can any support be derived in justifi-
f this proceeding from any power or authority conferred on the magis-
ıd council as commissioners of police under the General Police Act. All
risions founded on in the argument have reference solely to the improve-
' the public streets, and to steps taken with that view, and can on no
ɛtion be held to embrace alterations on the area of ground here contem-

Accordingly, it is not under the Police Act at all that the respondent's
ings were adopted.

considerations now stated afford a complete answer to the arguments so
r pressed by the respondent, that his premises were *de facto* bounded by

For not only do his titles purport no sea boundary, and confer only a
' access to the shore, but (1) the space which he has appropriated is not
ard, but to a large extent landward, if the gained ground at the market
n be so called; and (2) even the ground seaward has not been gained by
f embankment through his or his author's operations—which is the only
ıtemplated in the passage from Erskine on which reliance was placed—
been gained from the sea in such manner as to make the space, like the
the ground extending from Commercial Street down to Victoria Wharf,
property, and cannot be interfered with without the sanction of the

Nor (3) is it to be forgotten that in a possessory question the existing
' things falls to be preserved and protected, even were it within the
›f the respondent by declaratory action to vindicate the right which he
ɛrts, as against the Crown and all other parties interested.

rtaining the view now explained, it does not appear to me at all neces-
refer to the voluminous parole proof which has been led by the parties,
than to say that after a careful perusal of it I can find no facts estab-
having any essential bearing on the case, other than those which I have
d to be supported by the proof, parole and documentary, in the explana-
ıtement bearing on the conclusions at which I have arrived.

respondent, however, urges that the Crown are not here stating objec-
ınd that the complainers have no title to object. I do not think that
ı any ground for this plea in fact or in law. The titles of the several
iners give them sufficient interest to insist that the whole area extending
ommercial Street, along which their premises are situated, to the Victoria
, shall remain unobstructed, as it has existed hitherto. To some extent,
, the proposed erection would certainly interpose between the property of
f the complainers and the sea; and the ground proposed to be enclosed
also limit and narrow the space that has been used by them and by the in-
ats of Lerwick as an access to and from the sea and Victoria Wharf, espe-
›n the west side of the respondent's premises, near to the market cross. I
doubt, therefore, that there is title sufficient and interest in the com-
ɜ to insist in these proceedings. The case is essentially different from that
neron v. Ainslie, January 1848. There the boundary of the party whose
ions were objected to was the sea-beach, which the Court found must be
ɜ extending to the sea-shore; and further, the only use and possession
l by the objectors (feuars in the village) had reference to the use of the
ɜ fishermen, under the statute Geo. II., which the Court held did not con-
them any right of servitude which they could vindicate, and which was
ingly disallowed, under reservation to the feuars of all their statutory rights
ıermen. Here there is no boundary of sea-beach or sea-shore in the
dent's title, and his attempt is to appropriate ground which has been
from the sea, and which has been used and enjoyed, free of obstruction,
ı objectors and others, under titles which give them access to the sea and
›re.

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On the whole, I am of opinion that the interlocutor of the Lord Ordinary ought to be adhered to; but I cannot conclude without expressing my entire concurrence in the observations made by him as to the unnecessary and inexcusable length to which the proof led by the parties has extended, notwithstanding of the urgent and repeated remonstrances of the commissioners by whom the proof was taken.

The other Judges concurred.

THE COURT adhered to the Lord Ordinary's interlocutor.

MACNAUGHTON & FINLAY, W.S.—WILLIAM MASON, S.S.C.—Agents.

No. 53.

Jan. 18, 1873.
Leddy v. Gibson & Co.

TERENCE LEDDY, Pursuer.—*Scott—Rhind.*
GEORGE GIBSON AND CO., Defenders.—*Lord-Adv. Young—Trayner.*

Reparation—Collaborateur.—In an action of damages brought by a sailor against his employers, the shipowners, on the ground of personal injury caused by the fault of the captain, *held* that the captain and he were collaborateurs, and that, consequently, the owners were not responsible.

2D DIVISION.
Ld. Mackenzie.
R.

THIS action was brought by Terence Leddy, formerly sailor on board the steam-boat "Osborne," against George Gibson and Co., merchants, Leith, who were his employers, and owners of the vessel, for payment of £5 in name of damages and reparation. He averred in his summons that in the course of the return voyage from Rotterdam to Leith the "Osborne" required, as usual, to be turned from the river Maas into the canal running to Helvoetsluys, and that Mr James Johnstone, the captain of the "Osborne," directed a rope called a spring-rope, which was not of sufficient length or fit or intended for the purpose, to be used in checking or turning the steamer into the canal, and that he ordered the pursuer and other seamen to pay out or ease off, at the timberheads near the bow, the rope, one end of which was fastened on shore; that, on account of the shortness of the rope, the pursuer was obliged and was ordered, to let it go, while there was a heavy strain upon it; and that in consequence of this the end of the rope struck the pursuer before he could get clear of it, and broke one of his legs, and severely hurt the foot of the other; and that "the pursuer was thus injured by and through the gross fault and negligence of Captain Johnstone, who was in command of the vessel, in virtue of the powers conferred upon him by the defenders, in not using, or ordering to be used, a fit, sufficient, or suitable rope for said purpose, instead of a spring-rope, which was of insufficient length, or, at all events, in not stopping the steam-boat from proceeding before the rope was nearly all paid out, which it was the duty of the said Captain Johnstone to do."

He thus described the ordinary mode of turning or checking the steamboat into the canal:—When the tide is ebb the vessel is taken down the river below the entrance to the canal for a short distance, and is then swung or turned round in the river. It then steams up towards the canal, into which it is turned or checked by means of a rope called a check-rope. But when the state of the tide is about full, or slack as it is termed, the vessel, without descending the river, is at once turned in at towards the entrance to the canal, into which it is checked or turned by the aid of a check-rope. There are two check-ropes on board the vessel used for this purpose to suit the state of the tide. The one end of the check-rope is fastened on the shore, and it is eased off or paid out at the timberheads or forecastle near the bow, under a powerful strain, as the steamboat is being propelled into the canal. This strain upon the bow o

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r checks it into the canal. The rope employed for this purpose
› be strong, and of considerable length, and unless it is so it
r insufficient, but is unsafe and dangerous to those who have
t.

ıuer pleaded;—The pursuer having been injured in his person
ɔugh the fault of Captain Johnstone, for whom the defenders
ible, as above mentioned, he is entitled to decree for reparation
es, as concluded for in the summons.

nders pleaded;—(1) The statements in the condescendence are
and insufficient in law to warrant the conclusions of the sum-
The injuries sustained by the pursuer not having been occa-
ugh the fault of the defenders, they are not liable in damages
ıd ought to be assoilzied from the conclusions of the summons,
ıses. (3) The injuries sustained by the pursuer having been
by his own fault, or at all events the pursuer having contri-
e accident by which said injuries were occasioned by his want
d inattention to the warning given to him, or otherwise the
s having been occasioned by the fault of the pursuer's fellow-
ıe defenders are not liable in any damages on account of said
d ought to be assoilzied.

l Ordinary, on 1st November 1872, pronounced the following
r:—"Sustains the second plea in law for the defenders:
the summons, and decerns: Finds the pursuer liable in
&c.*

.— . . . . The Lord Ordinary is of opinion that the pursuer has not set
summons a good or sufficient cause of action. The pursuer does not
e captain of the steamer did not possess the statutory certificate of
or that he was not fit and competent for the duties of his office.
allegation that the defenders had failed to furnish the steamer with
ficient length, and fit for the purposes of checking or turning the
the canal. On the contrary, it is averred in the summons that the
ıing the steamer into the canal was by means of a check-rope, and
ere on board the vessel two check-ropes used for this purpose to suit
the tide; and the pursuer's complaint is, that these ropes were not
at the captain ordered a rope 'called a spring-rope, which was not
length, or fit or intended for the purpose,' to be used. The sole
tion, therefore, is the fault of the captain of the steamer in using
ient spring-rope, and in not using one of the two check-ropes on
ssel, or some other rope fit and sufficient for the purpose.
ıuer at the time was not a stranger, but the servant of the defenders.
the captain. The captain and the pursuer were, the Lord Ordinary
llow-servants engaged in one common employment, namely, the navi-
› vessel. No doubt they had each different duties to perform, and the
under the command of the captain. But, as observed by Lord Cran-
he case of Wilson v. Merry and Cunningham, 'workmen do not
ellow-workmen because they are not all equal in point of station or
A gang of labourers employed in making an excavation and their
ɔse directions the labourers are bound to follow, are all fellow-
der a common master, as has been more than once decided in Eng-
› this subject there is no difference between the laws of England and
The pursuer and the captain being fellow-servants, the defenders,
sters, are not responsible for an injury sustained by the pursuer
› fault of the captain, because the pursuer, when he entered the
ırvice, must be held to have done so in the knowledge that he was
he risk of injury through any fault on the part of the captain while
› defenders' servant, and on the footing that, as between himself and
he would run that risk. Such a fault as the pursuer complains of

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The pursuer reclaimed, and argued;—The doctrine of *collaborateur* did not apply to the relation which subsisted between the captain of a vessel and a member of the crew. The captain was, as to all matters connected with the management and hauling of the ship, absolute master of the sailors. The delegation of authority granted to him by the owners was so absolute that even one of the owners themselves could not interfere with these matters. He was more what has been called in England a deputy-master under them than their servant equally with the crew. There was no analogy here with the case of an underground manager in a pit.[1]

Argued for the defender;—As pointed out by Lord Chancellor Cairns in Merry and Cunningham's case,[1] the defence of the employer, in such cases as then before the House, did not depend, in any technical sense, on whether or not the person in fault was a *collaborateur* with the workman, but on a limitation of the employer's duty to the engaging of "proper and competent" workmen, and furnishing them with adequate materials and resources. The *dicta* in Gregory v. Hill,[1] and in the English cases since 1868, did not materially touch that proposition. It was not that the wages covered the risk, but that the workman took the risk with his eyes open.[2]

The underground manager in Merry and Cunningham's case[1] was just as supreme in his department (which included the piece of work which caused the accident), as the captain was here; and sailors are so little favoured by law that the owners are not even liable to them for the seaworthiness of the ship.[3]

At advising,—

Lord Justice-Clerk.—I am of opinion that the interlocutor of the Lord Ordinary is well founded, on the grounds which he has fully explained. The injuries of which the pursuer complains are said to have been inflicted by the neglect of the master of a vessel, of which the pursuer was one of the crew, in the course of a voyage. As far as the defenders, who are the owners of the vessel, are concerned, the master and the crew were their servants, engaged under a common employer, in the execution of a common employment; and, on the principle established in the case of the Bartonshill Coal Company, the defenders could not be liable for injuries received by one of their servants by the negligence of another in the execution of the contract of employment, if the

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is just one of the ordinary risks of a seaman's service, for which the masters, the owners of the vessel, are not, the Lord Ordinary thinks, liable in reparation. The pursuer may sue the captain for the consequences of this fault, but he has no ground of action against the defenders, whom he does not allege to have committed any wrong.—Wilson v. Merry and Cunningham, 29th May 1868, Law Reports, Scotch Appeals, i. 326; Bartonshill Coal Company v. Reid, 17th June 1858, 3 Macq. 266; Hutchinson v. The York, Newcastle, and Berwick Railway Company, 22d May 1850, 19 Law Journal, Exch. 296; Searle v. Lindsay, 22d Nov. 1861, 31 L. J. Com. Pleas, 106.

[1] Wilson v. Merry and Cunningham, May 31, 1867, *ante*, vol. v. 807—affirmed May 29, 1868, *ante*, vol. vi. H. L. 85—1 L. R. Sc. App. 326; Gregory v. Hill, Dec. 14, 1869, *ante*, vol. viii. 282; Smith on Master and Servant (3d edit.), 204; Gallagher v. Pyper, June 4, 1864, 33 L. J. C. P. 329; Warburton v. Great Western Railway Company, Nov. 17, 1866, 2 L. R. Exch. 30; Hall v. Johnson, Feb. 8, 1865, 34 L. J. Exch. 222 (Exch. Chamber); Tarrant v. Webb, June 18, 1856, 25 L. J. C. P. 261; Searle v. Lindsay, Nov. 22, 1861, 10 W. R. 88, 31 L. J. C. P. 106.

[2] Bartonshill case (*supra*).

[3] Priestly v. Fowler, 1837, 3 M. and W. 1; Smith on Master and Servant, 11; Conch v. Steel, 3 Ellis and Bl. 402, 23 L. J. Q. B. 121.

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ercised reasonable care in their selection of the servant who was guilty of
glect which caused the injury.

s been maintained that the master of a sea-going vessel holds an inde-
t position, and that on a voyage he has the absolute control of the ship,
h so that even the owners, had they been on board, could not have inter-
ith his orders. This is true, and arises from the incidents and exigencies
gation. But there can be no doubt that if third parties, or strangers, are
in person or property by the fault of the master or captain, the owners
ponsible, because he is the servant of the owners, and the rule of law
'acit per alium facit per se" would regulate the liability of the owners.
present case the owners are not liable, because both captain and
ere fellow-servants under a contract of employment with a common
er.

k occasion in the recent case of Gregory v. Hill to explain the principle
:h the Bartonshill case was decided, and which we must now hold to
law applicable to such cases, and I refer to my observations there on
glish decisions. The exception to the general rule, *respondeat superior*—
ed among us in our law by the *brocard* of the civil law, *qui facit per
icit per se*,—has been rested in England entirely on an obligation implied
ontract of service, under which the servant is presumed to undertake all
inary risks of the service, arising from the fault of those employed along
m, and to be recompensed for this risk by the remuneration which he
. I do not say that the case of Priestly, which was the first of the
ecessarily proceeded on so artificial a rule, but it is now clearly estab-
and, as far as I can judge, universally acknowledged and enforced in the
in England.

true that in the case of Merry and Cunningham, which was a clear and
illustration of this rule, Lord Cairns and Lord Colonsay expressed the
, and doubtless quite accurately, that the rule itself was only one illustra-
the maxim, "*culpa tenet suos auctores*," and indicated that this maxim
erhaps in some supposed cases have a wider application. But hitherto
. limitation of the employer's liability has ever received effect, and I have
oubts if it admits of application with much clearer definition. If indeed
ility of the employer were in all cases to be limited by the rule *culpa
os auctores* to an obligation to use reasonable care in selecting his servants,
r those who suffered by the negligence of those employed were fellow-
s or strangers, such a rule would be simple. But it is needless to say
:h is not, and never has been, the law. In the case of Gregory v. Hill,
view of all the authorities, we refused to liberate the contractor for the
work, in the building of a house, for the neglect of his servant, by which
rant of a contractor for the joiner work of the same house was injured.
st recent decision on the subject in the English Courts, of which I am
is the case of Murray, Law Reports, Common Pleas, vol. vi. p. 24. In
e a stevedore had been employed by the owners of a ship to land a cargo
rpool. In the process of landing one of his men injured one of the crew,
ought his action against the owners. It was found that the man who
the injury was the servant of the stevedore, and not of the owners.
Willes, in giving his opinion, says,—"The rule, out of which this case
n exception, that a servant or workman has no remedy against his em-
for an injury sustained in his employ through the negligence of a fellow-
an or servant, is subordinate to another rule, and does not come into
on until a preliminary condition is fulfilled; it must be shewn that if the
had been done to a stranger he would have had a remedy against the per-
o employed the wrongdoer." The plaintiff was held to have no such
in that case, because the stevedore was an independent contractor, over
ervants the owner had no control.

as suggested that the captain of a vessel on a voyage was to be held to be
nty-master" in the sense in which that term has been used in some Eng-
es. If, however, I rightly understand the phrase, it denotes one who is
ed to do that which, from the nature of the contract, the employer would

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himself have done. This is not the position of the captain of a sea-going vessel. In so far as he is anything but a servant, he is rather in the position of an independent contractor. But, as regards a question like this, I cannot look on him in any other light than as a servant, along with the rest of the crew, of the owners of the vessel, although he has control and power of superintendence over his fellow-servants.

LORD COWAN.—This is an interesting case, and differs in some respects from cases of a similar kind which we have had to consider. I concurred in the judgment delivered in Gregory v. Hill. I adhere to the views which were there fully explained as the grounds on which the Court proceeded. Holding those views, I do not think we require to go into the nice distinctions on which the doctrine of *collaborateur* is said by the Lord Advocate to be founded. The real question in the case depends on the relation in which the captain of a vessel stands to the crew which he commands. In such cases as the present are the master, mate, and mariners not all engaged in a common employment for business, and as engaged for the voyage by the owners? I think this query must be answered in the affirmative. In many matters a shipmaster is supreme, and wields dictatorial power; even over the owners themselves, if they come on board during the voyage, and attempt to interfere with his control of the navigation. In that respect he might be said to have a larger power than a mere *collaborateur*. But then, on the other hand, captain and crew are more closely fellow-workmen, in another respect, than we usually find in the cases already decided. They are all equally and wholly interested in the navigation of the vessel, and in the safe prosecution of its voyage. On the whole, I think there is no foundation for the distinction which has been pleaded in English cases between a deputy-master and a mere *collaborateur;* that captain and crew were equally the servants of the owners engaged in a common work; that the accident which occurred to the pursuer was one of the ordinary risks incident to his employment; and that the rule *respondeat superior* does not apply.

LORD BENHOLME.—The only question in this case is in respect of the application of the English doctrine of *collaborateur*. Is it to be held as not confined to workmen of not very different grades, but as extending to all officers whether of lower or of higher rank acting under one employer? Some observations of the English Judges might indicate that, though they applied the rule to a sub-foreman, such as the underground manager of a coal-pit, yet they reserved their opinion upon the case where injury has arisen from the fault of the principal foreman, on whom the owner has conferred the supreme control over the whole subjects, as well as over the workmen. I had some doubts whether we were not going beyond what had been expressly decided by the English Courts. But I do not see my way to give effect to these doubts. The word *collaborateur* suggests community of actual labour, but it is clear that the meaning of the word as used by the English Judges, must be taken in a much wider sense. If the fault of a foreman or sub-foreman is held to be the fault of a *collaborateur*, ought that to be extended to every person connected with the employment who is not the owner himself, even to the person upon whom the owner has conferred the full powers belonging to himself? On the whole, I am not prepared to give effect to the distinction between the two cases.

LORD NEAVES.—It is not necessary to go into that region which lies beyond the principle applicable to common employment. There is in it sufficient to afford grounds for the decision of this case.

The most general rule on this subject, and that most consistent with equity, is *culpa tenet suos auctores*, meaning not only that the person by whose fault an injury is caused is liable, but that no one else is liable.

But from this rule there are several exceptions, one of them being, *qui facit per alium facit per se*,—*i.e.*, a man who employs another to do anything is answerable for the way in which that other does it. In England this rule takes the form of the maxim, *respondeat superior*.

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i this rule, which is itself an exception, there are at least three counter
ons.
, if the person who employs another to do a thing does not employ a
, but a person of independent station—a tradesman or contractor—then
on employing this independent tradesman or contractor is not respon-
r the way in which he may perform or misperform the work. On this
e, if my coachman runs over a child, I am liable. But if I hire a post-
I am not answerable for the post-boy. He is the servant of the coach-
nd not mine.
nd, even if my servant in the course of his employment does an injury,
es it criminally, I am not liable. I am liable for his negligence, but not
nalice.
hird counter exception is that with which the use of the word *collabora-*
ginated. It may be too narrow a word, but the meaning of the doctrine
where several persons are engaged under one common employer, and one
is injured by another, the employer is not liable. I do not mean to
er. The captain of a ship, although certainly in a position of great
nust still obey the owner, except in so far as the navigation of the ship
ly concerned. I see no reason for holding that he is to be considered a
naster. If he were, it would give rise to endless anomalies. Suppose
ain lawfully off duty, and the mate to go on board, is the owner to be
ble for what the mate does, and not for what the captain does? In
nion, the captain, mate, and seamen are all persons deriving their
ment from the shipowner, and serving him in the navigation of the
d I think this principle has been well employed by the Lord Ordinary
ecision of this case.

THE COURT adhered to the Lord Ordinary's interlocutor, with expenses.

GEORGE BEGG, S.S.C.—P. S. BEVERIDGE, S.S.C.—Agents.

No. 54.

Jan. 21, 1873.
Macpherson v. Minister and Heritors of Kilmallie.

2D DIVISION.
Lord Gifford.
M.

DUNCAN MACPHERSON, Pursuer.—*Mackintosh—Robertson.*
. ARCHIBALD CLERK AND OTHERS (Minister and Heritors of the Parish of Kilmallie), Defenders.—*Asher.*

dmaster—Dismissal—24 and 25 Vict. c. 107, sec. 19—1 and 2 Vict. *Held* that the 19th section of the Parochial and Burgh School- (Scotland) Act, 1861, providing for the removal or dismissal of choolmaster of any parish," was not applicable to the case of a naster of a parliamentary school appointed under 1 and 2 Vict. (1838).

GIFFORD & SIMPSON, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 55.

Jan. 21, 1873.
Agnew v. Lord Advocate.

DREW AGNEW, Bart., of Lochnaw, Pursuer.—*Millar—Balfour—Crawford.*
RD ADVOCATE, Defender.—*Lord-Adv. Young—Sol.-Gen. Clark—Ivory.*

rty—Crown—Foreshore.—In a question between the Crown and a *eld* (1) that when an estate on the sea-shore, whether barony or not, is er a crown-charter which does not, by express grant or specific boundary, he right of the vassal beyond the high-water mark, there is no presump- the foreshore is a pertinent of the land; but (2) that in such a case the may be shewn to include the foreshore by such long-continued possession s can only be ascribed to a right of property.
rty—Possession—Crown—Foreshore.—Circumstances in which *held*

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that crown grants of lands on the sea-shore, with parts and pertinents, had been explained by possession of the foreshore as including a grant thereof.

Property—Servitude—Possession.—Observed that the taking of sea-ware for the purpose of making kelp was to be regarded as the exercise of a right of property, and not of servitude.

Crown—Property—Foreshore—Regalia.—The Crown has a right of property in the foreshore not as being one of the *regalia minora*, but as a portion of the *solum* of the country, and may alienate the same, subject to the burden of certain public uses which attaches to it, whether held in property by the Crown or by a subject.

Crown—Property—Foreshore.—The right of the public to use the foreshore for purposes of navigation is vested in the Crown as one of the *regalia majora*.

2D DIVISION.
Ld. Ormidale
R.

IN 1870 Sir Andrew Agnew, Baronet, of Lochnaw, brought the present action against the Lord Advocate, on behalf of the Crown and of the Commissioners of Woods, Forests, and Land Revenues, and as representing the Board of Trade, to have it found and declared that the whole soil and ground of the sea-shore above low-water mark of ordinary spring-tides, *adverso* of the sea-board lands after mentioned, pertained heritably in property and belonged exclusively to the pursuer, as proprietor of the respective lands. There were also conclusions declaratory of the pursuer's property in and right to the oyster beds, scalps, and fisheries above the low-water mark, and to the salmon fishing *ex adverso* of the said lands, but these were abandoned by a minute, consented to by the defender, which reserved right to the pursuer to proceed with the abandoned conclusions in a new action.

The pursuer was proprietor of extensive estates in Wigtownshire, some of which are bounded on one side by the sea. Of these, the lands of Kerronrae and Kirkland of Kirkcolm, the lands of Clenary, Salquhary, etc. in the parish of Kirkcolm, and the lands of Soleburn Croft, Low Auchneel and others, in the parish of Leswalt, were washed by the waters of Loch ryan on the east; the lands of High Auchneel, Mark, Knocknain, Galnoch, Larbrax, and others, all in the parish of Leswalt, were bounded by the Irish Channel on the west; while the lands of Crugaltown, Craigtown Cavens, and Polmallet, and others, are terminated on the east by Wigtown Bay or the Solway Firth. Some of these lands were included in the barony of Lochnaw, conform to a charter under the Great Seal in favour of Sir James Agnew (therein designed James Agnew, younger of Lochnaw), Baronet, dated 29th March 1699. The barony is described in the pursuer's titles as "All and Whole the barony of Lochnaw, comprehending All and Haill the five-merk land of Lochnaw, with the tower fortalice, mansion-house, buildings, yeards, orchards, milns, multures, and pertinents thereof, with the tenants, tenandries, and service of free tenants and whole pertinents thereof whatsoever lying within the parish of Leswalt and sheriffdom of Wigtown," &c. The other lands, which are not included under the barony, had been held for a very long period by the pursuer and his ancestors under Crown titles, and are thus described:—"All and Whole the lands of Larbrexgressie, *alias* Balgressie, and Auchentroich, the lands of Cardrain and Ayne, with houses, biggings, yeards, orchards, parts, pendicles, and pertinents of the same," &c.

None of the pursuer's titles contained any express grant of the foreshore or of oyster or salmon fishing, nor was there any mention of the boundary of any of the lands lying on the sea-board.

The pursuer averred;—(Cond. 3) "The lands and others described in article one above written were erected and incorporated into a barony, to be called in all time coming the barony of Lochnaw, conform to a charter under the Great Seal in favour of the deceased Sir James Agnew (therein

1 of the pursuer and his ancestors as part and pertinent of their
es. They have constantly and without challenge dealt with the
s as their own property, and from time immemorial, or at least
ds of forty years, have exercised their proprietary rights by acts
ion of every kind of which the subject was capable. Amongst
acts have been taking gravel, sand, and stones from the shore,
nting others from doing so, boring for coal and freestone, erect-
sing saltpans on the foreshores, using the shores for landing and
g persons, cattle, and goods, taking wrack and ware, and letting
to others the right of doing so. The said possession has been
of any possession on the part of others."

fenders' answer to this article was,—"Admitted that most of
mentioned in the summons are upon the sea-shore. The charters
of entail are referred to for their terms. *Quoad ultra* denied."

rsuer pleaded;—(1) The shore *ex adverso* of the lands and barony
s the property of the pursuer, in virtue of the titles by which the
s and barony are held, and he is entitled to decree in terms of
onclusion of the summons. (2) The shores libelled having been
for time immemorial, or at least for forty years, by the pursuer
redecessors, under the said writs and titles, as part and pertinent
d estates, the property thereof belongs to the pursuer, and he is
o have the right of property confirmed, as concluded for. (3) The
has, in virtue of the foresaid titles, and, *separatim*, in respect of
titles followed by the possession condescended on, the sole and
right to the oyster and salmon fishings upon and *ex adverso* of
s of the said lands, and he is entitled to decree declaring his said
concluded for.

fender pleaded;—(1) The Crown not having made any grant to
ier or his predecessors or authors of any of the subjects claimed,
der ought to be assoilzied. (2) The writs founded on not con-
a title in themselves to the portions of the foreshore claimed, and
ve possession not having been had of any of the said subjects,
der is entitled to be assoilzied from the conclusions of the sum-
th expenses.

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which has been had under them by the pursuer and his predeces forty years prior to the institution of the present action, or for ti memorial, that the shore of the sea above low-water mark of o spring-tides *ex adverso* of the lands libelled belongs to the pursuer, always to and under reservation of the right of the Crown to o same for public uses, as accords with law: Therefore, subject under reservation of said right in the Crown, finds and declares i of the conclusions of the summons, so far as the same have n abandoned, and decerns: Finds the pursuer entitled to expenses,"

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* "NOTE.—This case involves some points of great importance and o interest, touching the rights of proprietors having estates adjacent to shore on the one hand, and the rights of the Crown and the public, o Crown for the public, on the other.

"It was not disputed, but, on the contrary, expressly conceded, on t of the Crown, as defender in the present case, that the shore, or foreshore called,—that is, the ground between low and high water mark of ordinar tides,—is alienable, subject always to certain uses, such as the anchoring lasting of vessels, passage, and others, which must always remain veste Crown for the public; and, on the other hand, it was expressly state part of the pursuer that he did not and could not claim the shore in except subject to the right of the Crown therein for all such public uses referred to, and that he had no objection to that right being reserved most ample manner. In this view of the matter it is probably of litt tical importance whether the radical right of property of the particular p shore-ground immediately in question in the present case is to be held the Crown or in the pursuer, for it does not appear that any uses of thes of ground have been contemplated, or could well be taken, by the Cro the public, greater or more than the pursuer has expressed his readines cede, and has stated that he always has conceded. It is possible, however, other places, and in different circumstances, or even in the places now pute, the foreshore might, as was suggested on the part of the Crown, be siderable value in respect of the discovery of minerals underneath the s dependently altogether of the ordinary public uses which have been rese

"The question, therefore, which was discussed before the Lord Ordin not whether the foreshore is alienable, but whether it is or is not to be having, so far as claimed by the pursuer in the present case, come to hi the Crown, and now belongs to and is possessed by him as part of his subject to the reserved right in the Crown for public uses. It was not the pursuer, and certainly no title-deed or other evidence has been prod referred to by him to the effect that the foreshore was ever transferred or to any of his predecessors by express grant. But his contention wa that the mere fact of his lands abutting on or lying adjacent to the s sufficient, under his titles—which are neither bounding nor otherwise terms exclusive of the shore, but are of the most comprehensive charac contain, beside the specific lands conveyed, clauses of parts and pertinent most ample and unqualified terms—to give him the right claimed; 2d, t barony title, with its clauses, also of the most ample and unqualified na parts and pertinents, is at any rate sufficient to infer, and must in law to include in itself, a right to the foreshore; and 3d, that at any rate, the least favourable view for the pursuer that can be taken of his case, be held that, in virtue of his titles, and the possession which has follo them, his right to the foreshore, as claimed by him, has been sufficientl lished.

"In the view which the Lord Ordinary has taken of the proof, it is u sary to determine whether the first two of these pleas are in themselv irrespective of the state of the possession, sound or not; although certai will be afterwards seen, some of the authorities and precedents go the le supporting the affirmative. The Lord Ordinary's judgment in the prese

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ıe defender reclaimed, and argued;—I. Under the pursuer's title alone, t from any possession, he has no right to the fore-shore. Part of his

ınded on a combined view of the pursuer's titles and the possession which ɔved to have been had under them.

There can be no doubt, the Lord Ordinary thinks, that the proof prepon- es greatly in favour of the pursuer. He thinks, indeed, that it establishes ıe exclusive immemorial possession on the part of the pursuer and his pre- sors that could have been expected, or that could well have been had, con- ing the nature of the subject—shore-ground having no peculiar advantages d the public uses to which such ground must always be liable, let the pro- ary right to it be whose it may. It appears to the Lord Ordinary to be actorily established by the pursuer, not only that he and his predecessors for time immemorial been in the possession and occupation of the foreshore spute, and have taken from it stones and sand for the building and repair- f houses and dykes, and for the making of roads and walks, and wrack and for the manuring and cultivation of the lands, whenever and as often as ion required. Not only so, but the Lord Ordinary thinks it is also proved while such has always been the nature of the possession of the pursuer and redecessors, by themselves, their tenants, and dependants, it has also been ıd that the advantages derived from such possession have been valuable, uniformly treated as such by all concerned. Accordingly the tenants on ochnaw estate appear to have taken their farms and paid additional rent ıat footing and assumption. On the other hand, the proof shews that the ntages now referred to were not possessed by the public generally, or by party or parties at all other than the pursuer and his predecessors, and their ıts and dependants, but, on the contrary, that all others were prevented in ıus ways and at various times—in short, as much and as often as circum- es required—from interfering with the exclusive possession which it is clear ursuer and his predecessors have all along had, and understood and believed alone had right to. At the same time, it must be acknowledged that there me evidence of acts of possession by other parties; but, having regard to whole proof, the nature of the subject, and all the circumstances, the Lord nary has felt himself unable to attribute such acts of possession to any t of property in or asserted by these other parties. He thinks, on the con- r, that they have been sufficiently accounted for, where not mere trespasses, he footing of having been allowed by the pursuer and his predecessors, from ngs of good neighbourhood, or on other grounds in no degree derogating ı the paramount right of ownership and of possession which he must hold to ɔ been all along in the pursuer and his predecessors.

The Lord Ordinary may add, that he did not understand at the debate that Crown seriously disputed the state of the possession to be very much of the ıcter now described. What was maintained by the Crown seemed rather e that the acts of possession and enjoyment proved by the pursuer were more ulated to support rights of servitude than a right of property. The Lord inary, however, cannot think so. It appears to him that the acts of posses- and enjoyment referred to were far too numerous, varied, and exclusive in r character to be limited to servitude rights merely. The possession and yment established to have been had by the pursuer and his predecessors t be looked at as a whole, and so looking at them the Lord Ordinary is un- ı to draw from them any other conclusion than that they shew the pursuer his predecessors to have dealt with the shore *ex adverso* of their lands as nging to them in property, subject, it may be, to the burden of certain pub- ses, and not as having merely a variety of servitudes over it, as property nging to the Crown or some other party.

Having regard, then, to the fact that, while the pursuer's admitted property, by him under Crown titles, and, so far as the present question is concerned, large extent under a barony title, lies adjacent to the sea, and that there is ing to be found in the titles by way of reservation, or a bounding descrip-

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sea-board lands is possessed under a barony title, part under an ordinary crown title, and in neither case is there mention of a boundary by the tion or otherwise, to exclude the shore, the Lord Ordinary is of opinion that under these titles, fortified and explained as they are by the possession which has been had under them, it must be held that the shore in dispute belongs to the pursuer, subject to those uses of which the public, and the Crown for the public, cannot be deprived. It may be, he thinks, very fairly presumed that such was the object and intention of all concerned when the pursuer and his predecessors obtained right to their lands from the Crown, and it is not easy to discover any good or substantial reason for its being otherwise. It is obvious that there has been no intention, when the pursuer's crown titles were granted, to convey the shore between low and high water *ex adverso* of his land to some party other than the pursuer or his predecessors, or that intention would have been long ago carried out. It is scarcely conceivable, indeed, what object or interest any party other than the pursuer and his predecessors, whose lands lie adjacent to the shore, could have had in obtaining a right by itself, and unconnected with any other property whatever, merely to the shore in question. And it is also inconceivable that the Crown could have had any real or substantial interest in withholding from the pursuer and his predecessors, as the owners of the adjacent lands, a right of property in the shore, the public uses thereof being necessarily reserved.

"In accordance with and in confirmation of these views, arising from the nature and terms of the pursuer's titles and the other facts of the case, the weight of authority appears to be decidedly in his favour. Thus Lord Stair (ii. 1, 5), in treating of things which cannot be appropriated by any one in particular, but are common to all, such as the sea, navigable rivers, and others, alludes to shore in the following passage of his Institutions:—'So all nations have free passage by navigation through the ocean, in bays, and navigable rivers; and have also the benefit of stations or roads and harbours in the sea and rivers; and have the common use of the shores for casting anchors, disloading of goods, taking in ballast, or water rising in fountains there, drying of nets, erecting of tents, and the like. Yet doth the shore remain proper, not only as to jurisdiction, but as to houses or works built thereupon, and as to minerals, coals, or the like found therein; so is not in whole common, but some uses thereof only.' Except, therefore, as regards the public uses here referred to by Lord Stair, it is clear, at least on his authority, that the shore is alienable by the Crown, and may be appropriated by a private individual; and, for the reasons already adverted to, the Lord Ordinary must hold that it was conveyed, and was intended to be conveyed, to the pursuer and his predecessors under their crown titles. This view is further supported by Lord Stair in another passage of his work (ii. 3, 60), where he states that lands being disponed as here, with parts and pertinents, 'all is carried thereby that falls under the denomination of the lands disponed, *a cælo ad centrum*, and all that in the disposition was accustomed to follow it, not only as servitudes, but even contiguous parcels of land, which were not known as *distincta tenementa* or parts of any other tenement, except what the law reserves or the express provision of the superior;' and although the learned author goes on to observe that the law reserves 'all those things which are called *regalia* or *jura publica*,' he nowhere, that the Lord Ordinary can discover, says that the shore, so far as it may be appropriated by individuals, is *inter regalia*.

"The authority of Mr Erskine (Institutes, ii. 6, 17), while generally to the same effect, is even more unequivocally for the pursuer as regards the matter in question, for he says that 'by our constant practice the proprietors who border on the sea enclose as their own property grounds far within the sea-mark;' and he refers to the case of Bruce, Nov. 25, 1714, M. 9342, where it appears to have been expressly found that 'sea-greens are not *inter regalia*,' and that 'the sea-greens might belong to the neighbouring heritors as part and pertinent without a special grant.'

"Mr Bell, again, in his Principles, states the law in almost the very terms of the Lord Ordinary's finding in the prefixed interlocutor. After some explana-

sea-flood, &c., but only a grant of lands with pertinents *de* nded by the sea. So that the alternative questions arise—(1)

gard to the shore, which it is unnecessary to specify, he says (sec. 642), , as in England, held to be property reserved to the sovereign, but to be granted as part and pertinent of the adjacent land, under the the Crown's right as trustee for the public uses.' And in the next 43) he goes on to state that 'the shore, so far as capable of appropria- in England be part of the manor of a subject. In Scotland it may be by the royal grant, subject to the public use, and grants of the adjacent nder that implied burden.' And the doctrine thus stated Mr Bell support and illustrate in various ways, all tending to shew, in con- ith the Lord Ordinary's judgment in the present case, that the owner ds adjacent to the shore is, in the absence of an excluding boundary ion, or other qualification or limitation in his title, to be held to have to the shore, but subject to what must always be held to be the ight of the Crown as trustee for public uses. Nor can the Lord find that Mr Bell, any more than Lord Stair or Mr Erskine, says that is one of the regalia which cannot be carried by a clause of parts and , but can only be carried by an express grant or by a barony title with prescriptive possession. The passages in his Principles to which has already been made shew very clearly that he entertained no such

dition to the institutional writers who have now been referred to, many ises to the same effect were cited in argument to the Lord Ordinary, gst others the following:—

Magistrates of Culross v. the Earl of Dundonald, 15th June 1769, Mor. here it was decided that a crown charter of lands described as bounded conveyed to the grantees the right to the beneficial occupancy of the preference to an after crown grant purporting specially to convey the as reserved crown property.

v. Downie, 27th May 1807, Hume's Decisions, p. 552, where it was a bank of shelly-land contiguous to the sea-shore, and covered by the dinary tides, was not *inter regalia*, but a pertinent of the adjacent he report of this case is particularly valuable for the opinion it contains resident Ilay Campbell, to the effect that the shore with its adjuncts, a-weed and the like, are not *inter regalia* in the sense of being in- but must in the general case be held to belong to the proprietor of the ands as pertinents thereof without a royal grant, provided always he pede the uses of navigation, which is the single restraint of his right.

bell v. Brown, 18th November 1813, F.C., and Boucher and Others rd, 30th November 1814, F.C., where it was found that proprietors ds are described in their titles as bounded by the sea were entitled to nd therefrom so far as not inconsistent with the rights of the public.

ister v. Campbell, 7th February 1837, 15 Sh. 490, where it was held ifeftment in lands adjacent to the sea, 'with parts, pendicles, and per- was a good title, combined with an allegation of possession, to prevent nent on the shore by another for the purpose of taking away shells, ck, and ware, and whose plea that a party whose title did not contain s grant of the shore, nor describe his lands as bounded by the sea, had scended on any title in virtue of which he could prescribe a right to ore, was repelled. This case is also valuable for the explicit statement Gillies, to the effect that 'the Court could not hold the shore to be out of a crown grant wherever it was not expressly inserted in it,' but he contrary, 'the conveyance of an estate which is notoriously bounded a conveys the shore as effectually as if the words bounded by the sea he charter.'

rson v. Marquis of Ailsa, 11th March 1846, 8 D. 752, where it was that the proprietor under crown titles of lands adjacent to the sea, his titles did not contain any express grant of the sea-shore *ex adverso*

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of his lands, or of wrack or ware, had a sufficient title to resist an action by another party having lands lying near but not adjacent to the sea-shore, concluding for right to gather wrack and ware thereon. In this case the Lord Ordinary (Wood), in the note to his judgment, which was unanimously adhered to by the Court, appears to have entered into a very full and discriminating examination and review of all the authorities and precedents up to that time bearing on the question determined in the present case, and shewed very conclusively, as the Lord Ordinary thinks, that the result here arrived at is right. It is true that the Lord Justice-Clerk (Hope) in that case reserved his opinion how far the Marquis of Ailsa, who obtained the judgment, was to be held as having a full proprietary right to the shore, or merely to the sand, wrack, and ware; but the Lord Ordinary must own that, looking at the opinions of all the Judges in the case, as well as the prior decisions, he is unable to see any sufficient ground for drawing any such distinction; and, at any rate, he thinks that the proof in the present case, which has been already noticed, is amply sufficient to remove all ground for the distinction, supposing that room for it might otherwise be considered to exist.

"Lord Saltoun v. Park and Others, 24th November 1857, 20 D. 89, where it was held that a proprietor of lands forming a barony bounded by the sea, although not mentioned as the boundary, had right to the sea-weed and ware, and that an averment on the part of farmers and residents in different parishes, that they and the public had been in use to take the sea-ware and sand for upwards of forty years was not relevant. The Lord Ordinary (Ardmillan) in this case *in terminis* decided, in accordance with the opinion expressed by him in the note to his interlocutor, that a royal grant to lands, whether erected into a barony or not, and whether stated to be bounded by the sea or not, if *de facto* bounded by the sea, comprehends the shore with its adjuncts of sea-weed, &c. And although the Court, under a reclaiming note, limited the judgment to a right to sea-weed and ware cast on the shore, which was all that was necessary for the case, they expressed no opinion to the effect that the Lord Ordinary's findings were in themselves erroneous or ill-founded in law.

"There comes next the judgment of Lord Jerviswoode in the case of The Lord Advocate v. Maclean of Ardgour, 23d May 1866, 38 Jurist, 584, and 2 Scottish Law Reporter, 25, where the very question now determined by the Lord Ordinary in the present case was directly raised as between the Crown and a subject, proprietor of lands adjacent to the sea-shore, and decided in favour of the latter. It is true that the judgment in that case is that of a single Judge only, not reviewed and affirmed by the Court; but it is also true that, although the decision was wholly adverse to the Crown, it was acquiesced in. Not only so, but the report in the Law Reporter bears that, although a reclaiming note was boxed for the Crown and sent to the roll, it was afterwards refused before it came out for advising, on a note being lodged for the Crown desiring that it should be so. There was in that case, as here, a proof of the state of the possession, and the Lord Ordinary held it to be entirely with the private party. But here also there has been a very full proof, the import of which the Lord Ordinary, for the reasons already given, holds to be with the pursuer, the private party.

"And, lastly, there is the recent case of Hunter v. the Lord Advocate and Others, 25th June 1869, 7 Macph. 899, where, although it was held not to be indispensably necessary to decide the question determined in the present case, yet the circumstances were such as to raise questions very closely approaching to it, and as to which, consequently, remarks fell from some of the Judges which are of value here. In particular, Lords Deas, Ardmillan, and Kinloch, as the Lord Ordinary reads their reported opinions, appear to have entertained and expressed views very much in accordance with the principle upon which the Lord Ordinary has proceeded in deciding the present case. Lord Kinloch (911) expressed himself as follows:—'I entertain a decided opinion, to the expression of which I think the parties entitled, that, according to our law, the sea-shore is

th of these questions are still open, though there are *dicta* both ways. No. 55.
ius in Officers of State v. Smith,[1] Lord Justice-Clerk Hope, and Lord

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t is *patrimonio principis* more than are the adjacent lands. In legal theory, a sovereign is proprietor of all lands to which no one else can shew a title. Then the Crown gives off lands locally situate on the sea-shore I am of opinion at, whether the title declares the sea to be the boundary or not, there is ereby given off a right to the sea-shore as part and pertinent of the lands. The ght is, and can only be granted subject to the public uses of the shore for navition, fishing, passage, recreation, and the like. And to the effect of maintaining ese uses there may theoretically be said to be a trust vested in the Crown.'

"With such authority in the law of Scotland as that which has been now ferred to the Lord Ordinary does not see how he could allow himself to be uch influenced by the partial quotations which were made to him, as the sult doubtless of much elaborate and learned research by the junior counsel for e Crown, from the reports of cases decided in the English Courts, and from the orks of English, French, American, and other foreign authors. It is by the w of Scotland the Lord Ordinary must be governed, and when that law is ear, as the Lord Ordinary, on the strength of the authorities and decided cases which he has referred, holds it to be, it is not only unnecessary, but would e idle to enter into any examination of the law of other countries upon the ubject. He must be allowed to say, however, that one, and, as it seems to him, bout the most valuable of the English decisions to which he was referred on he part of the defender, appears to be strongly adverse rather than favourable o him. The Lord Ordinary alludes to the case of The Duke of Beaufort v. the Mayor, &c. of Swansea, 9th Feb. 1849, 3 Welsby, Hurlstone, and Gordon's Exchequer Reports, pp. 413–15, where it was held that the sea-shore between high and low water mark may be parcel of the adjoining manor, and that where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible in evidence to shew that such sea-shore is parcel of the manor.

"The Lord Ordinary may also explain that he has not adverted to many cases and authorities even in the law of Scotland which were cited in the argument, because they appeared to him to be not only not directly in point, but to have merely a remote and inferential bearing on the question which has now been determined. He thinks it right, however, to notice in a few words the well-known case of The Officers of State v. Smith, as decided in this Court 11th March 1846, 8 D. 711; and Smith v. The Officers of State, as decided in the House of Lords 13th July 1849, 6 Bell, 847; for, besides having a bearing on the points involved in the present case, it elicited to some extent the opinions on these points of Lords Brougham and Campbell in the House of Lords. The Judges who took part in the judgment in this Court were Lord Wood, as Ordinary, who merely referred to the judgment he had previously pronounced in the case of Patterson v. the Marquis of Ailsa, which has been already noticed as unequivocably favourable for the pursuer in the present case; the Lord Justice-Clerk and Lord Medwyn, who reserved entirely their opinion on the question what is the true nature of the Crown's right to the sea-shore in circumstances similar to those which occur here; and Lords Cockburn and Moncreiff, the former of whom appears to have expressed himself as holding that, even in such circumstances, the radical and dominant right of property must be held to be in the Crown. But Lord Moncreiff appears, on the other hand, to have expressed himself very distinctly to be of an opposite opinion, viz., that a barony title, or even an ordinary crown title, to lands adjacent to the sea, with parts and pertinents, carries the property of the sea-shore, subject to a trust right in the Crown for public uses. And although in the Court of last resort Lords Brougham and Campbell stated that they reserved their opinion on that question, as unnecessary to be decided, the former noble and learned Lord is reported (496) to have observed, in the course of his remarks, that he took the same view of the matter as Lord Moncreiff.

[1] March 11, 1846, 8 D. 711—aff. July 13, 1849, 6 Bell, App. 487.

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Cockburn, and Lord Chancellor Campbell incline to the side of the Crown, while Lord Moncreiff and Lord Brougham take the opposite view. See also Lord Cockburn's opinion in Patterson v. Marquis of Ailsa.[1] In Lord Saltoun v. Park[2] it was not decided that a barony title gave the right of property in the foreshore, but only an exclusive privilege of taking sea-ware, a sort of legal servitude, founded neither on property nor possession. In the later cases[3] there is little except an opinion by Lord Kinloch adverse to the Crown. In Magistrates of Culross v. Geddes[4] it was only decided that lands might be gained from the sea. The cases cited by the Lord Ordinary are not in point. Innes v. Downie was only a question between a proprietor forty years in possession and members of the public, and did not proceed on title. Campbell v. Brown was only a question as to the boundary between two conterminous feus. Boucher v. Crawford went no further than Geddes' case. In Magistrates of Culross v. Earl of Dundonald the right to foreshore was raised, but the interlocutor went no further than what was held later in Lord Saltoun's case. In M'Alister's case no one concurred with Lord Gillies. He and Lords Moncreiff and Kinloch are the only Judges who have given a clear opinion on this question; and Lord Moncreiff's opinion was given in a case between a heritor and one of the public only.[5] The text-books are in favour of the Crown's contention;[6] and so are the English and American authori-

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"The defender, it is true, founded, *per contra*, on the remark of Lord Campbell (p. 501), 'that whatever may be the effect of the grant of a barony described to be upon the sea-shore, there is no foundation in law for the position that the simple grant of a piece of land will pass the sea-shore by which it happens to be bounded.'

"But the Lord Ordinary must own that he is unable to see how this incidental observation of Lord Campbell can be held to affect the present case, where the pursuer does not merely and simply hold lands adjacent to the sea-shore, but holds them under a barony and other crown titles, with parts and pertinents, followed by possession and occupation of the shore for time immemorial.

"After a full and careful consideration of the present case in all its features, and especially of the pursuer's crown titles, defined and fortified by the possession which has followed on them, the result at which the Lord Ordinary has arrived is that the pursuer is entitled to decree as concluded for by him, under reservation of the Crown's right in trust for public uses. It is unnecessary, and it would be difficult, if not impossible, for the Lord Ordinary now to state or define with exactness what these public uses are, for that question has not been raised in the present case, and was not discussed or argued by the parties. It is left to the public, or to the Crown for the public, to vindicate and protect the reserved rights, whatever they may be, when and in whatever circumstances it may be thought necessary or desirable to do so."

[1] March 11, 1846, 8 D. 752 (770).

[2] Nov. 24, 1857, 20 D. 89; Keith v. Stonehaven Harbour Commission Trustees, Feb. 12, 1829, 7 S. 405.

[3] Baird v. Fortune, May 25, 1859, 21 D. 849—rev. April 25, 1861, 4 Macq. 127; Trustees of Scrabster Harbour v. Sinclair, March 19, 1864, *ante*, vol. ii. 884; Hunter v. Lord Advocate, June 25, 1869, *ante*, vol. vii. 899.

[4] Nov. 24, 1809, Hume's, Dec. 554; see also Aikman v. Duke of Hamilton, June 17, 1830, 8 S. 943; Berry v. Holden, Dec. 10, 1840, 3 D. 205; Brown v. Kinloch, 1775, M. 14,542; Earl of Fife's Trustees v. Cumming, Jan. 16, 1830, 8 S. 326; Garden v. Earl of Aboyne, 1784, M. 14,157; Leslie v. Cumming, 1793, M. 14,542; Meldrum v. Meldrum Feuars, 1716, M. 12,152.

[5] Patterson (*supra*).

[6] Balf. Pract. p. 626; Stair, ii. 1, 5; ii. 3, 45; ii. 3, 67, 69; ii. 7, 5; Ersk., ii. 1, 6; ii. 6, 1, 3, 14, and 17, 18; ii. 9, 14, 16, 17; Ross' Lectures, ii. 176;

egard to the practice, though there is no case known in which the s alienated the foreshore to a different proprietor, nor even to the rietor, on a separate disposition—this being now accomplished by ere are many instances of express conveyance of the foreshore lands. Apart from authority, it is plain that the foreshore is r territory, being alternately dry and covered with the sea, an n which the Crown has a peculiar interest for the public good. se of ambiguity or doubt as to whether the Crown has conveyed ore, it must be presumed not to have done so, but rather to ned it in order the better to carry out its public trust. This is ing of Lord Stowell, as quoted by Lord Cockburn in Smith's re he lays down that a grant from the Crown must be strictly d, and the clearest evidence of transfer required. If the foreonsidered as one of the *regalia minora*, like salmon fishings, the le alone cannot carry it without possession, though Stair, *supra*, ght differently.[3] A decision in favour of the pursuer would y be a grant of the whole foreshores of Scotland to the seaprietors; for this case was chosen by the Foreshore Association al one. The element of barony title, which applies to certain of makes no difference, this being a question of boundary, not of e, like salmon fishing. The only difference between the foreshe rest of the land, as originally supposed to have been in the he Crown, is in the matter of public uses; but that makes proof r much more arduous, there being a manifest propriety in the taining the property so as to carry out the trust. On the anavigable river, a Crown grant of lands bounded by such a ld not, while a grant of lands bounded by a private river would, bed up to the *medium filum*, though the water itself is public in s.[4] The pursuer's argument would give him right, like the proprietors at Greenock and Port-Glasgow, to build on or enclose low low-water mark.

to the possession had under the titles:—The pursuer's tenants took sea-ware, and had a special clause thereanent in the old ugh not in the later ones. He himself quarried stone; so did s and the public. As to oyster fishing, the right below lowrk was in the hands of a neighbouring proprietor, who had l on the foreshore, and the pursuer never had any possession,[5] was adverse possession on the part of the public, and no evieir being debarred by the pursuer, except in one instance as to d another as to sea-ware. If the sea-shore is open and unenere is no possession whatever which would necessarily be referred y, *e.g.*, the taking of sand is a servitude known to the law. It r been decided whether taking sea-ware is or is not. And as in of salmon fishing, the possession here too must be prescriptive, stinctly referable to the vindication of property, and to no other

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1, 641-3, 739, 746; Duff's Feud. Conveyancing, secs. 47 and 49; ectures, 3d edit. 547.

ii. 12, 4, 5; Kent's Commentaries, iii. 560; Duke of Beaufort &c., of Swansea, Feb. 9, 1849, 3 Welsby, Hurls. and Gordon, 413,

23; see 5 Robertson's Repts. p. 182.

ii. vi. 3, 9; Cathcart v. Lord Advocate, May 19, 1871, *ante*, ix. 744; ichmond v. Earl of Seafield, Feb. 16, 1870, *ante*, viii. 530.

Cockburn and Lord Chan. Campbell in Smith's case (*supra*).

ss of Sutherland v. Watson, Jan. 10, 1868, *ante*, vi. 199.

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lower right. Nothing has been done here by the pursuer which the Crown could reasonably have prevented, even if it had expressly reserved the foreshore to itself. In the cases of Lord Saltoun, Patterson, and Lochalsh (Innes v. Downie), taking sea-ware, shells, and sand, was allowed without determining as to the property of the shore itself. Such practice are explained as the exercise of servitudes, and are, besides, so harmless that it would have been invidious to interfere. It is said of the manufacture of kelp in last century, on the shores of Lochryan in particular, that it cannot be a servitude, as the material is not used for the benefit of any dominant tenement. That requisite must be very widely construed, so as not to exclude the watercourse for a mill, which is used for the benefit of all the world; pasturage accruing to a burgh as dominant tenement,[1] or to a house only.[2] It would be essential that the kelp should be manufactured on the *prædium dominans*.[3] Building, reclaiming, and working minerals, are the only unequivocal vindications of property.

It was argued for the pursuer;—This is a case very similar to that of the Lord Advocate v. Maclean of Ardgour,[4] in which the Lord Ordinary's interlocutor, which decided in favour of the sea-board proprietor, was acquiesced in by the Crown.

I. The true import of the evidence of possession is, that it was long established, indeed immemorial, and exclusive of all others.

II. Even apart from any possession, the pursuer has a title which implies a grant of the foreshore. It is only lately that it has been contended that a separate or express grant of the foreshore is required to take it out of the Crown. The real question is whether the territory which is alternately submerged and dry, is an accessory of the land on the one side, or of the sea on the other. If there were no tide the margin of the sea would be a proprietor's natural boundary. Now, it is admitted that the patrimonial interest of the Crown in the foreshore is alienable and may be granted to a subject; and the question whether it has, in fact, been alienated, may depend on general principles of construction, the actual history of the transaction between the Crown and its subject, the nature of the subject, and the conveniences or inconveniences of the grant. In England and America such uses as are here proved establish the right of a grantee of lands to the foreshore, there being no distinction between the land which is constantly and that which is intermittently dry, but the only question is one for the proof—viz., What does the manor include?[5] It is admitted, at least with reference to the decisions of the Court, that no doubt had ever been expressed as to the foreshore passing with a general crown grant of the land adjacent to the sea in the case of The Officers of State v. Smith. But the same is also true of the institutional writers.[6] The other cases were, without exception, either between competing landowners, or between landowners and the public when the latter sought to increase the burden of public uses.[7] So that this claim of the Crown is, if Maclean's case be put out of view, quite

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[1] Murray v. Magistrates of Peebles, Dec. 8, 1808, F.C.

[2] Feuars of Dunse v. Hay, 1732, M. 1824.

[3] Lord Reay v. Falconer, 1781, M. 5151.

[4] Jan. 9, 1866, 38 Sc. Jur. 584.

[5] Hale de Jure Maris in Hargrave's Tracts, edn. 1787, Part i. cap. vi. pp. 28; Duke of Beaufort (*supra*).

[6] Craig i. xv. 13, 15, 17; Stair, ii. 1, 5; ii. 3, 60, 61; Ersk. ii. 1, 5, 6; 6, 17; Bell's Prin. sec. 641; Mackenzie, ii. 6, 1; Duff, Feudal Conveyancing sec. 47, 3, p. 64.

[7] Innes v. Downie, May 27, 1807, Hume's Dec. 552.

and there is a strong presumption that no right ever existed in from the fact that it looked on while all this litigation pro- l made no attempt to interfere. It is further admitted that re is not *inter regalia*, and that the proprietor of land on the olds certain rights. Now, on what title? Not as servitudes, e cutting of ware for kelp is inconsistent with such a right;[1] erty, burdened only with certain public uses. There is no fair tween the "*solum*" of the sea and the foreshore. In the one cannot be a grant "*a cœlo usque ad centrum*," in the other

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STICE-CLERK.—This is an action at the instance of Sir Andrew ochnaw, directed against the Lord Advocate, as representing the ers of Woods and Forests, and the summons concludes that it should ld declared that the whole soil and ground of the shore of the sea ater mark of ordinary spring-tides, *ex adverso* of certain lands be- he pursuer, pertains heritably in property and belongs exclusively to as proprietor of the said lands. There are some other conclusions to oyster fishing and salmon fishing into which we need not go, e conclusions have been departed from.

upon which the pursuer founds is, in the first place, a title to the ochnaw dated shortly before the beginning of last century, and com- lands which have a frontage to Loch Ryan on the north and to the el on the west. He is also proprietor under a separate title, not a of other lands of smaller extent fronting the Solway Firth; and the of the summons relate to the sea-shore,—that is to say, to the shore ater mark,—along the coasts of these properties, along the shore of along the Irish Channel, and along the Bay of Wigtown. He also a proof has been allowed for the purpose of establishing, not only right as proprietor of these lands to that piece of ground above low- but that he and his predecessors have been in possession of the time immemorial. A proof has been allowed as to the possession, rdships have heard a most elaborate and learned argument upon the pon the title and upon the possession which is claimed.

se thus presented I am of opinion,

ne ground in question is capable of being transferred from the Crown proprietor under such titles as those on which the pursuer founds.

s these titles contain no specific description of the component parts conveyed, and as no specific boundary of the barony or lands is them, the extent of the barony and lands can only be determined of possession.

has been sufficiently established by the proof that the pursuer and ave for time immemorial possessed the ground in dispute as part of f Lochnaw, or of the other lands comprehended in the titles pro-

st and second propositions little controversy can arise. In some case the barony title may be supposed to have an advantage in the

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v. Crawford, Nov. 30, 1814, F.C.; Campbell v. Brown, Nov. 18, Commissioners of Woods and Forests v. Gammell, March 6, 1851, 868-9); Kerr v. Dickson, Nov. 28, 1840, 3 D. 154 (160); Mac- npbell (*supra*); Nicol v. Blaikie, March 23, 1859, 22 D. 335 (342); Marquis of Ailsa (*supra*); Lord Saltoun v. Park (*supra*); Baird v. L. April 25, 1861, 4 Macq. 127 (Lord Wensleydale at p. 147); Sutherland v. Watson (*supra*); Smart v. Mags. of Dundee, Nov. 23, Ap. 606.

rt v. M'Douall, March 1, 1867, *ante*, vol. v. p. 534 (Lord Ben- 7).

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argument; but both propositions seem to be well founded, provided the third is a correct deduction from the facts proved. If it be so, this is sufficient for judgment in the present case, and may render superfluous the consideration of some more speculative points. But as we were told from the bar that the case was intended to raise for judgment the general nature of the beneficial right in the foreshore, I shall shortly explain the steps by which I reach the question of possession on which the case, in my opinion, entirely turns.

It would be hopeless, within any moderate compass, and is altogether unnecessary, to analyse the large list of authorities on this subject. I prefer rather to state their import briefly, and to endeavour to extract from them the general principles to which a consideration of them ought to lead. With some modifications, which I shall explain, I concur in the views of the Lord Ordinary. I agree with him in thinking that most of the elementary principles on which questions of this class depend have been fixed by a series of well-weighed judgments pronounced by the highest authorities in Scottish conveyancing.

We have little or nothing which is new to learn in this department of jurisprudence. English analogies may mislead us; for although in such a case as the present, if I rightly understand them, they would probably lead to the same result, there are important distinctions between the systems on this subject, as Mr Bell well points out in his Principles. The safest guides we have are to be found in the decisions of the great feudalists of the two last generations, and they leave nothing which is material undetermined.

The nature of the right which the Crown has with us in that portion of the soil or territory of the realm which is subject to the flow and ebb of the tide is clearly fixed. It is settled in this country that the sea itself below low-water mark, with the soil which it constantly covers is, as a general rule, *extra commercium*. It is one of the *regalia majora* as far as the national dominion extends, and is not capable in general of becoming the property of an individual, but is held in trust by the Crown for the community.

Some uses and incidents of the sea, and even in some special circumstances the soil itself, may be appropriated, as in the case of harbours, minerals, salmon fishing, and even, as was found in the case of the Duchess of Sutherland, mussel beds; but still, as a general proposition, it is true that the sea and its bed are inalienable, and are not ordinary subjects of commerce.

With the ground above low-water mark it is different. It also is vested in the Crown as regards all the public uses of navigation, and such like, to which it is subject, and to that extent is inalienable. But as the land is ordinarily capable of being beneficially used, so, subject to the public uses, it is ordinary part of the soil of the kingdom, remaining like all the rest of the land vested in the Crown until granted out, and when granted out held under the Crown as feudal superior. Lord Stair, in the passage quoted by the Lord Ordinary, expresses himself with his usual precision. The shore, he says, "remains proper. It does not become "proper," but remains so, subject to and notwithstanding the public and inalienable rights over it. That is to say, in its patrimonial character and as respects its beneficial enjoyment, it is held by the Crown, and conveyed by the Crown, as other land is held and conveyed.

Of course, therefore, the right of property in the shore can only pass from the Crown to a subject by a crown charter, and such charters when granted will be construed according to those feudal rules with which we are familiar. The fact that all the land in Scotland holds of the Crown, and that the crown investitures are regularly renewed, renders this a subject with which our conveyancers are specially conversant. No light can be thrown on this subject from such *dicta* as that of Lord Stowell in the case of the "Elsebe,"[1] in reference to a claim to gift of prize money, although probably the principle contained is of general application. This is a question of feudal grant, depending exclusively for its solution on feudal principle, and involving elements both of technicality and fact which can only be judged of according to the rules of our own system. But there is a speciality attaching to crown charters of the land above low-water mark which

[1] 5 Robins. Adm. 173.

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es not apply to crown charters relating to other land. The same presumptions ply to both. The soil, no doubt, is subject to certain public uses; it is in elf of little profit to the owner, but it has no exceptional or peculiar character regards the mode of transferring it.

It is certainly not among the *regalia minora*, and therefore is not one of those neficial rights of property vested in the Crown, which from their rarity or ue cannot be carried without an express grant. Indeed, as regards its patrimonial character, it is not *inter regalia* at all. This is matter of express decim. Lord President Campbell, in the case of Innes v. Downie (Hume, 552), the note of his opinion preserved on his session papers, says,—"Property of e land adjacent to an heritor's shore is not a *regale*. Rocks with sea-weed and e like are pertinents of the adjoining property without a royal grant." Lord ncreiff, in the case of Ker v. Dickson, thus states the law:—"The Lord Ordiry adopts the opinion of President Campbell in the case of Innes v. Downie, th May 1807, as reported by Baron Hume, which, besides being of high thority in itself, appears to be in perfect agreement with all the other authoies, that the sea-beach or rocks within flood mark are not *inter jura regalia*, t subjects of private property for all purposes not inconsistent with the public e." Lord Justice-Clerk Hope, in the case of the Marquis of Ailsa v. Patterson, ted the law in similar terms. From its nature, indeed, the sea-shore, covered ice a day by the tide, possesses nothing in itself of that character of special ue which characterises the *regalia minora*. Its only value arises from its ing an accessory of the sea as regards its public uses, and of the land as regards s capability of being used to private profit. But it follows that, if the shore be t *inter regalia*, it may be transferred by the same forms as any other land may transferred; and so it has now been clearly settled, that if land be granted the Crown, and be described in the conveyance as bounded by the sea, the antee has right down to low-water mark. This was decided in the first of the es of the Magistrates of Culross in 1769 in a question with Lord Dundonald, ho had a posterior express grant of the sea-shore; and after the opinions of rd Glenlee in the case of Brown v. Campbell, of Lord Medwyn in the case of er v. Dickson, of Lord Justice-Clerk Hope in the case of Nicol v. Blaikie, as ell as the analogous cases of Smart in the House of Lords, and Berry v. Holden, e rule may be considered as fixed.

It has been, however, maintained by the pursuer, that it is to put his right on o low a level to assimilate it to ordinary property in land; that the sea-shore an accessory of the adjacent land; and that the right to the adjacent land, if have not an excluding boundary, necessarily carries it. In the case of Smith Officers of State Lord Campbell is reported to have said that 'there is no undation in law for the proposition that the simple grant of a piece of land ill pass the sea-shore by which it happens to be bounded." On the other and, Mr Bell, in his Principles, states the result of the decisions, in contrast ith the law of England, to be this: He says (642),—"The sea-shore is not, as England, held to be the property reserved to the sovereign, but presumed to granted as part and pertinent of the adjacent land, under burden of the rown's right as trustee for the public uses." In my opinion both views are o unreservedly expressed. On the one hand, there is very high authority in he direction of Mr Bell's view. A note of two cases reported by Tait indicates he opinion held by the lawyers of last century on the subject:—"In determing a cause concerning an oyster fishing between Ramsay of Prestwick and the ork Building Company the Lord President gave it as his opinion that the *lveus maris*, properly so called, and which is constantly covered with water, elongs to the Crown for behoof of the public. 30th November 1763.

"But as to the shore within the flood mark, covered at flood and bare at ebb, would appear that it remains the property of the contiguous heritor, subject the common uses of navigation. So argued as to lime rocks, summer 1772. ir John Hall v. Dirleton."

The same doctrine was expressed by Lord President Campbell in the case of nnes v. Downie, by Lord Meadowbank in the case of Campbell v. Brown, by ord Gillies in the case of Macalister, 15 S. 490, and by Lord Corehouse in the

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case of Suttie, 15 Sh. 1037. It was again distinctly repeated by Lord in the case of Hunter, decided last year.

These authorities are among the highest in this department of our dence, and it is idle to speak of their opinions as *obiter dicta*. They w these cases the grounds of judgment. Nevertheless, I incline to think Bell's conclusion from them is too broadly expressed. As applied to th case, they must be taken with two important qualifications. In the fir these opinions were not delivered in any question with the Crown. they related, as the three last cases did, to questions between a subject and his own vassal, the true construction of the crown grant could n If the vassal had clearly no right to the shore by the terms of his gra not in a position to challenge with effect that of the superior. On t hand, if the superior, having right to the sea-shore, feued out the land ing the shore without any excluding boundary, it might be fairly mainta the vassal's right was co-extensive with that of his author.

But, secondly, I imagine that this doctrine can go no further, in a with the Crown, than to establish that a grant from the Crown of la on the sea-coast may include the shore, if there be no words which ex provided the state of possession indicate that such was the nature of t And this leads me to point out how important this element of posses the practical solution of this question.

The sea-shore, in its natural state, is capable of beneficial possession the extent to which it is so it may be assumed that it has always bee cially possessed. But there is no example of the Crown using the sho natural state for purposes of profit. Indeed, without possessing grou high-water mark the property of the shore would be generally useless ficial purposes, at least for most of them. Neither is there any exa gift of the shore to any one, excepting to the proprietor of land co Nor, in general, has there been inserted in crown titles any words whi limit the right of the grantee in this respect. In small portions of the c sidered favourable for purposes of navigation the Crown may have so e its grants as to exclude the shore. But in general the land round the the island has been granted out in large baronies, like that now in que to burghs which are seaports; and in both it may be inferred that the b occupation of the shore had accompanied their occupation of the dry la

We may thus easily see how the real question which the Court ha sider in these cases was, how far the title would support a possession most of them was not doubtful, and which in few of them was disputed. the coasts of Scotland, especially on the west, the possession of the sea adjoining proprietors was, during last century, practically universal. and lucrative manufacture—that of kelp—was carried on by means of pation; and the crop was reaped periodically, as regularly as, and more than that growing on the land. The Crown never pretended right to inter the owners in this use of the shore, simply because it never had occurre Crown to be doubtful that the charter to the land included the shore a this accounts for the fact that throughout the series of decisions in q seems to have been assumed that the Crown had, and could have, little in the matter, excepting as trustee for the public.

Accordingly, in almost all the cases in question, even where the p was not introduced as an essential element, the existence of it was a The case of the Magistrates of Culross v. Cochrane well illustrates t that case Lord Gardenston said:—"The right of the town of Culross is from the Crown, confirmed and explained by possession. The subject grant is bounded by the sea. If this does not comprehend the shore, t valuable property still in the hands of the Crown, which is supposed the subjects having estates on the coast,—I mean the sea-ware all ro land. On the other side, the grant is of a later date, and there has possession." It will be found, on examining the cases, that in none of t the title to the sea-shore been sustained, excepting where it either app was assumed, that possession followed upon the grant.

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On the other hand, if no possession was ever had by the vassal or his predecessors which could truly indicate that the shore was included in his titles, I would hold that it was not included in his titles, as I should in the case of any other adjoining strip of ground which he had never possessed, or which had been possessed by others. The more the uses of the shore are accessory to those of the land adjoining, the more significant would the absence of possession become. Cases may no doubt occur in which the surface of the shore is incapable of beneficial possession, and in which there may be valuable minerals beneath the surface. In such a case I should think the shore not included in a general grant of the adjoining soil, as there would then be nothing to indicate that it was so. In the great majority of cases, at all events, possession will be sufficient to determine the right.

In the present case I think the proof of possession is as complete as the nature of the subject and the circumstances admitted of; in other words, that the pursuer and his authors have had the full beneficial occupation of the shore in question, and have possessed it without challenge for time immemorial, for all the purposes for which it can be used. I think it unnecessary to go at length into the evidence, as I concur in the views of the Lord Ordinary in regard to it, and have arrived at my conclusion without much difficulty. In regard to the loch Ryan shore, where the sea-ware is most abundant, the proof of possession is strong, as there the benefit to be obtained from it was material, and formed a not unimportant element of profit to the proprietor as well as the tenants on his estate.

I am not moved by the argument that all the acts spoken to might be as well referred to a right of servitude as to one of property. I think that where land has been occupied without challenge in every way in which it can be beneficially used by the vassal, and not used at all by the superior, or by any one else, the presumption is against servitude, and in favour of a right of property, being the title of possession. I think so especially in a grant from the Crown; for it is more reasonable to presume that the possession was consistent with the grant than that a right had been acquired against the Crown by prescriptive use beyond its limits. Reference has been made to the case of Lord Saltoun in support of this argument, but it lends very slender assistance. There was no proof of possession in that case, which was decided on the title, which granted certain privileges in regard to sea-ware, on which the Court thought it sufficient to proceed; and they thereby waived the question of right, which the Lord Ordinary had decided in favour of the proprietor.

But in the present case there is the less reason for raising this point, that in one respect the possession is free of all question. The manufacture of kelp on the sea-coast was carried on as a regular trade, not as an adjunct to the neighbouring farms, with which, indeed, it had no connection whatever. In this instance, as in all the other instances round the coasts of Scotland, the commercial manufacture of kelp was a direct assertion and enjoyment of the right of property in the shore which produced the sea-ware. There can be no doubt from the leases produced that this traffic on the Lochnaw shores lasted for nearly a century, and that even now the sea-ware is an important addition to the tenant's possession.

In regard to the coast opposite the Irish Channel, and that opposite the Solway Firth, as the sea-ware was less abundant, the acts of possession were fewer. But they seem to have been all which the nature of the shore admitted of. Sea-ware was collected, although in a smaller quantity, from the west coast, and stones were quarried within flood mark on the side next the Solway, as they were also on the Loch Ryan side, and to some extent on that of the Irish Channel. Sand and gravel were also taken from the shore all round the property. I hold it also to be proved that this possession was maintained and asserted as exclusive, although trespassers not unfrequently found their way there.

I think the proof for the Crown entirely fails to displace the testimony for the pursuer. The acts of taking ballast and beaching boats are truly incident to navigation; and the evidence regarding the oyster fishing, to which it was believed Sir W. Wallace had right, is entirely beside the present question.

On the whole, I think the pursuer is entitled to decree in terms of the sum-

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mons as now restricted, and that on the ground, not that the right to the sea-shore has been acquired by prescriptive possession, but that the possession is conclusive as to the extent of the grant.

LORD COWAN.—The summons concludes to have it declared by decree of the Court "that the whole soil or ground of the shore of the sea above low-water mark of ordinary spring-tides, *ex adverso*" of the lands specified and belonging to the pursuer, "pertain heritably in property and belong exclusively to the pursuer as proprietor of the said respective lands."

The lands referred to are described in articles 1st and 2d of the condescendence. Those in article 1st were erected and incorporated into a barony of Lochnaw, conform to charter under the Great Seal, dated March 1699, the said lands having long previously been held by the family of Agnew under crown titles. The lands mentioned in the 2d article had also been held for a very long period by the family under crown titles, but it is not alleged that these lands have ever been erected and incorporated into a barony. None of the crown charters or relative deeds contain any express grant of the foreshore; but the several lands mentioned are *de facto* upon the sea-shore, and although the sea boundary is set forth in the title-deeds it is undoubted that the lands extend along the shore of Loch Ryan on the one side for about five miles, and on the other side along the shore of the Irish Channel for several miles. A copy of the Ordnance Survey map produced with the summons shews the situation of the pursuer's lands and estate to be as now generally described.

The 4th article of the condescendence avers that, in virtue of their crown charters and relative deeds, the pursuer and his ancestors have been in possession for time immemorial of the portions of shore adjoining to and forming the boundary of their lands, as part and pertinent of their estates, and have constantly, and without challenge, dealt with the shore as their property, by exercising various proprietary rights and acts of possession of every kind of which the subjects were capable.

The summons and record contain assertions of the pursuer's right to the whole oyster beds or fisheries on the shore, and to the exclusive right and privilege of dredging and gathering oysters from the said shore above low-water mark, and also of the whole salmon fishings in the sea *ex adverso* of his lands. The conclusions of the summons to this effect, however, have been abandoned by the pursuer, with consent of the defender, as appears from the minute No. 5 of process, referred to in the interlocutor of the Lord Ordinary of date 20th January 1872. The only question for decision under this record has regard to the rights asserted by the pursuer to the foreshore.

The action is directed against the Lord Advocate as representing the Crown, and the defences stated are twofold: First, that the Crown, not having made any grant to the pursuer or his predecessors of any of the subjects, the defender ought to be assoilzied; and, second, that the writs founded on, not constituting a title in themselves to the foreshore claimed, have not been followed by prescriptive possession to the effect of conferring on the pursuer, under these writs, that right to the foreshore which he claims.

The questions thus raised for the decision of the Court are, in the first place, the effect of the crown charters as regards the foreshore *ex adverso* of the pursuer's lands and estate, there being no sea boundary expressed in the titles, in carrying right thereto to the grantee, irrespective of possession; and, secondly, assuming the crown grants to afford sufficient title for prescriptive possession of the foreshore, whether such possession has been proved as will suffice to establish the right in the grantee; or, to state this last matter in another way, whether the grant of lands contained in the pursuer's baronial title and other crown charters has been so explained, by proof of exclusive prescriptive possession of the foreshore, as to carry right thereto as effectually as an express grant.

Two preliminary observations may be made as essentially affecting the argument, viz.: (1) That it is not disputed by the Crown, but, on the contrary, it is at the basis of their case, that the foreshore, subject to the public trusts with regard to it under which the sea and its shore are vested in the Crown, may be

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in property to a subject; and (2) that the crown charters founded pursuer, although containing no special or express grant of sea-shore, ied by possession of the foreshore sufficient in endurance, and as and complete in its character as the subject admits of, will carry the y right thereto as much as a special or express grant from the Crown.

first of these questions it is clear that by the law of Scotland the pro- ight to the *solum* of the sea-shore is in the Crown, as much as the the sea itself adjoining the coast. This is laid down by all the autho- here are important public purposes and uses to be served, which can l by means only of the right to the shore being held radically vested own. Still, subject to such public uses, it is not disputed that the ay convey the *solum* of the shore in property; and the differences that are to be found in the opinions of lawyers have regard rather to the whether an express grant of the sea-shore be necessary to carry the right lands given out by the Crown are *de facto* sea-bounded, than to the whether the shore is *in patrimonio principis* and alienable. Now, se case to be here dealt with; and, apart from possession having fol- nesitate, notwithstanding the passage in Mr Bell's Principles quoted d Ordinary's note, to affirm that even the pursuer's baronial title can y itself to convey to him the proprietary right to the sea-shore. That ave been expressed to a different effect by eminent Judges is true; ccurred in cases to which the Crown was no party, and where the only to be decided was between parties holding opposing grants from the On a careful revision of the authorities and decisions, and specially of cases of Smith v. Officers of State, and of Gammell v. Them, I am un- m any other opinion than that, failing a special grant or an express by the sea in the crown title, and failing proof of possession, no right y in the shore can be asserted by the proprietor as against the Crown. gether, I do not think that the doctrine of Balfour, one of the earliest stitutional writers, has been in any essential respects departed from: havand landis pertenand to him lyand adjacent to the sea may mak bill, or molest the king or his lieges to win stanes, quarrel, or ony uther is awin profit or commoditie within the flude marke of the sea foiranent landis, except he quaha stoppis the uther be speciallie infeft within the mark, alsweill as without the samen" (Balfour's Practicks, p. 626); and ctrine he refers to a case, The King contra The Laird of Seafield, 29th . The doctrine laid down at so early a period was in substance that which Baron Hume, one of our most esteemed lawyers, who filled the chair this University now half a century ago, taught his pupils. Having his lectures, of which I have preserved full notes, I can safely say that indispensable, where the proprietor had only a general title from the at to give him a right to the shore he should have enjoyed immemorial puted possession.

nds held under crown charters which are *de facto* sea-bounded, though does not contain a boundary by the sea, carry with them as part and certain privileges or servitude rights in relation to the adjoining shore, sition which has been repeatedly recognised in the decisions of the Thus in the case of Patterson v. The Marquis of Ailsa, 11th March was found, in the circumstances set forth in the interlocutor of the st, although the crown title contained no express grant of the sea- *adverso* of the lands, or of wreck and ware, the proprietor had title to prevent other parties who had no special title from gathering and ing sea-weed or ware *ex adverso* of the lands. And to the same effect case of Macalister, 7th February 1837, where the proprietor of an the sea-coast being infeft in lands with parts, pendicles, and perti- without an express grant of shore, his title to prevent the public from ff shell, sand, wreck, or sea-ware *ex adverso* of his lands, followed by was recognised. It will be observed that prescriptive possession was ed, so that, although a strong opinion was expressed by one Judge llies) to the effect that the conveyance of an estate which is sea-

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bounded *de facto* conveys the shore as effectually as if the words "bou the sea" were in the charter, the decision of the Court was simply to the title, and to remit to the Lord Ordinary to proceed with the in other words, to inquire into the state of possession as alleged. more recent case of Lord Saltoun v. Park, 1857 (20 Dunlop, 89), further than to recognise the exclusive right of the proprietor of la under baronial title, which were bounded by the sea *de facto*, to the and ware cast on the shore *ex adverso* of his lands, and to prevent it b ried away by others: no special infeftment with an express grant of w ware was considered to be necessary to carry as a pertinent to the propri privilege of collecting sea-ware *ex adverso* of his lands, that being a right thought) inherent in the grant of lands *de facto* bounded by the sea Saltoun's right of property in the sea-shore it was found unnecessary mine in that case, although an opinion was expressed by the Lord (Lord Ardmillan) that the pursuer had vested in him the property of shore. The important matter as regards those cases, however, in so fa practical issue of the present case is concerned, is that in none of the doubted that the title founded on by the proprietor might be the found prescriptive possession of the shore to the effect of vesting it in the pr subject to the public uses.

But while I venture, contrary to the views that have been stated by whose opinions are entitled to the highest respect, to doubt whether i held that the property of the sea-shore is carried to a subject without grant, merely because of the lands contained in the charter being *de f* bounded, it is certain—and indeed the Crown do not dispute the propo that use and enjoyment of the shore by such possession for the pre period as a proprietor with a special grant would exercise will suffice to the crown grant, and confer on the grantee a right as effectual as if t had been specially conveyed by the charter. And this being so, I do n it at all necessary to enter further into the more general question, bei fied that the possession which has been instructed is sufficient to carr pursuer the right which he asserts in the conclusions of his summons.

As regards the character of the possession which will have the effect o right to the adjoining proprietor, Sir Matthew Hale, after stating the law land to be that the ground between the ordinary high-water and low-wa does *prima facie* belong to the king, although such shore may be, and co is, parcel of the manor adjacent, and so may belong to a subject, proceeds (Hargrave's Tracts, p. 27),—"And the evidences to prove this fact are co these:—Constant and usual fetching gravel and sea-weed and sea-sand the high-water and low-water mark, and licensing others so to do; enclo embanking against the sea, and enjoyment of what is so inned; enjoy wrecks happening upon the sand, and such like." I do not know t better description of the kind and extent of possession that will suffice port the right here in question could be given. The law of Scotland this respect be held to be well defined in the words I have quoted. N ever, that all of the possessory acts stated can be expected to be found existed in every locality. It must be sufficient that all the possession h had and enjoyed of which the shore adjoining the lands is capable in any able sense.

There are decisions in reference to rights connected with the shore although the royal grant was a sufficient title to lead to inquiry into the e possession alleged, that possession was found not established by proof, proprietor's claim consequently disallowed. The case of the Duke of P November 1832 (11 Shaw, p. 14), with regard to the right of lobster fish that of the Duke of Argyle, December 1859 (22 Dunlop, 261), in refe mussel fishing, may be cited as examples. On the other hand, in t of the Duchess of Sutherland, January 1868 (6 Macph. 199), while the n of a special grant of mussel fishing was negatived by the Court, a gene to the lands with fishings was held a good title to mussel fishings, if su ported (as it was in that case) by exclusive prescriptive possession.

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What, then, is the evidence of possession or of use and enjoyment of the ore between high-water and low-water mark on which the pursuer founds, nd what is the extent of these possessory acts as appearing from the proof?

1. From the earliest date it is established that, under his baronial title and her charters, the pursuer and his tenants have all along the shore, on both des of his estates on Loch Ryan and the Irish Sea, been in the habit of gather- g sea-ware, and of using it in the cultivation of their farms.

2. The granite boulder-stones to be found along the coast have, after being rried or cut on the shore, been used for the purposes of the estate, in the erec- on and repair of buildings and dykes upon the farms along the shore; and it specially proved that these stones were largely used in the erection of Loch- w Castle and offices between the years 1820 and 1830,—the stones being ssed on the beach in sheds erected for the purpose. The evidence of John awford, Thomas Moreland, and A. H. M'Lean is specially referred to as to this atter.

3. As regards the sea-ware and weed growing on the rocks or washed up by e tide, the use of it has not been confined merely to the gathering of what was be found upon the shore, but the ware has been made the subject of special propriation and patrimonial benefit by the pursuer and his predecessors.

Thus, in the first place, as appears from the documentary evidence, prior to 830,—when the manufacture of kelp from sea-ware became no longer the sub- ct of profit,—various tacks, dated in 1715, 1759, and 1799, were granted to dividuals, conferring on them right, as lessees of the proprietor, "to cut down nd intromit with the wreck within the loch of Lochryan, and the bay of Cru- ltone," being parts of the barony of Lochnaw, "and to draw and carry the ids wreck yearly to the shore side or next dry ground, and to win and cause urn the same thereupon," with power to the tenant to sell the same as his own operty. The three tacks produced, granted in the years foresaid, are respec- rely for twenty-one years. And in reference to this profitable use of the sea- are as kelp there is explanatory parole evidence given, especially by the old itnesses Thomas Moreland, William M'Miken, and Alexander Martin, and hers. And these witnesses state that when the sea-ware was let for the anufacture of kelp the tenants of the farm adjoining the shore were allowed ly to gather what was drifted on the land by the tide.

In the second place, the farms on the estate have been let to the tenants in ore recent times, with special liberty contained in the leases to take the wreck nd to cut it opposite their several lands, and to use the same as manure for eir farms, but in no other way; and from the parole evidence it appears that consequence of this privilege the farms on the estate have been let at a higher ntal than they would otherwise have been.—See M'Lean's evidence, and that M'Cubbin, and the other tenants, besides the witnesses already named.

And, farther, in the third place, the evidence given by several of the witnesses tablish that parties not tenants on the estate, but strangers, were prevented om interfering with and taking away the sea-ware and also stones from the ore; while in one instance, in the year 1850, interdict was obtained from the heriff of the bounds against a party who had been collecting and gathering reck and sea-ware, and carting off the same, and which no doubt had the effect f deterring others of the public from repeating the offence.

That certain of those acts apply only to Loch Ryan was said to limit their ffect. I do not think so. Having regard to the baronial and other crown harters under which the pursuer and his predecessors have for centuries been eated with the whole estates as a *unum quid* there is no good ground for the istinction pointed at.

Such, then, substantially is the evidence which the pursuer has led of the ossessory acts on which he relies; but throughout the proof there are also tatements in reference to sand and gravel taken from the shore by the pursuer nd his tenants, and their constant use of these materials when required for the state.

On the part of the Crown, again, there has been evidence led to the effect of ne persons having occasionally taken sand to make mortar for buildings,

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especially from one part of the shore, and also of occasional gathering of sea-weed by the occupiers of houses adjoining the shore for the use of their gardens or other small possessions. It is evident that these acts were not done in exercise of any right, and are to be explained either from their not being noticed by or known to the proprietor and his tenants, or, if known, from being tolerated as of no serious innovation on their proprietary rights. It has also been proved by the Crown that it has been, and is still, the practice of vessels bringing cargoes of coal and lime for the farmers, and others in the locality, to run their vessels on the beach for the discharge of their cargoes, and also for such vessels taking sand from the shore for ballast; but it is obvious that this custom is among the public uses to which every grant of shore is inherently subject. Although the Crown may in express terms give the property of the shore, the grant does not divest the Crown farther than is consistent with those public uses of it as regards navigation or otherwise, to secure which the Crown still remains trustee for the public. This beaching of vessels, therefore, or taking sand for ballast, cannot affect the right of the pursuer, any more than it would had his crown title contained an express grant of shore. Whether by grant or by possession, the property in the shore can be taken only subject to the public uses of which the Crown is the guardian.

One other matter has been the subject of proof by the Crown, viz., the possession and enjoyment by other parties than the pursuer of the oyster fishings in the loch of Loch Ryan; but this does not appear to be of any material moment. Supposing the right to the oyster fishings to be with General Wallace and not with the pursuer, it is a right which, as has been expressly found in other cases, may be the subject of a separate grant. It is no way inconsistent with the proprietary right to the shore being in the pursuer for every other purpose. Hence it cannot be alleged that decree in terms of the conclusions of the summons as now restricted can in any way affect the right in General Wallace or any other party to these oyster fishings. Whether the crown charter would have been a good title to prescribe a right of oyster fishing, if followed by prescriptive possession of such fishing, may or may not be doubtful; but as the pursuer has not had such possession, and at all events as he has now departed from that part of his action, I think the defence on this ground also does not rest on any substantial ground.

Lord Benholme.—I have listened with great interest to the opinions that have been delivered. They appear to me substantially, if not in every particular, to coincide; and for that reason, and because I could not hope, either in fulness or precision, to emulate their perfection, I shall confine myself to one or two simple observations on the result at which they both appear to have arrived. I think it is of great importance that we should now agree in stating as our opinion that where an estate is on the sea-shore, held by titles that do not, by express grants or specific boundary, extend the right of the proprietor beyond the high-water mark, there is no presumption that the foreshore is a pertinent of the land. That was doubted apparently in some cases, where distinguished Judges have given opinions that might appear to tend in a contrary direction, but to these cases we know that the Crown was not a party, and that it is only in later times that this matter has been at all made the subject of Crown investigation; and, so far as I can discover, the Crown have successfully maintained the affirmative of that proposition which I have just stated, that there is no presumption in favour of a proprietor, who by his mere position, without express grant, or definite boundary, or distinct possession, maintains his pretensions to the property of the shore. This is a very important principle, and I am glad that we all agree, as I understand we do, in the assertion of it. But there is another principle equally important, and extremely interesting to proprietors upon the shore, and that is, that even in such a case as I have supposed possession may affect the pretensions of the party, and that a possession long continued and of a certain definite description, may ascertain by explanation, if not by prescription, that a proprietor is entitled to the sea-shore. The nature of that possession which will so entitle the proprietor to the sea-shore has perhaps not

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herto been made the subject of so many decisions as would entitle us to define ctly what its extent or limit is; but this I will say, that a possession for a s of years,—nay, in the case before us, of centuries,—of the right of cutting n the rocks sea-ware for the purpose of manufacturing kelp is one of the t decisive symptoms of property that can well be imagined in the shape of session. I am old enough to recollect when that was a very valuable right, , as your Lordship has mentioned, it was invariably enjoyed by the proprietor he boundary was by the rocks that bore sea-weed. The kelp shores, espe- ly on the west of the island, afforded a very large portion of the rent, and it a great loss to such proprietors when, by the introduction of Spanish barilla, kelp was thrown out of use. I may mention as a curious fact in regard to e shores, that they were capable of a certain cultivation; and I know a part he shore which was let by a proprietor to a tenant who employed a species of ivation, by chipping the rocks, so as to obtain an artificial surface more urable to the growth of the sea-ware,—to the attraction of the seed, I sup- e, and the introduction of the weed into the rocks,—than before that opera- n took place. Here, then, was a regular crop, and the foreshore was made as servient to that artificial use as the land itself. In the present case there is most complete evidence of this kind of possession, which is a species of en- ment in itself almost decisive. The enjoyment of mere waif and stray cast n the shore is very different, and much less important. In the case of Saltoun ink there was the one and not the other, and we made some alteration on Lord Ordinary's interlocutor, or at all events expressed our opinion that the d Ordinary's views had gone rather too far, in holding that without posses- n there could be a presumption of property in the sea-shore. I do not think t I ought to weaken the effect of what has fallen from your Lordship and n Lord Cowan by repeating in detail the principles upon which this case is e decided. I think, by adhering to the Lord Ordinary's interlocutor, and by observations made in the judgment we are pronouncing, our view of this t of the law is made very definite and clear.

LORD NEAVES.—I concur in the result at which your Lordships have all ived, that we should adhere to the Lord Ordinary's interlocutor. This is loubtedly a very important case, and the decision we are to pronounce, if it therwise maintained, may decide many cases. At the same time, it is clear t it may not decide all the cases as to the foreshore, although it is said to be rt of pattern or trial case: for, according to the view which we are now ing, there must be a concurrence not only of title, but of possession, sub- ntially equivalent to that which has here existed, before this decision can be recedent for other cases.

I shall endeavour shortly to state my views on the subject, which are sub- ntially those that have been already explained.

The sea-shore, meaning thereby the space between high and low-water mark ordinary spring-tides, is certainly, in some respects, a peculiar subject. In sense, it is undoubtedly *inter regalia*,—that is, in so far as regards public e, for navigation and other public purposes; it being the genius of our law t that which the Roman civil law held to be public is with us vested in the reign, who is the representative of the public. In so far as it is vested in n for public uses, it is, as your Lordship has observed, inalienable; at least, is practically so, because, although it might perhaps be alienated for the herance of that public purpose, such as building docks or harbours, it cannot alienated so as to extinguish or defeat any part of these public purposes. , subject to these public purposes, it may be alienated; and I am inclined gree with your Lordship that the whole shore, so far as it is alienable,— t is to say, the property of it subject to these uses,—is not a *regale*. It is ng the *majora regalia* that the sea-shore in its full right as a public subject ts; but, in so far as it can be separated from public uses, I doubt whether a *regale* at all. As to its being one of the *minora regalia*, I do not think can say that there are two *regalia* incorporated in that one right. There is general right among the *majora regalia*, and there is this power of alienating

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the shore as property; but I doubt whether the qualified right of property, subject to the public uses, is in itself a *regale*. Now, the way in which it may be alienated is the question that we are in a great degree to determine here. There are three conditions in which the matter may stand: 1st, The grant may contain an express grant of the foreshore along with the adjoining lands; 2d, it may contain a grant of the adjoining lands, excluding expressly the foreshore; and 3d, It may contain a grant of seaward lands, that is, lands bordering on the sea, without anything in the grant itself to indicate whether the shore is given or is withheld. Now, in the cases where it is either expressly given or expressly retained by the Crown from the grant there can be no difficulty. But the question that arises is *quid juris*, where there is a grant which does not on the face of it shew, either by description or boundary, whether the sea-shore is given or not. If such a case were to occur in a perfectly pure form on the simple title, without anything extrinsic to explain it, the case would be a difficult one, and I cannot say that my opinion upon it is made up; but I am inclined to hold that the shore would not by implication necessarily pass in a general grant of the adjoining land. I think that probably its liability to the public use would raise a presumption against the implied grant. It is rather to be implied that the Crown would retain such a subject altogether, unless it expressly gave it out, and I doubt whether the circumstance of the estate being a barony makes in this respect any difference. A barony has some privileges. The proper characteristic of a barony is that it confers jurisdiction. That is the original meaning of it, and it also implies union and some other facilities. But I doubt whether it interferes with the question whether there is or is not a presumption that the sea-shore accompanies a grant of the *terra firma* adjoining. But such a pure case without anything to explain the grant is not likely to occur, and certainly does not occur in the present case, for we have a great deal to explain the grant, and I take it that the object is to find out from the possession that has followed what is the meaning of the grant. I agree with a remark made by your Lordship, that the possession is not so much a means of acquiring the shore as a means of shewing whether or not the shore is included by signification in the grant that is made. If the possession is such as to indicate that in granting these lands, or this barony, the shore was meant to go as much as the adjoining lands, that is an interpretation of the grant which ought to receive effect. I think it follows from that view that it does not necessarily require that it should be prescriptive possession. If the possession is such as in the circumstances shews that that was meant by the words used in the disposition clause, this is sufficient to explain the grant as being a grant of shore as well as a grant of adjoining lands. These are the principles on which I am inclined to decide this case; and it just resolves itself into the question, whether the possession that has here taken place for a great length of time is or is not such as to raise the belief and conviction that the shore is a part of the subject granted. I think it is, and for one or two reasons which I shall shortly state. This is a case in which there are no words pointing at a right to the shore in the title itself, either by boundary or anything else, and in that respect it differs from the very important case of Morton v. Covingtree,[1] an Orkney case, in which there was a competition between a heritor next to the sea and Lord Morton, general grantee of all the Orkney lands, who was in the rear rank away from the sea, at least as to the ground in dispute. Both had in their titles a grant of wreck and ware,—differing in that respect from the present case, but it was held that a grant of wreck and ware, coupled with a proximity to the sea, was a preferable title to that of Lord Morton. In that case references were made to some old dicta of Skene in his book on the Signification of Words, and it was indicated that the granting of sea-bounded land with a grant of wreck and ware was sufficient to give a right to the sea-shore and to the exclusive possession of it. The case, however, was not decided upon that view, but upon possession, and there it is that I think the case is of importance as shewing the characteristics of that possession which will amount to property. Of course all this is unavailing if you

[1] M. 13,528.

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annot extend your title by possession, and I have already stated, what I think we are all agreed upon, that a general title may be supplemented by characteristic possession. Now, a great distinction taken in that case was the cutting of kelp, and the case (occurring as it did in the year 1760) shewed that at that time kelp had not been long introduced, at least into Orkney;—and so it was that Mr Covingtree of Newark, who was next the sea, had cut kelp on the rocks, while Lord Morton had not done so, and had only possessed the privilege of taking drift-weed from the shore and manuring his lands with it. That was what led the Court to their decision. The cutting of kelp is very particularly founded on; and the report in Morrison, 13,528, says, "Of late the manufacture of kelp was introduced into that country. The weed proper for making it is not the loose ware thrown in by the sea, but what is there called tang, which grows upon and adheres to the rocks, and is cut off from them at low water. Newark's tenants began to carry on that manufacture successfully upon the shore of his own lands; and thereupon the Earl's tenants attempted to do the same on those shores, but were interrupted." Now, the possession there was not very long, but no difficulty in that respect was got over by the reference to the words in the clause of wreck and ware; and this was the decision of the Court:—"The Lords found that the Earl of Morton, as heritor of a part of the urislands of Watland and Skealon, has no right to cut ware or tang for making of kelp upon the rocks or shores of Newark and Air; and decerned and declared accordingly; and assoilzied Newark from the process at the Earl of Morton's instance, reserving to the Earl and his tenants the servitude of carrying off from the shore of the two urislands of Watland and Skealon, or Air, what wreck and ware shall be cast thereupon, in proportion to his penny-lands in the two urislands, conform to use and wont." Now, that decision shews the plainest possible distinction between the right of cutting a growing weed from the soil, used for the manufacture of kelp, which was not a mere predial servitude, but an absolute right of property, and a servitude right of getting merely the drift-ware, which was no part of the soil, but was thrown on the shore by the winds and waves, and to which the Earl of Morton's right was restricted according to the proportion of his lands, and for the use of his lands, this being a purely predial servitude, while the other was a right of full property in the soil. In the present case we have the right of making kelp exercised for a very long time in the plainest way by the pursuer of this action and his ancestors, and therefore we have the exercise of a plain and indisputable right of property that is so extensive as to be very important. The other matters might in themselves be less characteristic of property, though I think some of them go very near it,—I mean the taking of sand, and those other things; but then there comes an element in favour of the pursuer that cannot be overlooked, for it is plain that he prevented others from doing such things. Now, a man who has a servitude can take what he wants for himself, but I am not aware that in general a man having a dominant tenement with a servitude, if he gets what he needs for himself, has any right to interfere with other people taking it from the same subject. There are questions whether, if there is not enough for all, the dominant tenement may not take to the exclusion of the servient tenement; but where no question of that kind arises the claim of a man not only to take things for his own use, but to prevent others from doing so, is more the exercise of a right of property than the exercise of a simple right of servitude. Now, of that claim there is abundance here, because, besides licences being granted to others to do the things in question, there are clear cases where others were prevented from doing that which they would have been entitled to do, as far as this party was concerned, if he was only a servitude holder; for a servitude holder can only take what he needs for himself, and has no right to interfere with others who may have leave from the proprietor, and who cannot be challenged by one who is not himself a proprietor. I think that the exercise of these several rights to the extent that I here proved is sufficient to convert this grant of lands, which may mean with shore or without shore, into a grant of lands with the shore, and that thus the shore is equally his property with the dry land itself. On these grounds I adhere without difficulty to the Lord Ordinary's interlocutor.

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THE following interlocutor was pronounced:—"Refuse the ing note, and adhere to the interlocutor of the Lord Ordin additional expenses," &c.

SKENE, WEBSTER, & PEACOCK, W.S.—DONALD BEITH, W.S., Solicitor for H. M and Forests.—Agents.

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Gordon v. Scott.

ALEXANDER SIMPSON AND OTHERS (Francis Gordon's Trustees), and Real Raisers.
Mrs ISABELLA GORDON, Claimant.
MRS ELIZABETH ISABELLA JOHNSTONE GORDON OR SCOTT AND HER *ad litem*, Claimant and Respondent.—*Lord-Adv. Young—M'*
HUGH SCOTT, Claimant.
MRS ANNE E. A. JOHNSTONE GORDON'S OR MUIR MACKENZIE'S T AND EMILY M. E. JOHNSTONE GORDON, Claimants and Reclain *Sol.-Gen. Clark—Millar—Adam.*

Succession—Heir and Executor—Annuity—Tract of future time.— conveyed his whole estate of every description to trustees, for the p entailing a certain estate on a series of heirs, of realising his other est able and moveable, of fulfilling and discharging the obligations contai antenuptial marriage-contract, of paying legacies, and, lastly, of p residue to certain persons *Held* that an annuity payable to the testat under his marriage-contract was due out of the residue, and was not on the entailed estate.

2D DIVISION. Ld. Mackenzie. R.

THE late Mr Francis Gordon of Kincardine died on 27th 1857, leaving a trust-disposition and settlement dated 13th M 1851, conveying to trustees, for the purposes therein written, all l other heritable estate, of whatever kind, and all debts, sums of m effects, and moveable property of every description, which shou to him at the time of his death, and, particularly, all and whole th Kincardine O'Neil. The trust-purposes, after payment of debt charges, and the expenses of the trust, were:—"Secondly, in the my only son James marrying with the consent of my said tr quorum foresaid, and having a family, for the purpose of conveyin poning to his eldest son, and the heirs-male of his body, the said Kincardine O'Neil, and my said other lands above described, within the said parish of Kincardine O'Neil, under strict entail necessary clauses; whom failing, to his second son, and the heir his body, and so on through the other sons of my said son; w ing, to the eldest daughter of my said son, and the heirs-mal body; whom failing, to the second daughter of my said son, a heirs-male of her body, and so on through the other daughters o son; whom failing, to the eldest son of my said daughter by he or any future husband, and the heirs-male of his body; whom f the second son of my said daughter by her present or any future and the heirs-male of his body, and so on through her other son failing, to the eldest daughter of my said daughter by her prese future husband, and the heirs-male of her body; whom failin second daughter of my said daughter by her present or any fu band, and the heirs-male of her body, and so on through t daughters of my said daughter; whom all failing, to my ow heirs and assignees: Thirdly, For the purpose of realising my oth

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ritable and moveable, and above conveyed, and of fulfilling and discharging the obligations contained in the marriage-contract executed by e and my dear spouse, Isabella Gordon, as well as for implementing d paying the legacies and donations which may be left by me in any st will or other writing, however informal, which I may execute, or hich may be found in my own custody or that of any other person after y death: Sixthly, For the purpose of paying to my said spouse, besides e allowances made by her marriage-contract, the sum of £1000 sterling the first 20th of June or December twelve months after my death: ifthly, Failing my said son marrying and having lawful issue, for the urpose of paying and applying the residue and remainder of my said eans and estate, heritable and moveable (excepting the said lands irected to be entailed as aforesaid), on my said son's death, to the hildren of my said daughter, whether of her present or any future marage, and that equally; and in the said event the said lands directed to e entailed shall be entailed by my said trustees, or quorum foresaid, as foresaid, so far as the foregoing destination in article second hereof will hen apply, excepting always from any share of said residue the person r persons succeeding to the said entailed lands, who shall have right nly to £1000 sterling out of such residue on my son's death: Declaring ereby that the period of vesting of the provisions hereby made in favour f the children of my said daughter shall be as at the death of their nother if she shall have survived my said son, or as at the death of my aid son if she shall have predeceased him; but providing nevertheless hat if any child or children of my said daughter shall die before the eriod of vesting above mentioned, leaving lawful issue, such issue shall e entitled to the share of said residue to which their deceased parent or arents would have been entitled if alive."

By the contract of marriage between Mr Francis Gordon and his second wife, entered into in the year 1826, the said Francis Gordon bound and obliged himself, his heirs, and executors, to pay to the said Isabella Gordon, her heirs, executors, or assignees, a free yearly annuity of £400 sterling.

Mr Gordon was survived by his wife, by his son James, who died on 27th March 1871, and by his only daughter, Mrs Johnstone, otherwise Mrs Johnstone Gordon, who died on 20th January 1863.

Mrs Johnstone Gordon was survived by her husband, who is since dead, and four daughters, one of whom has since then died unmarried, the others being the claimant, Mrs Scott, and the claimants, Anne E. A. Johnstone Gordon (afterwards Mrs Muir Mackenzie) and Emily Johnstone Gordon.

On the death of James Gordon it became incumbent on the trustees (1) To entail the lands of Kincardine on Mrs Scott of Gala, Mrs Johnstone Gordon's eldest daughter, and the substitute heirs of entail, in terms of the ninth purpose of the trust-deed, and subject to whatever burdens or limitations may be imposed by the other provisions of the deed, and the truster's marriage-contract above referred to; (2) To pay over the residue to the two younger daughters of Mrs Johnstone Gordon, with the exception of £1000 thereof payable under the trust-deed to Mrs Scott, who succeeded to the estate of Kincardine.

Besides the furniture in Kincardine Lodge, which was liferented by the widow, the trust-estate, as at the date of the death of James Gordon, the truster's son, consisted of—(1) The lands of Kincardine, yielding a rent (exclusive of the mansion-house, offices, garden, and home farm) of about £900, and yearly drawings from thinnings of wood of about £200; (2)

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Cash amounting to somewhat more than £7000, of which £70 secured on bond and disposition in security.

In an action of multiplepoinding brought by the trustees a q was raised between Mrs Scott and her sisters, the Misses Joh Gordon, as to whether the annuity of £400 contained in the sai nuptial marriage-contract in favour of the said Mr Gordon's widow be thrown as a burden on the entailed estate accruing to Mrs S on the residue accruing to the Misses Johnstone Gordon.

Mrs Scott claimed—'1' A conveyance of the said estate of Kin and others in favour of herself as institute, and the heirs-substi entail mentioned in Mr Gordon's trust-settlement, and that free fr annuity payable to his widow, and from the burden of any of the l bequeathed by the said settlement and codicils, except in the e the personal estate being insufficient for the payment thereof.

Mrs Scott pleaded;—'2' On a sound construction of the said tru position and settlement Mrs Gordon's annuity is primarily a burde the residue of the said trust-estate, heritable and moveable, othe the estate of Kincardine, which is the subject of special destination

The Misses Gordon claimed—(1) That the free yearly annuity o sterling, provided and secured to the said Mrs Isabella Gordon, the of the truster, the said Francis Gordon, by antenuptial contract o riage entered into between them, of date 1st and 4th September payable by equal moieties of £200 on the 20th day of June an day of December yearly, during her life after his decease, with th interest of said annuity as long as the same should remain due af terms of payment above specified, should be found and declared primarily a burden on the truster, the said Francis Gordon's la Kincardine O'Neil and others, specified and described in the said disposition and settlement, and thereby directed to be entailed. (2 the said trustees and the said Mrs Elizabeth Isabella Johnstone G or Scott were bound to free and relieve the said claimants, and the r and remainder of the means and estate, heritable and moveable, truster, the said Francis Gordon (excepting the said lands directed entailed as aforesaid), of and from the said annuity of £400 provide secured to the said Mrs Isabella Gordon as aforesaid.

The Misses Gordon pleaded;—(1) The annuity to Mrs Gordon h a tract of future time is heritable in its nature, and forms a burde marily upon the heritable estate of the truster. (2) The truster h directed his whole estate heritable and moveable, other than the directed to be entailed, to be realised and divided, the said annu primarily a burden on the said lands so directed to be entailed. (3 said annuity being primarily a burden on the said lands directed entailed, the claimants are entitled to be relieved thereof.

The Lord Ordinary, on 14th November 1872, pronounced the foll interlocutor:—"Finds that, according to the true construction of th trust-disposition and settlement, the free yearly annuity of £400 pro to Mrs Isabella Gordon, the widow of the said Francis Gordon, h antenuptial contract of marriage entered into between them of da and 4th September 1826, is primarily a burden upon the residue o trust-estate of the said Francis Gordon, other than his lands of Ki dine O'Neil, and the other lands specified and described in his said disposition and settlement, and thereby directed to be entailed; su the first claim stated for Mrs Elizabeth Isabella Johnstone Gord Scott and her curator *ad litem*, and repels the first and second c stated for the claimants, Anne Elizabeth Augusta Johnstone Gordo *Emily* Matilda Elibank Johnstone Gordon, and decerns: Reserv

ons of expenses, and appoints the cause to be put to the roll with to further procedure."*

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NOTE.—By the antenuptial contract of marriage entered into between the , Mr Gordon of Craig and Kincardine, and his wife, the claimant, Mrs , he bound and obliged himself, his heirs and executors, to pay her a free annuity of £400 during her life after his decease, restricted to £300 in nt of her entering into a second marriage. By his trust-disposition and ent, in which he conveyed his whole estate, both heritable and moveable, rustees, for the purposes therein set forth, he directed his estate of Kin- and others to be entailed, and failing his son marrying and having law- e, he appointed the residue of his means and estate thereby conveyed, should remain after satisfying other trust-purposes, to be paid to the n of his daughter, excepting such of them as should succeed to the en- state. The estate of Kincardine now falls to be entailed upon his grand- er, the claimant Mrs Scott of Gala, and the substitute heirs of entail men- in his settlement, and the residue remaining after satisfaction of the other rposes falls to her two sisters, the claimants Misses Gordon. The estate cardine and the said free residue are each of them sufficient to meet Mrs 's annuity, and the question on which these claimants are at issue, and has now been decided by the Lord Ordinary in the competition between s whether that annuity is a primary burden upon the estate of Kincar- upon the free residue. The decision of that question depends upon the ction of Mr Gordon's trust-disposition and settlement.

e Lord Ordinary understands the rule of law, as fixed by the decisions, at the heritable and the moveable succession must respectively bear the r burdens appropriate to each, unless the testator in his settlement gives directions to the contrary, or gives directions with reference to the dis- his means and estate which by clear and necessary implication plainly at a particular burden or debt is to be paid out of that part of his suc- upon which it would not fall but for these directions—(Macleod's Trus- 8th June 1871, 9 Macph. 903, and cases there cited). In the present e Lord Ordinary is of opinion that the directions expressly given by Mr to his trustees in his settlement with reference to the disposal of his clearly shew that it was his intention that they should fulfil and dis- the obligations contained in his marriage-contract out of the estate, herit- d moveable, thereby conveyed to them, other than the estate of Kincar- hich he directed them to entail.

the second trust-purpose of his settlement Mr Gordon directed his trus- the event of his son (who, as stated in the narrative of the deed, was l from managing his own affairs) marrying with their consent, and hav- mily, to convey under strict entail to his said son's eldest son, and the ersons therein mentioned, his estate of Kincardine and others. The third rpose is in the following terms:—'Thirdly, for the purpose of realising er estate, heritable and moveable, and above conveyed, and of fulfilling charging the obligations contained in the marriage-contract executed by my dear spouse, Isabella Gordon, as well as for implementing and pay- legacies and donations which may be left by me in any last will or other , however informal, which I may execute, or which may be found in my stody or that of any other person after my death.'

e period when the entail of Kincardine fell to be executed was his son's This is shewn by the directions to the trustees contained in the fourth, h, eighth, and ninth trust-purposes. These provided (4) for the mainten- the son wherever the trustees should consider most for his advantage mfort; (7) for the occupation of Kincardine Lodge, offices, and garden, ome farm, by his wife, or, if she approved, by her and his son together, as his son continued unmarried, and for the sole possession of Kincardine offices, and garden by the son if he should marry with the approbation of stees; (8) in the event of the son marrying with such approbation, for

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This interlocutor was reclaimed against by Miss Emily M. E. Jo Gordon, and by Sir Alexander Muir Mackenzie and others, under a trust-disposition dated 15th and 16th October 1872, by the said Miss Anne E. A. Johnstone Gordon, now Mrs Mu kenzie, whose trustees had been sisted, and allowed to reclaim the said judgment of the Lord Ordinary by an interlocutor dat November 1872.

The reclaimers argued;—According to the theory of Scotch annuity, being an obligation having a tract of future time, would n fall on the heritable property, and the fact that the property is dis be entailed makes no difference.[1] There is no express provisior matter, for the truster evidently expected his son to survive his w which case this question could not have arisen. That being so, t fall back on the common law rule. The payment of the residue entail of the estate are to be *unico contextu*, and that could only by throwing the annuity on the entailed estate.

Argued for the respondent;—A money annuity is not a natura on heritage. No doubt at common law the heir is liable for it executor. But this is an accident, and probably arose from the i the heir of a debtor should be liable for that of which the heir of a has the benefit. But this cannot be said of an annuity to a widow other estate" means all estate which is not otherwise destine trustees were to realise the estate other than Kincardine, for the *inter alia*, of satisfying the truster's obligations under the n contract.

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the application of the yearly revenue of his whole other means and e the benefit, maintenance, and comfort of his son and his son's wife an and (9) failing the son marrying and having lawful issue, for the exe the entail of Kincardine, in so far as the destination in the second trus should then apply. Until that entail came to be executed on the so the duty of the trustees was to hold the lands of Kincardine and other to be entailed; to realise the whole other trust-estate, and fulfil and the widow's annuity and other marriage-contract obligations; to pay the legacies and donations, among which are included the sum of £1000, directed the trustees (sixth purpose) to pay to his widow, 'besides t ances made by her marriage-contract;' and to apply the free yearly remaining for the maintenance of his son, and also of his son's family s marry with the approbation of the trustees. The trust-disposition an ment is not well drawn; but upon a careful consideration of its pro seems to the Lord Ordinary to be clear that the testator's intention that the directions which he accordingly gave to his trustees are, that his annuity should be fulfilled and discharged, and that the legacies and e left by him should be paid out of the means and estate thereby convey trustees other than the estate of Kincardine, which he directed them and that the said estate of Kincardine should upon the death of his s tailed free from the burden of these legacies and donations, and of the annuity. This construction is in accordance also with the directions e in the ninth trust-purpose, whereby the trustees are directed, on the his son, without issue, to pay 'the residue and remainder of my said m estate, heritable and moveable (excepting the said lands directed to be as aforesaid),' to the children of his daughter, excepting such of them s succeed to the entailed lands,—that is, as the Lord Ordinary considers, due of the trust-estate, exclusive of the lands directed to be entailed whi remain after fulfilling and discharging the marriage-contract obligation legacies and donations, and maintaining his son."

[1] Mackintosh v. Mackintosh's Trustees, March 2, 1870, *ante*, vol. Macleod's Trustees, June 28, 1871, *ante*, vol. ix. 903.

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LORD BENHOLME.—This is a process of multiplepoinding raised by the trustees and executors of the late Francis Gordon of Kincardine against Mrs Gordon or Scott, wife of Mr Scott of Gala, and others, for the purpose of ascertaining the equal distribution of the trust-estate of Mr Gordon. Mr Gordon died in the year 1857, leaving a widow, a son, and a daughter. It appears that the son was weak in his mind, and esteemed by his father incapable of managing his own affairs; and as for the daughter, she had, in respect of a provision made upon her at her marriage, renounced all claim on her father's succession. The widow, besides other gifts, was entitled to an annuity of £400, and I may observe that although this multiplepoinding raises several minor questions in regard to the distribution of Mr Gordon's estate, the only point that has been decided by the Lord Ordinary, and the only point to which your Lordships' attention was called, was the question upon what part of this estate, whether upon the heritable landed estate of Kincardine O'Neil, or upon the money, the residuary part of it, this annuity of £400 was a primary burden. "Secondly, In the event of my only son James marrying with the consent of my said trustees, or quorum foresaid, and having a family, for the purpose of conveying and disponing to his eldest son and the heirs-male of his body the said lands of Kincardine O'Neil, and my said other lands above described, all lying within the said parish of Kincardine O'Neil, under strict entail, with all necessary clauses; whom failing, to his second son and the heirs-male of his body, and so on through the other sons of my said son; whom failing, to the eldest daughter of my said son and the heirs-male of her body; whom failing, to the second daughter of my said son and to the heirs-male of her body, and so on through the other daughters of my said son; whom failing, to the eldest son of my said daughter by her present or any future husband, and the heirs-male of his body; whom failing, to the second son of my said daughter by her present or any future husband and the heirs-male of his body, and so on through her other sons; whom failing, to the eldest daughter by her present or any future husband, and the heirs-male of her body; whom failing, to the second daughter of my said daughter by her present or any future husband and the heirs-male of her body, and so on through the other daughters of my said daughter; whom all failing, to my own nearest heirs and assignees: Thirdly, For the purpose of realising my other estate, heritable and moveable, and above conveyed, and of fulfilling and discharging the obligations contained in the marriage-contract executed by me and my dear spouse, Isabella Gordon, as well as for implementing and paying the legacies and donations which may be left by me in any last will or other writing, however informal, which I may execute, or which may be found in my own custody or that of any other person after my death." "Sixthly, For the purpose of paying to my said spouse, besides the allowances made by her marriage-contract, the sum of £1000 sterling on the first 20th of June or December twelve months after my death." "Ninthly, Failing my said son marrying and having lawful issue, for the purpose of paying and applying the residue and remainder of my said means and estate, heritable and moveable (excepting the said lands directed to be entailed as aforesaid), on my said son's death, to the children of my said daughter, whether of her present or any future marriage, and that equally; and in the said event the said lands directed to be entailed shall be entailed by my said trustees, or quorum foresaid, as aforesaid, so far as the foregoing destination in article second hereof will then apply, excepting always from any share of said residue the person or persons succeeding to the said entailed lands, who shall have right only to £1000 sterling out of such residue on my son's death: Declaring hereby that the period of vesting of the provisions hereby made in favour of the children of my said daughter shall be as at the death of their mother if she shall have survived my said son, or as at the death of my said son if she shall have predeceased him."

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Now, what took place was this:—The truster's son died unmarried in the year 1871, his sister (the daughter of Mr Gordon) had died in the year 1863, having three daughters, who are parties to this multiplepoinding, and whose

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interests are at stake in regard to the point which we have to determine. Thes daughters were, in the first place, Mrs Scott, who married Mr Scott of Gala; another lady, who married Mr Muir Mackenzie; and a third, who is still unmar ried. As regards the estate of Kincardine O'Neil it falls to be conveyed unde strict entail to Mrs Scott of Gala with a number of substitutes; and, in respe of her becoming the institute in the entail of that estate, she does not share i the distribution of the pecuniary residue of the estate except to the extent o £1000. Now, the question occurs, whether the annuity of £400 to which th widow is entitled shall be made a burden on the rents of the entailed estate which Mrs Scott is entitled, or shall be paid out of the pecuniary residue, whic I think, chiefly consists of an heritable bond for about £7000. It is very cle that there is here no question of intestate succession. In a question of intest succession, the circumstance that this provision for the widow bears a tract o future time, being an annuity, would have had a very important effect in th solution of this question, because, by our intestate law of succession, such pro sions bearing a tract of future time fall to be paid, *cæteris paribus*, out of t heritable succession. They fall as a natural burden on the heir. But in th case there is nothing left to the determination of intestate succession. Eve thing is settled by distinct provision on the part of the testator. He has by h trust-deed appointed an entail to be executed, of which Mrs Scott is the fi institute, with a provisional substitution; and, in respect that she takes th heritable estate, she is debarred from sharing in the pecuniary part of the su cession which forms the residue, except to the extent of £1000. Now, as th pecuniary succession goes to the two younger sisters, the question arises, a they not bound also to provide for the widow's annuity amongst other deb of the testator which fall to be defrayed out of their portion of the succes It has been ingeniously argued that it naturally falls on the successive heirs entail who take the landed estate (they drawing the rents for an indefinite peri of time) to pay the annuity that is due to the widow. There was a good de of plausibility in that, but I see no ground in law for it. This is a pecunia obligation which may be discharged by purchasing an annuity, and there is nothi in my opinion in that circumstance which goes so far as to throw this obligati upon the heiress of entail in the present case, because the succession of the testa here is to be regulated not by the rules of intestate succession but by his ow personal declaration. It appears to me, my Lords, that the part of his tru deed in which he appoints the trustees to realise his other estate, heritable a moveable, and fulfil and discharge the obligations contained in the marria contract between him and his wife, clearly ascertains that the fund out of whi not only his legacies and donations were to be paid, but also the provisions the marriage-contract between him and his spouse were to be defrayed, was t moveable succession or residue. Indeed, the very character of the residue seem to me to impose the obligation that is here mentioned upon that part of his su cession. I am, therefore, of opinion that the Lord Ordinary's interlocutor, whi deals with that question and that question alone, is a right decision.

The other Judges concurred.

THE COURT adhered, with expenses since the date of the Lord Ord nary's interlocutor.

MORTON, NEILSON, & SMART, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

ble in damages.

action was brought in the Sheriff-court of Lanarkshire by Francis ', moulder, Kirkintilloch, against the North British Railway Com- oncluding for payment of £1000 damages on account of injuries ed by the pursuer "through the culpable negligence and gross care- s of the defenders, or of their servants, for whom they are respon- asmuch as the pursuer having paid his fare as, and having been a er to Kirkintilloch in the train which left Glasgow for Kirkin- on the evening of Wednesday, the 20th day of July 1870 years, arter before eight o'clock; and the defenders, or their servants, for they are responsible, in violation of the legal obligations incum- them as carriers of passengers for hire, as well as in violation of es of the said railway company, having failed to keep the door on side from the Glasgow platform, in the compartment in which the had taken his seat, locked and fastened; and the pursuer, while d train was proceeding between the Bishopbriggs and Lenzie n Stations of the said railway, having risen from his seat for the e of looking out of the open window in the said door, and when he the act of leaning with his elbow on the said door, it suddenly en, and the pursuer fell out upon the line, whereby he sustained bodily injuries, necessitating the amputation of his left arm, and so y injuring his health and physical system that he has been per- ly disabled and rendered unable for life to earn a livelihood."

lefenders averred that the doors had been properly fastened by their s, and that the accident occurred through the pursuer or some other er in the compartment tampering with the handle of the door.

oof was led, the import of which is sufficiently given in the note Sheriff-principal.

Sheriff-substitute (Dickson) pronounced an interlocutor, containing, *lia*, the following findings:—"Finds that the door flew open in ience of the sneck not having been properly fastened at the time: t not proved that there was any defect in the door or the sneck or thereof, or in the carriage: Finds it not proved that the defenders'

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On appeal the Sheriff (Glassford Bell) pronounced the following interlocutor:—"Finds that the interlocutor appealed against correctly sets forth the time when, the place where, and the circumstances under which the pursuer sustained the injuries for which he now seeks reparation against the defenders; as also the general nature and extent of said injuries; but, *quoad ultra*, and in as far as said interlocutor finds that the defenders are not responsible to the pursuer for said injuries, and assoilzies them from the conclusions of the summons, recalls the same, and finds on the contrary, that it is proved that the defenders, in violation of the legal obligation incumbent on them as carriers of passengers for hire, as well as in violation of the rules of their company, failed to keep the door on the off-side from the Glasgow platform, in the compartment of the railway carriage in which the pursuer was travelling, properly shut and fastened, in consequence of which, while the train was proceeding between the Bishopbriggs and Lenzie Junction Stations, and while the pursuer was in the act of leaning with his elbow on the said door, it suddenly flew open, and the pursuer fell out upon the line and sustained the injuries which necessitated the immediate amputation of his left arm, besides severely impairing his health and physical system: Finds that the pursuer, who wrought as a moulder, had been earning wages which averaged about 35s. a-week, but he cannot now work as a moulder, and is not able to earn more than from 10s. to 12s. a-week: Finds, in these circumstances, and under reference to the annexed note, the defenders liable to the pursuer in the sum of £150 sterling in name of damages and solatium: Finds them also liable in expenses; allows an account," &c.*

* "NOTE.—It is not without hesitation that the Sheriff has differed from the view taken by the Sheriff-substitute of this case; but after mature consideration he cannot help being of opinion that the facts are such as throw responsibility on the defenders. One thing is certain, to begin with, and is not disputed, that when the pursuer fell out of the carriage in which he was travelling the door through which he fell was open. Now, although the mere occurrence of an accident may not always afford *prima facie* evidence of negligence, in some cases *res ipsa loquitur*, and the accident may be of such a nature that a presumption of negligence arises from its occurrence—(See Hodges on Railways, 4th ed., 532). Here the door should have been securely fastened, and it was open, and the defence is that it was fastened when the train started, and that it must have been subsequently opened by the pursuer himself. The *onus* of proving this lies, it is thought, with the defenders. In M'Aulay, December 9th, 1846, Lord Jeffrey said,—'I concur in the view of Lord Fullerton, that, in all cases of this kind, the proprietor is entitled to no presumption of innocence. He must prove that it was an accident, and failing his proving that, the pursuer is entitled to her verdict.' The defenders' leading witness, Walter M'Taggart, the sole guard on the train, cannot be said to be an entirely neutral party, for he was guilty of a serious breach of duty if the door was not fastened. He swears—'Before the train started from Glasgow I satisfied myself that all the carriages had the doors on the right side going from Glasgow shut and locked. That is the off side under the defenders' regulations;' and again, 'I locked every one of the doors on the right side at Glasgow before the train started. The train had ten carriages and two break vans, being one carriage more than usual for the train at that hour.' The first observation upon this is, that if it is true then the off side door, not only of the compartment in which the pursuer travelled, but of various other compartments, must have been unlocked, and not again locked, as they should have been, at Cowlairs, because it is proved beyond all doubt that when the pursuer fell out and the train was brought to a stand a number of passengers turned the handles of the doors on the off-sides of their carriages, and not finding them locked walked out on to the line to see what had happened. The train had stopped before this only at Cowlairs and Bishopbriggs, and the

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The defenders appealed to the Court of Session, and it was argued for em, that the presumption being that the door was shut, the *onus* lay

ers could not have been interfered with at the latter place, because they were t on the side next the platform at which the train drew up. There were three rd class carriages in front, and the pursuer was in the one next the engine. ter Ferguson, one of the defenders' porters at Cowlairs, says that he there locked and then relocked two of these carriages. But this cannot be true if means that he relocked all the off-side doors of these two carriages, because it proved that persons who were travelling in them found them unlocked after accident happened; and if Ferguson did not unlock them then they cannot re been locked by M'Taggart at Glasgow. William Hay, the defenders' other ter at Cowlairs, says he unlocked some of the doors there, but that he shut d locked all that he had unlocked. This is a vague statement, which does t much affect the case. The important fact is, that whilst the defenders may t have been under any obligation to the public to keep the doors locked, their law (see rule 290 of No. 13) made it a part of the duty of their guards and sters to keep the off-side doors locked, and, in point of fact, this duty must ve been neglected on the present occasion. If so, it becomes less impossible at the duty to the public of keeping the doors properly fastened may also have en neglected. The guard M'Taggart admits that he did not personally fasten e doors at Cowlairs, but he says the porters stated to him that they were all ht, and that he saw by taking a glance along the train that the handles were a position which indicated that they were turned so as to keep the doors sed. This is very loose evidence, and cannot be regarded as sufficient to tablish the fact. What is much more material is, that it is proved by the stinct depositions of several witnesses that the off-side door of the compartment in which the pursuer was, which was on the near-side at Cowlairs, but where else, was not opened there, that the handle of the door was never ached, and that no one either went in or out of the compartment, which was ready full, either at Cowlairs or Bishopbriggs. The door, therefore, must have en in the same condition at both of these places as it was when the train left lasgow. Some evidence has been led with the view of shewing that if the ndle had not been properly down in the sneck the motion and jolting of the riage as it proceeded must have caused the door to fly open long before the nsuer fell out. But this is hypothetical. The door may have been jammed tty stiffly in its place, and may have required a certain pressure from within fore it opened. The defenders' own witness, James M'Laren, their general perintendent, says,—'It is possible that a door might be shut nearly close, t not quite close, and that the sneck should not have been in its place, and at in this case the handle should have been horizontal and apparently all ht;' and the witness adds, 'The doors when closed are flush with the outside e of the carriage, but there is a thin strip of iron or wood beading, about a arter of an inch thick or less, outside, to keep the carriage water-tight.' Up this point, then, it seems impossible for the defenders to escape from the lemma that, if the door had been properly fastened, it would not have flown en, and that, if it did fly open, it had not been properly fastened. The defenders' final suggestion therefore is, that the pursuer must have put his arm t and turned the handle himself. Now, as to this it is not, in the first place, be denied that the pursuer when he entered the train was to a certain extent der the influence of liquor; but it is not proved that he was in such a conion as not to know perfectly well what he was doing, and it is proved that conduct in the carriage was in no way offensive. The pursuer himself says, 'I was quite capable at the time, but might have felt the drink in my head. . . . I was not the worse of liquor at all. My head might have been a le light with drink.' His fellow passenger, Agnes M'Kechnie, says,—'He l been drinking, but seemed able to take care of himself;' and another senger, Mrs Janet M'Lean or Clelland, says,—'He had got a glass of spirits, nobody would have thought there was anything wrong with him, either in

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upon the pursuer to prove that it had been left open, and that failed to discharge that *onus*. It was not sufficient to prove that was not locked, because it was the duty of the company's servants the door, but not to lock it.[1] Besides, the pursuer, by rashly against the door, contributed to the accident in such a degree t if he proved neglect against the defenders he had no recourse them for damages.

Argued for the pursuer;—It was the duty of the company's not only to fasten but to lock the off-side doors, in terms of t rule of the company, and upon the evidence it appeared that the not even been fastened. The company, therefore, was liable.[2]

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talking or walking.' The account which the pursuer gives of what oc the carriage immediately before the accident happened is corroborated witnesses, so that his recollection must have been pretty correct. swears is, that no one entered or left the compartment at Cowlairs; t passing Bishopbriggs he rose to look out at the window and lit a mat went out, and immediately afterwards he lit another, and lighted his it; that he then went with the pipe in his mouth to look out at the that he had his elbow on the ledge of the door, and was going to look that before he got out his head the door opened and he fell out; that had not been opened by any one before that, and that neither he no inside the compartment had touched the handle of the door. Variou who were in the same compartment confirm this. James O'Hara, moul —'No one that I saw touched the handle of the door on the right side have seen if any one did so.' He then describes, as the pursuer does latter went twice to the window and leant his arm on it; and adds,—' thing I saw was the door opening and him falling out. I was observir the time. I must have seen if he had leant his hands out of the sp the door.' He farther states, what seems important, 'I account for opening the second time and not the first time from the train ha going at full speed when it opened, and so the carriage was not smo time. When pursuer first leant out it was not going so fast.' Peter says,—'As the pursuer was putting his head out of the window I saw fly open and him fall out. He did not put his hands outside so far He could not have done so without my seeing him at the time. He time to lean heavily against the door before it flew open.' Mrs Clella —'The door flew open immediately on the pursuer going to it, and body going against it. It seemed all right before that.' Miss Agnes M one of the defenders' witnesses, says,—'The pursuer put his hand on but did not look out of it. The door thereupon gave way. Pursue threaten to leave the carriage before he fell out.' Finally, Mary another witness for the defenders, says,—'Pursuer when he looked ou to stand without any support. I thought him able to take care of hin was quiet in the train. There was no quarrelling. . . . I did n hands outside the door. I think I would have observed if his hands outside. I did not see any one touch the door handle from leaving G the accident.' There is not one particle of evidence contradictory which not only does not support, but goes directly to subvert the t the opening of the door was an act of the pursuer's own. The simple fore remains, that through the negligence of some one, for whom the are responsible, there was an unsecured door through which, on its un opening, the pursuer fell and got himself maimed for life, and there to shew that he was contributory in any way to this misfortune, o defenders are entitled to be relieved on any other ground from th resulting from sending a passenger carriage in an unsafe condition line."

[1] Fearns v. North British Railway Company, 9 Scot. Law Reporter

[2] Daniel v. Metropolitan Railway Co., 3 L. R. (C. P.) 216.

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RD JUSTICE-CLERK.—The grounds upon which this action is brought are explained in the summons: The defenders ought to pay damages to the ner, "inasmuch as the pursuer having paid his fare as, and having been, a nger to Kirkintilloch in the train which left Glasgow for Kirkintilloch on evening of Wednesday the 20th day of July 1870 years, at a quarter before t o'clock; and the defenders, or their servants, for whom they are responsible, iolation of the legal obligations incumbent on them as carriers of passengers ire, as well as in violation of the rules of the said railway company, having d to keep the door on the off-side from the Glasgow platform, in the com-ment in which the pursuer had taken his seat, locked and fastened; and the ner, while the train was proceeding, having risen from his seat for the pur-of looking out of the open window in the said door, and when he was in act of leaning his elbow on the said door, it suddenly flew open, and the ner fell out upon the line, whereby he sustained severe bodily injuries."

he Sheriff-substitute has found in this case upon the proof that it has not a proved that the door was not locked and fastened in violation of the rules, he has further found that it has not been proved that the injuries to the ner arose from the fault of defenders. The Sheriff-principal has taken a erent view of the case, and I am of opinion that he is right.

omething has been submitted to us in argument on the question of *onus*, though in some cases that is a very material consideration, I do not think it ecessary for us to deal with it in this case, for in my opinion it has been rly proved that, as a matter of fact, the accident to the pursuer resulted from negligence of the defenders, and so there is no room for question here whether *onus* thrown upon either party has been discharged.

t is quite clear from the evidence that the door of the carriage in which the ner was was not locked, and that it ought to have been locked under the es of the railway company. In regard to this rule, that the doors on the side of the carriages must be locked, it is argued for the defenders that the blic are not interested in the observance of this rule, and that it is merely a tter between the railway company and its servants. I cannot agree with s remark, and although I do not think that the evidence that the door was t locked is essential to the result at which I have arrived, yet I think that it ght not to be left out of view. The evidence, however, goes further than this, d besides proving that the door was not locked, it proves that it was not tened. Now, if the door was not fastened at the time when the accident ppened there are only two ways in which that could have occurred, either, t, somebody must have opened it after the train started from Cowlairs, or, ondly, it must never have been fastened at all. As regards the first of these ernatives—and this is the turning point of the case—it is clearly stated in e evidence that no one in the carriage did open it, and many who were in the rriage were examined. As to the pursuer the evidence is that he was somewhat ttered, but that he could take care of himself, and no one saw him put his nd out of the window, which they would almost certainly have done if he had. think the evidence of Agnes M'Kechnie is very much to the point, and I was uch struck by it. She says:—"After leaving Bishopriggs he rose and looked t of the right hand window of the carriage for a moment. He looked up and wn the train. He leant on the door with his head and shoulders out. I can-t say if his hands were out. I did not see them out. He sat down after that, d rose a few minutes after. He then put his hand on the door, but did not ok out of it. The door thereupon gave way." So, upon the whole evidence, the question,—Did the pursuer open the door himself?—must be answered yes no, I have no difficulty in answering it in the negative.

This being so, the evidence is clearly in favour of the pursuer, for the only ternative is that the railway porters did not shut the door. Now, the evidence r the pursuer is, that at the time of the accident the door was open, and that did not open it, and against that there is the evidence of the railway porters, o say that they shut and locked the door. But it is proved that they did

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not lock the door, and so we cannot trust their memory when they say that th shut the door. It is said that the door was certainly locked at Glasgow. I a not sure of this, for the evidence goes to shew that nobody unlocked it at Co lairs. But whether it was locked at Glasgow, and unlocked at Cowlairs, whether it was never locked at all, does not much matter, for in either case t door was not locked through the negligence of the defenders' servants.

It was further said that the guard saw all the handles horizontal, whi shewed that the doors were fastened. But this evidence is not reliable, for was only when the train was in motion after leaving Bishopriggs stati that he observed that all the handles were horizontal, which they mig have been although the door was not close shut. The evidence does not sh that before starting from that station—which was the last stoppage before t accident—he saw that the door of the carriage in which the pursuer was fastened.

Now, as we have already seen, the evidence shews that the pursuer did n open the door himself. If, as is alleged in the statement of facts for the defend there had been quarrelling between the pursuer and his wife, or any other c cumstance to shew excitement on his part, it would have been more probab that he should have opened the door, but it is proved that nothing of the s occurred. I am therefore of opinion that we should adhere to the judgment the Sheriff.

Lord Cowan.—I take the same view of the case. I am not at all sure th it is not enough for judgment that the door of this carriage was not locked. think that these regulations as to locking carriages may be held as imperati on the company as the regulations in regard to signals, and as regulations in t one case as in the other, in the observance of which the public safety is co sidered. Where the rules as to signals have not been observed the railw company are certainly liable in damages for injuries occasioned by their no observance on the part of their servants. I apprehend that the regulations to locking the off-doors of carriages are not mere internal arrangements of t company, but a matter in which the passengers have a very material inter But it is not necessary to decide this case on that ground, though it is a po which cannot be left out of view in estimating the general evidence applica to the proper shutting and fastening the door of this carriage out of which t pursuer fell. It is quite certain that this door was not locked, otherwise th accident could not have occurred; yet to this the company's officials depone they do to the door having been properly shut. This is not the conclusion wh the evidence as a whole has led me to adopt. I think it proved that the do was not shut. Whether it was left open at Glasgow or at Cowlairs is of lit consequence, for undoubtedly when the train left Cowlairs it ought to have be in a safe state, with all the doors properly shut. As the door was clearly n shut when the pursuer fell out, it must either have been left open at Glasgow Cowlairs, or some one must have subsequently opened it. I think it prove that no one in the carriage opened it, and the only alternative, assuming it h have been fastened at Glasgow, is that it was opened by the company's servan at Cowlairs and not again shut. I am therefore of opinion that the Sheriff's interlocutor is well founded, although some of the findings may require to b modified.

Lord Benholme and Lord Neaves concurred.

The Court pronounced this interlocutor:—"Find that the even libelled occurred in consequence of one of the doors of th carriage in which the pursuer travelled not being properly close and fastened by the handle being turned and the bolt inserte into the holder: Find it proved that the door of the carriag was not opened by the pursuer: Find that it was the duty of th servants of the defenders, for whom they are responsible, to clo and fasten the door of the carriage by turning the handle an

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inserting the bolt: Find that the servants of the defenders at Cowlairs station failed to close and properly fasten said door, or to see that the same was properly closed and fastened before the train left Cowlairs station on the occasion in question, as it was their duty to have done: Find that the injuries libelled which the pursuer sustained were caused by the fault of the servants of the defenders, for whom they are responsible: Find that the pursuer did not by any fault contribute to the event by which the injuries libelled were sustained: Therefore dismiss the appeal: Affirm the interlocutor of the Sheriff of 11th June 1872: Find the defenders liable in expenses in this Court; and remit," &c.

DAVID SANG, W.S.—HILL, REID, & DRUMMOND, W.S.—Agents.

No. 58.

Jan. 25, 1873.
Donaldson v. Thomson.

ROBERT DONALDSON, Petitioner and Respondent.—*Harry Smith.*
WILLIAM THOMSON AND COMPANY, Respondents and Reclaimers.—*Robert Johnston.*

ssio Bonorum—Husband and Wife.—The pursuer in a process of *cessio* re- d to execute a revocation of a disposition of a property of the value of £50 :h he had granted to his wife when he was solvent. *Held* that his refusal not a sufficient reason for refusing to grant the *cessio.*

1ST DIVISION.
Sheriff of Dumfries.
B

:OBERT DONALDSON, joiner, Lockerbie, applied for the benefit of *cessio rum* in the Sheriff-court of Dumfries. In the note appended to state ffairs given in under sec. 4 of 6 and 7 Will. IV. c. 56, he stated,—"The tioner's wife is proprietrix of a house in Lockerbie presently occupied im. This property was purchased at the price of £200 from the cerbie Building Society in or about the year 1867. When the purchase effected only £50 of the purchase money was paid, a bond being then ted to the society for the remaining £150. The portion of the hase money actually paid was advanced by the petitioner's wife and ghter, who had saved that sum in keeping lodgers in the house, and as intended that on this account the conveyance should be taken in e of his wife. By an oversight, however, this was not done, but it taken to petitioner, and the property remained in the petitioner's e down till March 1871, when, in conformity with the original ngement, he conveyed it to his wife, still subject to the bond for £150. and prior to the date of the conveyance to his wife petitioner was not r solvent but was actually in good circumstances, being more than able neet his liabilities, and having always something to the good." In the mination before the Sheriff the petitioner stated that he was not "in- ed to sign a deed of revocation of said disposition."

Villiam Thomson and Company, who were creditors, objected to the nting of the *cessio*, because the pursuer refused to sign a deed of revo- on.

'he Sheriff-substitute (Hope) refused *in hoc statu*, to grant the petitioner benefit of *cessio bonorum*. A reclaiming petition having been pre- ted the Sheriff-substitute made avizandum to the Sheriff.

'he Sheriff pronounced this interlocutor:—"Finds, first, in point of , that it neither appears from anything in the process before the Sheriff, is it alleged by any of the opposing creditors as a reason for refusing petition for the benefit of *cessio bonorum*, that the pursuer of it is *in a fide* in any respect as regards the state of his affairs or the manage- nt of his funds: Therefore, under the whole circumstances of the case, s, in point of law and equity, that the pursuer's declining to revoke

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the conveyance in question to his wife as a condition precedent to ob ing his *cessio* is not a sufficient reason for refusing it: Therefore re the interlocutor appealed against: Finds the pursuer entitled to the be of the process of *cessio bonorum;* and with these findings in fact and remits the case back to the Sheriff-substitute to proceed accordingly.

The respondents, Thomson and Company, appealed to the Cou Session. They argued that the petitioner was bound to revoke the position to his wife before getting decree in his favour. The dispos being a donation *inter virum et uxorem* was revocable. The wife follow the fortunes of her husband.[1]

The counsel for the petitioner was not called on.

LORD PRESIDENT.—I think the Sheriff is right. The peculiarity of the is that there is no suggestion of fraud or improper conduct on the part o pursuer of the cessio. He seems to have made a full disclosure of his a The only objection is that he has conveyed a house to his wife. Now value of the house, after deducting the debt to the building society, is £50. The disposition of the house was intended as a provision for the and, if the pursuer was solvent at the time, was the performance of a n obligation. The objection stated by the creditor is not that the disposition granted after bankruptcy, or in contemplation of bankruptcy, but that th suer refused to execute a revocation of the disposition. It is doubtful if he revoke. If it is revocable sequestration would operate a revocation, and revocable, the creditor is not entitled to call upon him to execute a deed of cation as a condition of obtaining liberation.

LORD DEAS, LORD ARDMILLAN, and LORD JERVISWOODE concurred.

THE COURT adhered, with £5, 5s. of modified expenses.

JOHN WHITEHEAD, S.S.C.—J. C. & A. STEUART, W.S.—Agents.

No. 59.

Jan. 30, 1873.
Edmond v. Edmond.

MRS HANNAH EDMOND, First Party.—*Horn.*
PETER EDMOND, Second Party.—*Watson.*

Succession—Testament—Titles to Land Act, 1868, 31 *and* 32 *Vict. c sec.* 20.—A person who carried on the business of an innkeeper, in prem which he held a long lease, left testamentary writings in these terms:—' hereby bequiath, in event of my death before my wife H. E., the wh property ether in money, bonds, debets, bussness, and other affects whats . . . . and I appoint H. E., my wife, heir and executor of this my la and testament." *Held (diss.* Lord Ardmillan) that the words could not construed as to include the lease of the inn.

1ST DIVISION. B.

THOMAS EDMOND, hotel-keeper in Balfron, died on 1st April leaving the following testamentary writings, which were all on the sheet of paper:—

"I do hereby Bequiath in event of my Death Before my wife H Edmond the whole of Property ether in money Bonds Debets Bus and other affects whatsoever, after all my just debets, are decuted fro same. THOS. EDMOND. Robert Brown, witness; Margaret Brown ness."

"And I appoint Hannh Edmond my wife Heir and Executrix o

[1] Dunlop v. Johnston, April 2, 1867, 1 L. R. (Scotch Appeals), p. 109, vol. v. H. L. p. 22; Rust v. Smith, January 14, 1865, *ante,* vol. iii. p. Johnston v. Dunlop, March 24, 1865, *ante,* vol. iii. p. 758; Erak. i. 6, 30

will and testimant. THOS. EDMOND. Robert Brown, witness; No. 59.
t Brown, witness."
is the last will and testimant of Thomas Edmond.—Balfron, 10th Jan. 30, 1873.
71. THOS. EDMOND. Robert Brown, witness; Margaret Brown, Edmond v. Edmond.

aper was endorsed,—"Balfron, 10th May 1871.—this the last will imant of THOS. EDMOND."
estator was survived by his widow, Mrs Hannah Edmond, but ren. His estate consisted of moveable property, and also long f certain heritable subjects and the hotel in which he carried on for several years.
ridow, and Peter Edmond, his heir-at-law, presented this special order to obtain the judgment of the Court on the question whether amentary writings left by Thomas Edmond were sufficient to as a general disposition of his heritable estate in favour of the nder section 20 of the Titles to Land Act of 1868.
ridow maintained that the writings must all be read together, and expressed as to make the testator's intention clear that his widow succeed to all his property, both heritable and moveable. The ffects" had been held to apply to heritage, and the words here were .[1] The word "business" meant more than moveable property. In conduct the business it was necessary that the widow should e lease of the hotel. The appointment of the widow as heir made ator's meaning more clear.[2]
eir-at-law maintained;—In order to dispossess the heir words of *nti* conveyance are required. An indication of intention to dis- is not enough. The intention of the 20th section of the Act was to dispense with the word "dispone," and not to make every indi- f intention effectual. The Court are not entitled to make a will n. A testator must make his gift in clear terms.
lvising,—

PRESIDENT.—The question in this special case is whether the testamen- tings left by Thomas Edmond are sufficient to convey to his wife his as well as his moveable estate. This depends on the meaning of the themselves, and on a construction of the 20th section of the Titles to Land 868. With regard to the writings themselves, it is not impossible to spell em an intention that his wife should have the heritable as well as the move- perty; and I should be disposed to say that such was his intention. But ot sufficient for the disposal of the present question, because the statute does that, whatever the way or manner in which the intention has been ex- it is to have effect given to it. The clause begins by enacting that lands conveyed by testamentary deeds as well as by dispositions. In the second provides that no testamentary deed shall be insufficient to convey lands on nd that the word "dispone" has not been used. Now, it would not have essary to have enacted these two provisions if the statute had contained ng provision that any expression of intention would be enough to convey The third part of the clause is thus expressed,—"Where such deed or writ- hat is, a testamentary or *mortis causa* deed or writing, purporting to or bequeath land,—"shall not be expressed in the terms required by the law or practice for the conveyance of lands, but shall contain, with to such lands, any word or words which would, if used in a will or it with reference to moveables, be sufficient to confer upon the executor anter, or upon the grantee or legatee of such moveables, a right to claim

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tgomerie Bell's Lectures on Conveyancing, ii. p. 869.
airn v. Pitcairn, Feb. 25, 1870, *ante*, vol. viii. p. 604; M'Millan v. n, Nov. 28, 1850, 13 D. p. 187.

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or receive the same, such deed or writing if duly executed in the m required or permitted in the case of any testamentary writing by the l Scotland, shall be deemed or taken to be equivalent to a general disposit such lands." In order to bring a testamentary writing purporting to convey within the meaning of this part of the clause it is necessary that it contain which would be sufficient to express a gift of moveables. It is not enoug the granter shall nominate an heir as he would an executor and universal le It is plain that there must be words—I do not say of conveyance, but of with reference to such lands, or, in other words, a gift of the lands. He granter does not use words of bequest of the "property." Now, if he had stopped there we might have had a strong arg that heritable property was meant to be included. But he goes on to de from the general bequest, by the enumeration of "money, bonds, debets, ness, and other affects whatsoever." I think, upon the rules of construction a able to discharges and other writs of a like description, enumeration be held to derogate from a generality. The only word at all general follows is "affects." We have already decided in Pitcairn's case that "e does not include heritage. I am therefore of opinion that the heritable goes to the heir-at-law and not to the widow.

Lord Deas.—The most favourable way for the widow in which to take writings is to consider them together as forming one writ. Taking them a are only two words which can be said to support the contention for the —these are the word "business" and the word "heir." The use of the "heir" cannot, however, be said to import a conveyance of the whole he property. As to the word "business" I cannot construe it as includin equivalent to the words "lease of the hotel." The whole length the goes is, that words of gift shall have the same effect with regard to herit they would have with regard to moveables. The evident intention statute was to dispense with any technical word or words formerly nec in our law for the disposition of heritage. It was not intended to di with a distinct expression of the testator's will. He must use words of gi say what it is which he intends to be gifted. If he wishes to bequeath his heritable property he has only to say so; or if he wishes to bequeath a it, he has only to say distinctly what part. It may be very probabl this man thought he had given his widow the lease of the hotel. B statute does not go the length of making a mere probability sufficient was never sufficient before. It dispenses with technical words, but it do substitute conjecture for words of a distinct or definite meaning.

Lord Ardmillan.—I have had great difficulty in this case, and it i diffidence that I say I cannot concur with your Lordships in the opinio have pronounced.

I quite admit and refer to the words which I made use of in the previo of Pitcairn. In that case we were of opinion that the word "effects," in i textual position, did not mean heritage. I am still of the opinion whic pressed in that case. What the clause of the statute provides is, that a b shall be effectual as regards lands, if, (1) moveable property would have carried by the words of the writing; and, if, (2) the meaning of the writ plainly to comprehend heritage. If, then, the true meaning of this writing he meant to convey to his wife the house in which he conducted his bu the statute will come in to make the bequest effectual.

We must construe the writing, but in doing so we must read it in the afforded by some circumstances in the case which are of importance. writer had long carried on his business of hotel-keeper in this particular of which he had a long lease: he had no child; his nearest heir was an In these circumstances he executed this first writing, which we must re connection with the subsequent writings on the same paper. When tak that way it comes to mean "in the event of my wife surviving me, I h appoint her my heir and executrix, and bequeath to her the whole of m

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erty in money, in bonds, in debts, in business, and in other effects whatsoever," &c. If that be the meaning of these writings, then you have a conveyance to his wife of his property in his business. And his business was that of an innkeeper conducted in that house. The house was held on lease, and used for his business; and it may naturally and reasonably be viewed as within the meaning of property in business. I go no further than saying that it appears to me to mean an effectual conveyance of the lease of that particular house to his wife. I do not say that was a good conveyance of the other heritable subjects. I consider, however, that by "business" there is meant something beyond money or debts, and something beyond furniture, plate, &c., which may be included in the word "effects"; thinking so, I cannot help coming to the conclusion that he meant to leave her the business, and the goodwill of the business, and the house in which it was carried on. If he meant this, the bequest is sufficient under the recent Act. If it is within the meaning and the scope of the description in the writings, then the power of conveyance is helped out by the provision of the statute. The meaning of this man's writing, reading it fairly and bearing in mind his position, is evidently to bequeath his business, which was his inn, and the goodwill of it, and the lease of the inn, without which the goodwill would be of no use. The statute then comes in and gives effect to the words of the bequest, so as to make them habile to convey heritage.

I agree entirely with your Lordships in holding that it is very undesirable and inexpedient to extend the provisions of this statute too far. It was not meant to enable the Court out of every loose expression to spell out an intention to convey heritage, and give effect to it, as though it were sufficient conveyance, and so defeat the rights of the heir. The meaning must be plain. But I humbly think it plain enough in this case.

LORD JERVISWOODE concurred with the Lord President.

THE Court pronounced the following interlocutor:—"Find and declare, in answer to the first question, that the testamentary writings of the deceased Thomas Edmond are not expressed in terms valid and sufficient, under the 20th section of the 'Titles to Land Consolidation (Scotland Act, 1868,' to operate as a general disposition *mortis causa* of the deceased's heritable estate in favour of the party of the first part; and find and declare, in answer to the second question, that the party of the second part is entitled to succeed to the said Thomas Edmond's heritable estate as his heir-at-law *ab intestato*, and decern."

MAITLAND & LYON, W.S.—J. & R. MACANDREW, W.S.—Agents.

No. 60.

Jan. 31, 1873
Life Association of Scotland v. Foster.

LIFE ASSOCIATION OF SCOTLAND, Pursuers.—*Lord-Adv. Young—Shand—Balfour.*

JANE FOSTER AND OTHERS, Defenders.—*Sol.-Gen. Clark—Asher.*

Insurance—Warrandice—Error—Failing to disclose material facts.—A person signed a proposal for an assurance on her own life, with a declaration that she was "in good health, not being afflicted with any disorder, external or internal;" . . . "and I do hereby agree that this declaration shall be the basis of the contract." In reply to the question put by the medical officer of the assurance company whether she had rupture, her answer was "No." She then made a statement in writing that the answers she had given to the questions were faithful and true." In an action brought by the assurance company for reduction of the policy which had been granted, on the grounds (1) of breach of warranty, and (2) of concealment of material facts, it was proved that at the date when the assurance was effected the assured had a small swelling on the groin, which was a symptom of rupture, but which she did not know to be so, and which she did not consider of importance, and did not disclose. *Held* (1) that the warranty by the assured of the truth of her statements in regard to her

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health was not a warranty that she had no disease, known or unknown, but merely that, so far as within her own knowledge, she had none; and (2) that the failure to disclose the material fact of the swelling on the groin was not a ground for reduction, in respect that she did not know it to be material, and that persons without medical knowledge could not be expected to know that it was so.

Process—Jury Trial—Enumerated Causes.—Motion in the above action by the pursuers for a proof before answer, in lieu of Jury trial, granted, although it was resisted by the defenders.

1st Division.
Lord Gifford.
M.

THIS was an action of reduction of a policy of assurance brought by the Life Association of Scotland against Jane Foster and others, who had acquired right to the policy by an assignation from the late Mrs Foster, the insured. In the month of May 1871 Mrs Foster made to the pursuers a written proposal for an assurance of £300 upon her life. In the proposal it was stated that her age at next birthday was fifty-two years; and to the proposal was appended a declaration in the following terms, signed by Mrs Foster on 19th May 1871:—"I, Mary Waugh or Foster, before designed, do hereby declare that I am at present in good health, not being afflicted with any disorder, external or internal; that the preceding statements are true, and that I have not withheld or concealed any important circumstance. And I" (the party in whose favour the assurance is to be effected) "do hereby agree that this declaration shall be the basis of the contract between me and the Life Association of Scotland, and that if any untrue averment be made therein, or in the anwers to questions by the society's medical officer in reference to this proposal, all sums paid on account of the assurance shall be forfeited, and the assurance be null and void.

Of the same date a number of questions contained in the printed form used by the pursuers were put to Mrs Foster by James Moffat, the medical officer acting on behalf of the pursuers; and her answers to the questions were in her presence written down by him, and afterwards signed by her, along with the declaration after mentioned. The fourth of the questions was as follows:—"Are you now, in your own opinion, in perfect health?" Mrs Foster's answer was, "Yes." The fifth question was "What ailments and medical advice have you had?" and to this Mrs Foster answered—"Never had any ailments except those diseases common to childhood, such as measles, &c., and never had medical attendance except during my confinements." The sixth question put to Mrs Foster was as follows:—"Have you had rheumatism, gout, rupture, fits, asthma, spitting of blood, disease of the chest, or any affection of the kidneys or urinary organs?" and to this question Mrs Foster answered "No." To these statements made by Mrs Foster in presence of the medical officer there was appended the following declaration, signed by Mrs Foster:—"I, the person whose life is proposed for assurance, declare that the above statements are faithful and true; and I undertake that, in the event of my having rupture, either now or at any other future time, I will constantly wear a properly-adjusted rupture truss."

The pursuers alleged (Cond. 6)—"In reliance and on the faith of the said declaration and statements made by Mrs Foster as aforesaid being true the pursuers issued to her a policy, dated 24th May 1871, No. 18,213 A, upon her own life, for the sum of £300, which policy bears to be upon the basis of the said declaration of 19th May 1871, and acknowledges that she has paid (as she did, in fact, pay) the sum of £15, 2s. 6d. as the premium for the assurance for one year from 1st April 1871. By the said policy it was, *inter alia*, expressly stipulated and agreed, 'That if anything averred in the foresaid declaration forming the basis of the assurance, or in the relative statements, be untrue, this policy

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d assurance shall be void, and all moneys paid in respect therof shall forfeited to the Association.'" (Cond. 7) "The pursuers have discovered, and it is the fact, that at and for several months prior to the date the said declaration and answers, and of the said policy, Mrs Foster d inguinal hernia or rupture; farther, at and for months prior to the id dates, a tumour or swelling on the groin had made itself distinctly rceptible. She was fully cognisant at, and for several months prior to, e said dates, of the existence of this tumour or swelling. This tumour swelling was caused by the hernia or rupture under which Mrs Foster boured, and it would at once have indicated to any medical man the prence of the disease; but its existence was not mentioned by Mrs Foster." ond. 8) "The said rupture afterwards became worse, and the medical man ho attended Mrs Foster on 16th November endeavoured to effect duction of the rupture, which was then incarcerated, by the usual eans, but it was found that the rupture could not be entirely reduced. n 18th November the said rupture or hernia was found to be strangutted, and the necessary operation was performed on the same day; but, vertheless, gangrene set in, and Mrs Foster died on 30th November. er death was the direct result of the rupture from which she was suffer-g, as aforesaid, at and prior, as well as subsequent, to 19th May 1871." ond. 9) "The existence of the said rupture was a fact highly material the contract of assurance entered into between the pursuers and Mrs ster. If she had disclosed the existence thereof, or of the tumour or elling whereby the same was manifested, to the pursuers or their edical officer, the pursuers would have had the rupture carefully exnined; and unless it had proved to be reducible, they would not have tered into a contract of assurance upon the life of Mrs Foster at all; d even if the rupture had proved to be reducible, they would not have tered into such contract until it had been reduced and supported by proper truss. Further, even in that case, an additional premium would ve been charged for the risk." (Cond. 11) "Further, in failing to disose the existence of the said tumour or swelling by which the said rupre was manifested, Mrs Foster withheld or concealed an important and terial circumstance affecting the risk undertaken by the said policy."

The defenders denied that Mrs Foster was suffering from rupture at the te of the policy, and stated that she had no knowledge or suspicion that e was suffering from such a complaint until she was suddenly taken ill.

The pursuers pleaded;—(1) The averments made by Mrs Foster, as foresaid, having been untrue, the said policy, and the assurance bearing be thereby effected, has been and is null and void, in terms of the conitions to that effect contained in the said declaration of 19th May 1871, nd in the policy itself. (2) At all events, the said policy is reducible nd ought to be reduced, in respect that in making the said statements Mrs Foster made misrepresentations, and concealed facts highly material to the contract of assurance upon her life.

The Lord Ordinary pronounced this interlocutor:—"Before farther nswer, allows to the parties a proof of their respective averments on record; appoints the said proof to be led before the Lord Ordinary, under The Evidence (Scotland) Act, 1866; and appoints the case to be enrolled that a diet of proof may be fixed, but grants leave to reclaim against this interlocutor." *

* "NOTE.—At one part of the debate the defenders seemed inclined to ask a judgment on relevancy without any proof at all, but ultimately both parties appeared to be satisfied that a judgment on relevancy on the record as it now stands, without any farther admissions, would hardly be satisfactory; and the

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The defenders reclaimed.

After hearing counsel, the Court allowed a proof before answer. It appeared from the proof that the deceased, at the time when she applied

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true question ultimately discussed before the Lord Ordinary was, whether there should be a proof before answer, or a jury trial.

"The Lord Ordinary concurs with the parties in thinking that it would be unsafe to dispose of the case on relevancy on the present record, and without proof. The questions of law, whether the statements in a declaration in a policy must in all cases be absolutely true in every particular, that is, in exact accordance with actual fact, or whether it is enough that they are true to the knowledge and *bona fide* belief of the declarant, also how far the question of materiality is admissible, are extremely delicate, and can only be satisfactorily dealt with when the actual facts are elicited. In all the cases which were referred to the facts were in one shape or other before the Court.

"But then the point arises, in what form is the inquiry to be taken? The pursuers moved for a proof before answer. The defenders keenly resisted this and insisted on their absolute right to have trial by jury.

"The Lord Ordinary cannot accede to the doctrine contended for by the pursuers, that in every case the mode of proof is a mere question of discretion for the Lord Ordinary or the Court, unfettered by any rule whatever. The Act of 1868 (31 and 32 Vict. 100), section 27, was founded on as giving the Lord Ordinary in every case power, when he thinks that there should be no trial by jury, to dispense with issues, and 'determine the manner in which the proof is to be taken.' But besides that this section is modified under powers of the Act by the Act of Sederunt of 1870, it has been expressly decided that the words in question do not give the Lord Ordinary any absolute discretionary power to fix the mode of proof. Thus in the recent case of Nicol v. Britten, 15th January 1872, 10 Macph. 351, it was held that in an enumerated cause, even when both parties consented, it was absolutely incompetent to allow proof by commission.

"It rather appears to the Lord Ordinary that the clause in the Judicature Act of 1825, being section 28, enumerating the causes appropriate to the Jury Court is still unrepealed, and that the only modification of the rule prescribed by the Judicature Act is contained in the 4th section of the Act of 1866 (29 and 30 Vict. 112), which provides that, 'If both parties consent thereto, or if special cause be shewn, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section 1st hereof (that is, before the Lord Ordinary) in any cause which may be in dependence before him, notwithstanding of the provisions contained in the Act passed in the sixth year of the reign of George IV. cap. 120, section 28.'

"If this be so, as there is no consent in the present case, the only question is whether there be 'special cause shewn' why the case should not be tried by jury, for the present action seems to be an enumerated cause, though it is brought by the insurance company, and not by the holder of the policy.

"The Lord Ordinary at first thought that there was no sufficient special cause shewn for depriving the policy-holder of his right to demand a jury trial, for in all such cases there is a risk of delicate questions of law arising; and to hold that this risk is sufficient to substitute a proof before answer for a jury trial would be to do away with jury trial in such causes altogether.

"On farther consideration, however, the Lord Ordinary has come to think, though with great difficulty, and with much hesitation, that the specialties in the present case do constitute 'special cause' for a proof before answer.

"There is no averment of fraud or wilful misrepresentation on the part of the late Mrs Foster, and although 'concealment' of material facts is alleged, it is not maintained that there was anything but the most perfect *bona fides* on the part of the insurer. Although parties are at issue on many material facts—for example, the very existence of rupture at the date of the policy is denied—still it is plain that the true ultimate question will not be so much a question

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e the insurance, and for a year prior to her death, had a small swelling out the size of a walnut on the groin, which did not cause pain or interre with her health, and that she was ignorant of the fact that such relling was a symptom of rupture. It further appeared that the rupre must have subsisted for some months prior to death, and that it ight not have caused any pain, or made its existence known to the ceased.

The pursuers argued;—The only thing which the insurance office oked to was the truth or untruth of the statement. It was of no portance that the insured believed that she was free from disease. rue" meant true in point of fact. The word "faithful" meant at an honest answer had been given to the spirit of the question. the statement had been wilfully untrue, the policy would have been ducible at common law. The contract made in the declaration meant mething more. It meant that the insurance company were conacting with a person who had not rupture. If they had dealt with r on the footing that she might have rupture, the terms would have en different. There was a mutual mistake, and the contract was therere reducible. There was no allegation of fraudulent concealment, but ly that there were here signs which would have indicated to a person ordinary intelligence that there was something wrong, and which ght to have been disclosed. People have no right to state facts not thin their knowledge, and make them the basis of a contract. The swers given here were the basis on which the premiums were calculated. If any of the answers were untrue the policy is void. The sured gave a warranty of the truth of the statements. At common w, a person who applies for an insurance on his life is bound to disse everything which he knows to be material to the risk.[1]

The defenders argued;—The words of the declaration, being proposed the insurance company, must be construed strictly against the company. e declaration by the assured, that the statements were "faithful and e" meant no more than that so far as she knew they were true. "Faithl" meant that the insured acted in good faith. "True" meant true in knowledge of the declarant, who could only speak of her own belief. it were taken to mean absolutely true, the assured would have to state re than she had any means of knowing. The question appealed to the

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t as a question of law regarding the true import and construction of the licy and relative writs. Now, when this appears certainly the case, the Lord dinary thinks that he is not absolutely bound to raise the question by way of ls of exception or motions for a new trial, but that the certainty of such being e nature of the ultimate question forms a 'special cause' warranting a proof fore answer.

"The Lord Ordinary does not disguise his own opinion that such questions more satisfactorily determined on a proof before answer than after a jury al. But he is conscious that his very leaning against jury trial in such cases ay lead him unduly to stretch the provisions in the Act of 1866. As the matter of some importance, and as it is desirable that, as far as possible, some rule guiding principle should be laid down, the Lord Ordinary has granted leave reclaim."

[1] Duckett v. Williams, 1834, 2 Crompton and Meeson, 348; Anderson v. tzgerald, June 1853, 4 H. L. Ca., 484, Lord Brougham's opinion, 505; Fowkes Manchester and London Life Insurance Company, 1863, 32 L. J. (Q. B.) 3; Cazenove v. British Equitable Assurance Company, 1859, 28 L. J. (C. P.) 9; Bunyon on Life Insurance, p. 31; Dalgleish v. Jarvie, 2 Macnaghten d Gordon, 243; Lindenau v. Desburgh, Nov. 12, 1828, 8 Barnewell and esswell, 586; Arnold on Marine Assurance (4th ed.), vol. i. p. 509-12.

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knowledge of the person to say what she has suffered from. There was no guarantee of the truth of the statement. The whole responsibility was taken off the insured by the examination of the medical officer, who had no right to assume a knowledge of symptoms on the part of Mrs Foster, but ought to have satisfied himself by a personal examination.[1]

At advising,—

LORD PRESIDENT.—In the month of May 1871 the now deceased Mrs Mary Foster made to the pursuers a proposal for an insurance of £300 on her own life, which was accepted, and a policy of insurance was completed accordingly. On the 30th of November following the insured died of inguinal hernia or rupture.

The pursuers in this action contend that the policy is void and the premiums forfeited, because the insured had rupture at the time of effecting the insurance, and because in the declaration and relative papers which form the contract between the parties she warranted that she had not then and never had rupture.

A second ground of action on which the pursuers seek to have the policy declared void is, that the insured concealed or failed to disclose a fact material to the risk.

The evidence shews that Mrs Foster had at the date of the policy and of the proposal a swelling in her groin, of no great size, which to a medical man would or might have indicated the existence of rupture, but that it gave her no pain or uneasiness of any kind, and she attached no importance to it whatever, and never thought of it as a circumstance requiring her to resort to medical advice till the month of November, when in consequence of some unusual exertion the swelling increased suddenly in size, and was found on examination to be of a serious character, and ultimately proved fatal. It is also established by the medical evidence that a rupture in the incipient and undeveloped condition in which this was at the date of the insurance very generally escapes the observation of the person affected, and raises no suspicion in the mind of any one not possessed of medical skill that it indicates anything more serious than the temporary swelling of a gland. Indeed it has been the condition of the argument throughout that Mrs Foster had no knowledge or suspicion that she was affected by any malady, and believed herself to be in perfect health.

The first question, therefore, for the decision of the Court is, whether it was a condition of the contract between the parties that Mrs Foster warranted herself free from rupture.

We have heard a great deal of argument on the authorities and on the principles of law applicable to such questions, which, however, are very well known and ascertained both in Scotland and England. The only real difficulty regards the construction of this particular contract, and the question is, whether by the terms of the contract there was a warranty that the insured was free from rupture or whether her assertion on the subject amounts to no more than an assurance that, so far as she knew or had any reason to believe, she was not affected by that disease.

In the policy there is a proviso "that if anything averred in the declaration forming the basis of the assurance or in the relative documents be untrue the policy and assurance shall be void," &c.

The declaration thus referred to is appended to the proposal, and in it the insured declares "that I am at present in good health, not being afflicted with any disorder, external or internal; that the preceding statements are true, and that I have not withheld or concealed any important circumstance;" and she agrees that the declaration so made shall be the basis of the contract, and that "if any untrue averment be made therein, or in the answers to questions by the

[1] Hutcheson v. National Loan Assurance Company, Feb. 21, 1845, 7 D. 46; M'Laws v. United Kingdom Temperance and General Provident Institution, Feb. 16, 1861, 23 D. 559; Forbes and Co. v. Edinburgh Life Assurance Company, March 9, 1832, 10 S. 451.

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ty's medical officer in reference to the proposal," the policy shall be &c.

is not alleged by the pursuers that there is any untrue averment in the s of the declaration itself. They admit that Mrs Foster was within the neaning of the words "in good health," and not "afflicted with any disorder, nal or external." Neither could it be maintained that there is any untruth e answers to the questions in the proposal, called in the declaration "the ding statements." But the untruth is said to be contained in one of the ers to the questions put to the insured by the society's medical officer. It nes necessary, therefore, to examine carefully not only the particular answer l on by the pursuers, but the whole paper in which it occurs, and the nature at document, and its relation to the other documents forming the contract surance.

e paper in which these questions are contained is sent by the insurance any to their medical officer, and contains, first, the questions to be put to nsured, printed, with spaces for the answers to be inserted in writing. Then rs a declaration to be signed by the insured in the following terms:—"I, erson whose life is proposed for insurance, declare that the above statements ithful and true, and I undertake that in the event of my having rupture, r now or at any other future time, I will constantly wear a properly adjusted re truss." The next part of the paper consists of questions to be answered e medical officer, and among these occur the following:—"6. Describe ondition of the several cavities and their viscera. If anything be abnormal, ver slightly, state the particulars." "If there be rupture, describe its nature osition, and state whether he wears a sufficient truss." "Is he in every respect perfectly free from disease?" Lastly, there is appended the opinion e medical officer and his certificate that the questions addressed to him have "faithfully answered to the best of my knowledge and judgment."

e first, second, third, and tenth of the questions put by the medical officer e insured relate to matters of fact necessarily within the knowledge of the ed, and an untrue answer to any of these would amount to wilful falsehood. eventh, eighth, and ninth questions demand particulars of the history and h of the parents, brothers, and sisters, and other relations of the insured, of which may, and probably will be, within the personal knowledge of the ed, but others can be known to him only by hearsay or surmise. Some of questions accordingly are answered by Mrs Foster with qualifications, "not r knowledge," "as far as I recollect," "not exactly known to me." The ining three questions are concerned entirely with the health of the insured lf, and must be taken and construed together. These questions, with the ers given by Mrs Foster, stand as follows:—"4. Are you now, *in your own on*, in perfect health?" "Yes." "5. What ailments and medical advice you had?" "Never had any ailments, except those diseases common to hood, such as measles, &c., and never had medical attendance except during onfinements." "6. Have you had rheumatism, gout, rupture, fits, asthma, ng of blood, disease of the chest, or of the brain, or liver, or any affection e kidneys or urinary organs?" "No."

is on the last negative answer,—taken in connection with the declaration ded to the proposal, which provides that "if any untrue averment be therein or in the answers to the questions by the society's medical officer" olicy shall be void,—that the pursuers rely as a warranty that Mrs Foster ree from rupture.

e question turns very much on the construction to be given to the word rue" in the declaration, and it is beyond dispute that the primary and signification of the word is "contrary to fact," and not "knowingly false." equally clear, however, that the word is susceptible of the latter meaning, t must always depend on the context and the nature of the contract which s two was the meaning intended by the contracting parties.

questions of this description a distinction must be observed between in- ce effected by a person on his own life and insurance effected by a person e life of another. Examples of the latter occur in the cases of Sir Wm.

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Forbes and Co. v. The Edinburgh Life Assurance Company, 10 S. 4
Duckett v. Williams, 2 Cr. and M. 348. In such cases it is held, on
principles of equity, that where one states as a matter of fact that whi
within his own knowledge, with a view to induce another to enter in
tract, he does so at his own peril. He is under no obligation or neces
so; and if he does not possess positive evidence of the fact, he shoul
his statement as being to the best of his belief. But if he states it
qualification he is justly held to warrant the statement as consistent
On the other hand, a person making a statement regarding his own he
be assumed generally to be speaking according to his own personal k
and there are many facts regarding his health of which he cannot be ig
misstatement of which would of course be fraudulent. But there may
other facts, materially affecting his state of health and prospect of lon
which a person without medical skill or medical advice can know noth
doubt a contract of insurance may be so expressed as to make freedom
tain specified diseases, however latent, matter of warranty, but the con
not so readily bear that construction in the case of a person insuring
life, and making statements as to his own health, as in the case of
makes such statements respecting the health of another for the p
obtaining a policy of insurance upon the life of that other person. T
has no personal knowledge of that of which he is speaking, and therefc
from information and evidence in his possession, not accessible to
party, on which of course the other party relies implicitly when he
qualifiedly what is its result and import. The former has much perso
ledge, and may be fairly presumed to speak from that personal knowle

In connection with this distinction it is further to be kept in mind
obligations fall to be construed strictly *contra proferentem*. This rule, fc
plain justice, is quite settled in practice. Insurance companies have th
of their contracts in their own hands. They may make such conditio
please, but they are bound so to express them as to leave no room for a
They must be construed, as Chief-Justice Cockburn said in Fowk
Manchester, &c. Assurance Association (32 L. J., Q. B. 153), "in the
which the agreement would be understood by a layman who was abou
upon an insurance transaction."

Keeping in view, then, that Mrs Foster was asked to make, and w
request of the pursuers, making a statement regarding her own health,
if her answer was to be of the nature of a warranty the pursuers were
make this plain to her,—could she be expected to understand that
answered the sixth question of the medical officer in the negative, a
her name to a declaration that her answers to all the questions were
and true," she was giving a warranty to the pursuers that there were not
any symptoms, however latent and unobservable, of any one of the fift
diseases embraced in that very comprehensive question?

Of the three questions regarding her personal health, the first make
appeal to her own knowledge and feelings, "Are you, in your own o
perfect health?" The second, in like manner, obviously is an appe
personal knowledge; and when the third and very comprehensive q
put, it would be most natural that she should suppose she was again
to answer merely according to her own experience and belief. This co
receives much aid from the manner in which the question was actual
the medical officer. He states in his evidence that he read over the s
tion to Mrs Foster as one question, and took her one general answer
the whole question, that he did not explain to her the nature of a
diseases comprehended in the question, and did not ask her separatel
she had rupture or any other of the diseases.

It appears to me that if the pursuers desire to have a warranty of t
of all the diseases comprehended in the sixth question this should
matter of very distinct provision in the contract, and not be left to b
of an answer to a question, which the insured may very fairly suppo
tended only to elicit facts and information within the knowledge of t

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it is addressed. The insured is almost inevitably thrown off his guard
ıms in which the preceding fourth question is put, and by the subject-
ı well as the terms of many of the other questions in the same paper,
ı he is asked to attest that the answers he has given are "faithful and
w can he suppose that this means anything more than that they are
given, and true according to his knowledge and belief? It would
:er into the mind of a person of mere ordinary intelligence, being neither
l man nor a lawyer, nor a director of an insurance company, that he was
warrant that his father died at the age of sixty, and not at fifty-nine or
, or that his mother, as in this case, died of old age at ninety-nine, and
fracture of the skull at ninety-eight. And yet it is very difficult to see
portion of the answers to this catechism (where there are no qualifying
ther in the question or in the answer) is to import a warranty and
is not. The very fact that Mrs Foster was allowed to give qualified
to some of the questions was also calculated to mislead her as to the
d effect of the others.

l, it seems hardly probable that these answers were intended by the
themselves to import a warranty. They instruct their medical officer
specially as to the condition of the several cavities and their viscera,
e makes such an examination as is necessary to enable him so to report
ot fail to discover all the symptoms which by possibility could become
› the insured, and probably a great many more. It is of no importance
Moffat in this case confined his examination to the thorax and neglected
ne the abdomen and the pelvis, and in consequence did not discover
ing which would or might have indicated to him incipient hernia. But
ıportance to see that the insurance association are anxious to use every
detect the presence of any of those serious diseases, against which, at
time, they say they have got a warranty.

ıstruing the word "untrue" in the declaration it is further to be ob-
at, unless it imports a warranty of the facts stated in the answers to the
of the medical officer, it does not import a warranty at all, because
ıer statement that the insured is called upon to make regards facts
ır own knowledge. But even in the answers to the medical officer's
the great majority of them either regard matters within her personal
ge, or are expressly appeals to her own opinion and belief, or are allowed
wered with such qualifications as "not to my knowledge;" so that so far
supposed warranty standing out prominently, as it ought to do, on the
e contract, it is hidden away in a mere corner of the transaction in such a
ot only not to challenge observation, but most probably to escape notice.
ese reasons I cannot consent to enforce a warranty which, though it may
ı the literal meaning of the words, is yet so expressed as not fitted to
› the mind of any person of ordinary intelligence contracting with the
: association the information that he is, by subscribing the contract,
ıimself in such a warranty.

cond ground of action, viz., that the insured concealed, or failed to dis-
ıct material to the risk, rests on the same allegation as breach of war-
The only fact concealed or undisclosed was the existence of the swelling
oin.

ılment or non-disclosure of material facts by a person entering into a
is, generally speaking, either fraudulent or innocent, and in the case of
ıtracts where parties are dealing at arm's-length, that which is not
ıt is innocent. But contracts of insurance are in this, among other par-
exceptional, that they require on both sides *uberrima fides*. Hence,
ıny fraudulent intent, and even *in bona fide*, the insured may fail in the
disclosure. His duty is carefully and diligently to review all the facts
› himself bearing on the risk proposed to the insurers, and to state every
ıce which any reasonable man might suppose could in any way influence
ers in considering and deciding whether they will enter into the con-
ıy negligence or want of fair consideration for the interests of the
ın the part of the insured leading to the non-disclosure of material facts,

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though there be no dishonesty, may therefore constitute a failure in the duty of disclosure which will lead to the voidance of the contract. The fact undisclosed may not have appeared to the insured at the time to be material, and yet if it turn out to be material, and in the opinion of a jury was a fact that a reasonable and cautious man proposing insurance would think material and proper to be disclosed, its non-disclosure will constitute such negligence on the part of the insured as to void the contract.

The only question therefore is, whether the existence of the swelling in Mrs Foster's groin was such a fact, and that question in the present case we are to decide as jurymen. My opinion is, upon a consideration of the whole circumstances as disclosed in the evidence, that the swelling which is proved to have existed at the date of the contract of insurance has not been shewn to be such a fact as a reasonable and cautious person, unskilled in medical science, and with no special knowledge of the law and practice of insurance, would believe to be of any materiality or in any way calculated to influence the insurers in considering and deciding on the risk.

The result of my opinion is, that the defenders ought to be assoilzied from the conclusions of the summons.

Lord Deas.—In this case the pursuers, the Life Association of Scotland, seek to reduce a policy of assurance on the life of the late Mrs Foster, on two grounds, which I shall take leave to consider in the reverse order in which they were argued at the bar,—1st, Negligence; 2d, Breach of warranty.

The alleged negligence on the part of Mrs Foster consists in her not having disclosed that she had a swelling on the groin, which, if mentioned to and examined by a medical man, would have enabled him to know that she had rupture, although she herself did not suspect anything of the kind.

The alleged breach of warranty rests upon the fact that she had rupture at the date of the assurance contract, whereas, to the question whether she had had rupture or various other specified diseases, her answer was "No."

Considering that for the last ten or twelve years life assurance policies are understood to be effected, in this United Kingdom, to the estimated amount of from twenty to thirty millions of money in each year, it would be difficult to over-estimate the interest and importance attaching to a case like the present, in which the truthfulness and good faith of the party insured are altogether undoubted. The circumstances are these:—

Mrs Foster was the widow of an innkeeper and farmer near Gatehouse of Fleet. After her husband's death she continued to carry on a considerable dairy farm for the benefit of herself and her children. It is reasonable to suppose, therefore, that her life was of some value to her family, the youngest being only seven years of age. On the 19th May 1871—being then in her fifty-second year—Mrs Foster made a proposal to the pursuers, through their local agent, for an assurance on her life to the amount of £300. It is stated in the record that the assurance was applied for on the urgent solicitation of the local agent, who was well acquainted with her. Whether this was so or not has not been ascertained, but supposing it to have been so, the agent did nothing more than the duty which all assurance companies inculcate upon their agents to procure them all the business they can—and, in this case, the agent is supported by the opinion of the pursuers' local medical officer, who certified that Mrs Foster's life was "a very eligible life for assurance."

The pursuers' printed form of proposal for assurance, supplied to Mrs Foster, contained a variety of questions with blanks for the answers, in the usual way, all of which questions, it is not disputed, Mrs Foster answered quite correctly. None of these questions related to her health, past or present. The questions upon that subject were all contained in a separate schedule, furnished by the pursuers to their local medical officer, to be read by him to the applicant, and the answers taken down and signed in his presence,—a printed direction to him being prefixed that "no third person should be present." I cannot say that this appears to me to be so satisfactory a mode of interrogation as the embodiment of these questions in the proposal itself, which the party has an opportunity

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considering deliberately, and of being reminded by others of circumstances ich might have been forgotten, and of being advised as to what might otherwise re been misunderstood. Be this as it may, however, the answers to the medical icer were prospectively made part of the contract by the declaration appended the proposal, which bore that "I am at present in good health, not being licted with any disorder, external or internal; that the preceding statements true; and that I have not withheld or concealed any important circumstance. nd I do hereby agree that this declaration shall be the basis of the contract tween me and the Life Association of Scotland; and that if any untrue aver-nt be made therein, or in the answer to questions by the society's medical icer in reference to this proposal, all sums paid on account of the assurance all be forfeited, and the assurance shall be null and void."

The society's medical officer, Dr Moffat, explains in his evidence that he read er to Mrs Foster the questions in the printed schedule thus referred to, *riatim*, in their order, and himself wrote down her answers, after which he used her to read them over, and then she signed the declaration at the bottom ereof, which was in these terms:—"I, the person whose life is proposed for surance, declare that the above statements are faithful and true, and I under-ke that, in the event of my having rupture, either now or at any other future me, I will continually wear a properly adjusted rupture truss."

The questions and answers with which we are more immediately concerned ntained in this schedule are the 4th, 5th, and 6th, which are in these terms: Quest. 4th) "Are you now, in your own opinion, in perfect health?"—(Ans.) Yes." Upon the answer to this question, I may observe, in passing, that its ntire accuracy is not impugned. (Quest. 5th) "What ailments and medical rvice have you had, trivial or otherwise? Names of medical advisers?" Ans.) "Never had any ailments, except the diseases common to childhood, such measles, &c., and never had medical attendance except during my confine-ents." Upon this answer I may observe that its accuracy likewise is not im-gned, unless indeed the swelling to be afterwards adverted to can be called a "ailment." There is a *notandum* upon this query to the effect that "the mes of medical attendants at confinements should be stated;" but the medical ficer either did not ask these names, or did not take them down. (Quest. 6th) Have you had rheumatism, gout, rupture, fits, asthma, spitting of blood, sease of the chest, or of the brain or liver, or any affection of the kidneys or inary organs?"—(Ans.) "No." It is upon the answer to this 6th question, upled with the terms of the declarations already quoted, and of the declara-ion in the policy itself, that the present action to reduce the policy is founded. he declaration in the policy bears,—"It is also expressly provided that if any-hing averred in the foresaid declaration, forming the basis of the assurance, or n the relative statements, be untrue, this policy and assurance shall be void, nd all moneys paid in respect thereof shall be forfeited to the association."

The medical officer admits, what, indeed, the form of query 6th and the nswer as taken down would presume, that he read over that query to Mrs Foster, and took her answer to it, in the negative, as one general query, although t embraces, in its terms, eleven different kinds of disease, and contains general words which may comprehend many additional diseases. He depones,—"I did not ask her as to rupture or any of the other diseases mentioned in it separately." This, certainly, was a very loose mode of interrogating the applicant on matters of such importance, but that may not be of much moment in the present case, because it is clear enough that if he had asked her, separately and expressly, "Have you had rupture?" she would have answered "No"—that being the only answer she could possibly have given without stating what she must have considered a wilful falsehood. Dr Moffat admits, in his evidence, that he did not explain to her the nature and symptoms either of rupture or of any of the other diseases specified in query 6th above quoted, and, on his attention being alled to that part of his printed instructions from the company which directed him to "institute an examination, by auscultation or otherwise," of the appli-ant's body, and to "describe the condition of the several cavities and their iscera," and if there was anything abnormal, however slight, to state the par-

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ticulars, he depones that he examined "the cavity of the thorax only." And, being reminded that he had stated that Mrs Foster might have rupture without knowing it, and asked why he did not examine to see whether she had, his answer is,—"because she stated that she had no rupture, and I did not suppose that an insurance company would expect me to expose a woman in order to ascertain such a thing." Now, this might have been all very well if Mrs Foster had been asked whether she had any swelling on her person, and had answered that she had none. I observe, from the report of the case of Cazenove, that one of the printed questions in the list prescribed by the British Equitable Company was 5. "Whether had tumour or swelling of any kind? State its nature and position." But there was no such question either prescribed to be put, or actually put, in this case, and I can find no general question even which could be naturally supposed to comprehend it.

The written answer which Dr Moffat returned to the company, in compliance with the direction already quoted, to "describe the condition of the several cavities and their viscera," was "normal." To another direction, "if there be rupture, describe its nature and position, and state whether he (or she) wears sufficient truss," he returned no answer. To the question, "is she in every other respect perfectly free from disease?" his answer was "free." To the direction to "describe her present state, as regards positive healthiness and vigour: Is it above—only equal to—or below the average?" his answer was "Above the average." He had previously stated, in his report, that he had known Mrs Foster for about twelve months. And his opinion at the close, which I have already alluded to, bore that, "after careful consideration of the family and personal history, and other circumstances, I am of opinion that she is a very eligible life for assurance." His report bears the same date with the proposal, viz., 19th May 1871; and on the 24th of the same month the proposal was accepted and the policy signed in Edinburgh by the directors.

Up to this time it is clear, as indicated, to some extent, by the medical report, that Mrs Foster had enjoyed unusually good health. She had never required medical aid except upon the occasion of her childbed confinements, the last of which had occurred seven years previously. She had, consequently, no medical adviser whose name she was required to state in the proposal, and any evidence we have otherwise is to the effect that she was a very active healthy person.

On 15th November, however, of the same year in which the assurance had been effected—being about six months after the date of the proposal—she was seized with violent sickness and vomiting, and Dr Cox was called in, and found her, to use his own words, "suffering from gastric derangement, and treated her for that." It appears from her son's evidence that Mrs Foster took an active charge of the dairy, consisting of the produce of some fifty cows or thereby, that her daughter Jane, who usually assisted her, had been absent in London for about two months, and that the dairymaid had left suddenly about eight or ten days before Mrs Foster was taken ill, whereby her duties had been increased—that she had been working among a number of cheeses in the dairy shortly before she was taken ill, and that, in particular, she had succeeded, the very day before, in the difficult task of taking out of the cheese-press a heavy cheese which others about her had tried to take out and failed. The question was not put to any of the medical men, but I presume there can be no doubt that over-exertion may cause sickness and vomiting; and Dr Cox appears to assume in his evidence that it was not the rupture which brought on the sickness and vomiting, for he says that on the 15th and 16th he continued to treat her for a bilious attack, and considered her suffering from nothing else, and that what first indicated to him strangulation of the bowel was stercoraceous vomiting, which did not occur till the night of the 17th. He farther says that the violent vomiting was quite sufficient to cause the strangulation, and coupling this with the fact that the swelling had not increased from the time Mrs Foster had first observed it till between the night of the 15th and the morning of the 16th, when it doubled in size, the inference seems to be that the direct cause of the strangulation was, not the over-exertion, but the sickness and vomiting, although, except for accuracy, it may not be material to distinguish between the

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se cause and the other. Dr Cox having discovered on the 16th, by questions Mrs Foster, and examination of her person, that rupture existed, and on the ght of the 17th that strangulation had occurred, he called in Dr Shand and r Dickson on the 18th, when, the rupture being found not reducible, an operaon was performed, the propriety and skilfulness of which there is no reason to ubt, but, gangrene having supervened, she died on the 30th, her death being ns fairly attributable to the rupture.

In these circumstances the pursuers in their record and pleas seek to reduce e policy, on two grounds, which, as I have already said, I shall take leave to nsider in the reverse order from that in which they were argued, because I ink it contributes to clearness to ascertain, first, whether any negligence or lame can be attributed to Mrs Foster sufficient to void the policy, with or without forfeiture of the premiums, and then to inquire whether, although there may ve been no such blame, there was nevertheless a warranty that in point of ct she had no rupture—it being undoubted that if there was such a warranty he consequences of a breach of it have been incurred. The word warranty is ot indigenous in our practice, but it is the shortest and most convenient exression for the thing signified, and I adopt it accordingly.

The pursuers state, in article 7th of their condescendence, what may be taken o be substantially correct, that for months prior to the proposal of assurance rs Foster was aware that she had a swelling on the groin of the size of a walut, which, if it had been mentioned to a medical man, would have indicated o him that she had rupture, but the existence of which swelling was not mentioned by her. In article 11th of their condescendence the pursuers say,—"In iling to disclose the existence of the said tumour or swelling, by which the id tumour was manifested, Mrs Foster withheld or concealed an important and terial circumstance affecting the risk." And their second plea in law bears at the policy is reducible "in respect that she made misrepresentations, and ncealed facts highly material to the contract of assurance upon her life." This ea (as contradistinguished from their first plea, to be afterwards noticed), though expressed in the plural, can only be held, I presume, to refer to the ngle fact of her not having mentioned the swelling in question.

It must be remembered, with reference to this point, that not only was the estion not specially put to Mrs Foster, either in writing or verbally, whether e had any swelling on the groin, or any swelling at all, but, as I have already served, even the general question,—not unusual in printed forms of proposals med by assurance companies, whether the applicant is aware of any circumance not specifically mentioned, which he or she thinks it right or proper to mmunicate to the assurance company,—is altogether absent from the papers this case.

It is sufficiently clear upon the proof that at the date of the assurance Mrs ster did not know or suspect that the swelling on the groin indicated rupture; d in place of this ignorance on her part being inexcusable, or even remarkable, is abundantly proved that nothing is more common than such ignorance mong non-medical persons of intelligence and more liberal education than Mrs ster is likely to have had. If the swelling had not indicated rupture it is ot suggested, either in the record or by the medical witnesses, that it could ave indicated anything else of a serious nature, or to which Mrs Foster could asonably have supposed the pursuers would have attached importance, and which e might consequently have had a motive to conceal. The medical men say he swelling might have indicated a swollen gland, or what is vulgarly called 'a waxen kernel;" and they do not say that if they had examined the swelling nd pronounced it not to indicate rupture they would have attached importance o it on any other ground.

It is plain, I think, that even up to the time when Dr Cox became her medial attendant, Mrs Foster attached no importance to the swelling upon any round whatever. It had been stationary for nearly a year, and had never used her the slightest pain or inconvenience. The fact of its having doubled s size in the course of one restless night, coupled with Dr Cox's expressed esire to know how she had spent that night, and all other particulars, led her,

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for the first time, to think its existence worth mentioning, and then it apparent surprise that she heard from Dr Cox its nature and import aver, as is done in the record, that Mrs Foster "withheld or conceal the pursuers "an important and material circumstance affecting the risk to me to be to use words of no relevancy to the objection I am now unless their meaning be, either that she purposely withheld or conc circumstance, which is contrary to the import of the evidence, or that to disclose the existence of the swelling was so inexcusable as to be to intentional concealment, which is, I think, equally contrary to the the evidence. To plead (as in plea 2d) that the policy is reducible " that she made misrepresentations" on the subject, is to state a ple neither on averment nor fact.

Assuming now, however, that neither blame nor negligence affe validity of the policy can be attributed to Mrs Foster, the importan remains, whether there was a warranty that, in point of fact, she ha ture.

That there may be such a warranty in a contract of life assurance doubt. And if there was such a warranty here I could just as little the policy on Mrs Foster's life is void.

The all-important question, therefore, comes to be, whether the con to be construed as importing the alleged warranty. And that questi will be found to resolve substantially into another—in what sense is "untrue" used in the declarations which formed the basis of the cont reference to the answers returned to the society's medical officer. Th this view, can only be solved by a careful consideration of the conte whole documents.

The contract of life assurance is a contract of good faith on both si assurers may stipulate for any warranty they please, and if the assur takes that warranty, although it may be of something not within h knowledge, he or she must abide the consequences. But when the intend that there is to be a warranty of that sort they must make it that such is their intention. They must use unequivocal language, su sons of ordinary intelligence may, without difficulty, understand. paration of the printed documents is in their hands; and, by the form documents, the answers and undertakings of the assured are necessa moulded as to make it equitable to construe what is doubtful unfavo the assurers. It is not to be presumed that, in a contract of life as party undertakes to warrant a fact which, at the time, he neither know the means of knowing, and ambiguous words are not readily to be con that sense.

Now, the word "untrue," upon which the case really turns, may be more senses than one. Sometimes it means untrue in point of fact, and times it means untrue in the knowledge of the party. This last appe to be the more natural meaning of the two, where the party is required of his or her own ailments, diseases, and health; particularly when t "untrue" and "true" are used along with other words or phrases, as they are here, indicating that the object was really to get a faithful a what the party knew about herself.

There are two declarations of date 19th May 1871—the one append proposal, and the other appended to the answers, made to the society's officer, both of which I have already quoted at length, and which I s analyse. The first begins thus,—"I do hereby declare that I am at p good health, not being afflicted with any disorder, external or internal appears to me to be the language of a party speaking, to her own know what she could not fail to know absolutely, and as to which it is not that her answer was absolutely true. She was in good health, and not with anything in the natural and most obvious sense of the word "affli

The next words, "that the preceding statements are true," refer to the st in the proposal, some of which were within her personal knowledge and s but all of which are admitted or assumed by the pursuers to be absolutely

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contended both by Mr Balfour and by Mr (now Lord) Shand, on behalf of pursuers, that if the answers to question 5th either as to the precise age, or cause of death of the applicant's father or mother, had not been precisely ct in point of fact—for instance if the mother had died at the age of ninety inety-eight in place of ninety-nine—or had died of something else than old —that would have voided the policy; and they both admitted that such was legitimate and necessary result of their argument on the matter of warranty. t certainly seems to me a startling result. The Lord Advocate, for the pur-s, refused to say whether he took that view or not, and I am not disposed old the pursuers committed to it. But the alternative must be, that the arations cannot be read as making every answer a warranty, but that you t look at the matter of the question and answer, as well as the whole con-t, to see whether there is a warranty of the particular answer or not.

he declaration I am now examining goes on, "and that I have not withheld oncealed any important circumstance." I have already had occasion to rve, in dealing with the plea of negligence, that this also is language expres-of the knowledge of the applicant, and, when the declaration goes on farther ay, "that this declaration shall be the basis of the contract," "and that if untrue averment be made therein, or in the answers to the questions by the ety's medical officer," the premiums should be forfeited and the policy void, ink the fair construction of the whole is that the declaration refers generally hat may turn out to have been untrue, to the knowledge of the applicant.

he language of the declaration, appended to the answers to the society's lical officer, "that the above statements are faithful and true," favours the e construction. The impression which such words naturally convey is, that applicant has faithfully stated, to the best of her knowledge, the truth of ry thing in reference to which her personal knowledge was appealed to.

he declaration embodied in the policy is just a repetition of the declarations 19th May, and therefore requires no special notice.

o come now to the questions as to health. These are all in the list of ques-s to be put by the society's medical officer, and Nos. 4, 5, and 6 must be en together, in order to see whether No. 6 is to be read as intended to elicit applicant's knowledge of her own state of body, or a warranty of something within her knowledge.

have quoted these questions already in the first part of my opinion, and it is icient here to remark upon them that No. 4, in the clearest possible manner, s nothing but a faithful opinion; No. 5 just as clearly requires an answer ording to the knowledge of the party, "what ailments and medical advice re you had?" and No. 6, in the natural sequence, particularises the more ious ailments which were inquired about, by bringing them, by name, under notice. It could hardly, I think, be expected to occur to any one, answer-; these three questions in succession, that No. 6 was intended to be answered a different footing from Nos. 4 and 5, unless something had been added to licate that such was the case.

The whole questions as to ailments, diseases, and health are thus framed in language of parties asking for faithful and honest information from the appli-nt, as to what he or she knew of himself or herself, rather than of parties quiring a warranty of matters of fact; and, taking the phraseology of the ques-ns in connection with the phraseology of the declarations, I think the whole re not calculated, so clearly and unequivocally, to convey to the mind of the plicant that he or she was undertaking a warranty of facts, known and un-own, as would be necessary to constitute so onerous an obligation.

The contention is that, if the applicant had any one of the diseases falling ithin the extensive range of the 6th question, however latent and undeveloped at disease might be,—a growing *calculus* in the bladder, for instance, which d never yet occasioned any sensible uneasiness—or if she had disease of the art, or some congenital malformation of that organ which, at the date of the licy, had never manifested itself in any way—never given her the slightest in referable to such a cause—and, consequently, had never been suspected by self, or anybody else, to exist, and only found to have existed by *post mortem*

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examination, the policy was to be void and all the premiums forfeited. know too well, and have been painfully reminded by recent instances, tha affections may exist for long periods unsuspected, and may manifest them only by sudden death or by death occurring within a few days or weeks first symptoms of illness; and, although I do not question the legality assurance companies taking a warranty to protect themselves against such rences, I certainly think there is no hardship in requiring them to make fectly clear to the applicant, by the language of the contract, that such warranty the applicant is required to undertake, more particularly whe assurers insert, as the pursuers here do, all their questions about ailment eases, and health, in the schedule of questions to be put by their medical which the applicant does not see till she comes into his presence, when, in of having the safeguard suggested as necessary by Lord St Leonards in An v. Fitzgerald, of having a lawyer at her elbow, the pursuers' rule is that no person shall be present.

The Lord Advocate said that life assurance tables of premiums are f upon the footing of the policies importing such a warranty as here cont for, so that they could not afford to dispense with that warranty. I had understood that the premiums were fixed with reference to tables shewin average value of human life, taking into account that men are subject ordinary diseases of the country and climate, and that, nevertheless, the bu of life assurance companies was not unprofitable when well conducted, great success of the pursuers' company shews their business to have been this as it may, however, I cannot entertain a doubt that it is one reason an others why many prudent people insure their lives for the benefit of their lies, that there may be undeveloped diseases lurking in their system, o genital peculiarities, unknown and unsuspected, and yet that the result o that they live to pay premiums which, if saved and accumulated, would exceed the amount assured and payable at death. Most people would I think, in effecting a life assurance if informed in plain terms, that he candid their statements, it could not, by possibility, be determined, til were dead and dissected, whether their families would be entitled to an under the policy, or whether, on the contrary, all the money paid for it shape of premiums would be forfeited. Many, I think, would decline alto to enter into the proposed contract, and, if this would be so were such an nation given of its nature, I cannot think that assurance companies, by ping up the matter in generalities, or using language which is not cle unequivocal, ought to be allowed to prevent the applicant from considerin his eyes open, whether he will enter into such a contract or not.

The case of Duckett v. Williams (2 Crompton and Meeson, 348) was th case quoted at the bar in which it can be held to have been *in* decided that the words "not truly stated" meant not true in fact, whate knowledge or belief of the party might have been. That was a case of r ance by one assurance company (The Provident) with another (The whether to the full or only to a partial extent is not stated. An acti brought by the Provident to recover the sum re-insured. The report bea "the defence was that the life was not insurable." The jury returned a that the life was not insurable, and the Court refused to disturb that In a second action for a return of the premiums the jury found that the l insurable. But on a motion to set aside that verdict, the Court, having b ment of parties looked into the evidence, came to the conclusion that, at t when the policy was effected, the person whose life was insured had upo disease which tended to shorten life, and consequently (I infer) that his l not insurable at the ordinary rate of premium.

That was not the case of a party insuring his own life, but a contra insurance which may be entered into on either of two different footings it is necessary to distinguish. The statements of the party whose life is may be made part of the contract, as in the case of Sir William For Company, 9th March 1832 (10 S. and D. 451). Or the one insurance c may accept the risk in reliance solely upon the statements made by th

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last, so far as can be gathered from the report, seems to have been the nature he contract in Duckett v. Williams. The terms of the proposal are not n, but the declaration annexed to it, which is fully quoted, bears that the tees of the Provident thereby declared that John Stephenson, in whose life had an interest to the amount of £5000, was in good health, and had not ured under any of the diseases therein enumerated, "or any other disease ch tends to shorten life"—that this declaration or statement should be the is of the contract between the two companies—"and that if any untrue ment be contained herein, or if the facts required to be set forth in the above posal be not truly stated," all moneys paid should be forfeited, "and the rance itself be absolutely null and void."

he knowledge and belief of John Stephenson as to his own diseases and lth were thus, so far as appears, no part of what the Hope relied upon in acting with the Provident. Whether the disease he laboured under was wn to himself, or whether it was latent and unknown to him, does not ter. The last is not, I think, to be presumed. In such a case, or in any where an applicant, on the strength of his own inquiries, ventures to make ments as to the diseases and health of a third party, with a view to obtain surance on the life of that third party, he would require, I think, to be very ious as to the wording of the contract to avoid the inference that he takes himself the risk that he has accurately ascertained the facts he sets forth he basis of the contract. If the statements of the third party as to his ses and health be made part of the contract, it may be that the applicant l be responsible only that there has been a full and faithful disclosure of all relates thereto. But if the third party be not appealed to in the matter, one ther of the contracting parties is necessarily taking the risk of an imperfect stigation, and a contract expressed as the contract was in Duckett v. Wil- may quite fairly be held to lay that risk upon the company proposing the surance.

or it is material to observe that in that contract there were two things agreed ither of which, apparently, was to infer nullity and forfeiture,—1st, "that y untrue averment be contained herein:" that might naturally enough refer class of averments as to which vigilance and good faith could alone be rea- bly expected. But then there came "or" (2d), "if the facts required to be forth in the above proposal be not truly stated." There are no such words as e in any of the declarations in the present case—no distinction indicated ween untrue averments and facts not truly stated. But it was upon the last- tioned words alone that Lord Lyndhurst commented and proceeded in ivering the judgment of the Court. "The point," his Lordship said, "is ther the facts stated were not truly stated within the meaning of the decla- on and agreement," "and looking at the context, we think it clear that the ties did not mean to restrict the words in the manner contended for."

he fatal fact in that case was that Stephenson, on whose life the assurance affected, had on him, at the time, a disease which tended to shorten life, which rendered his life not insurable,—at least not at the ordinary pre- um. Now, when an applicant for insurance on his own life is asked to wer questions about his own diseases and health, he may naturally conclude, not warned to the contrary, that he does all he is expected to do if he faith- ly makes known to the assurance company all that can possibly be known anybody. But when the same questions are put about the diseases and health another, to an applicant for insurance on the life of that other, the applicant not the same reason for concluding that his personal knowledge is alone ealed to; for personal knowledge he has none, and he cannot tell the com- y undertaking the assurance all that can possibly be known on the subject. is not surprising, therefore, that, in Duckett v. Williams, the Court, looking he context,—that is to say, taking the words in which it was agreed that ain consequences should follow if the facts required to be stated were not ly stated, in connection with the whole terms and nature of the contract,— e to the conclusion that the words "not truly stated" were intended to n, and did mean, in that case, not correctly stated.

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I have gone thus at length into the case of Duckett v. Williams b was the only case commented and relied on by the Lord Advocate in su the warranty contended for in the present case. I have not, howev carefully to consider all the other cases, cited in the previous argu which *dicta* more or less favourable to the pursuers' contention were have fallen from Judges of high authority. It appears to me, howeve estimating the value of these *dicta* regard must always be had to the which they incidentally occurred, and that if *dicta* were to be place *dicta*, those of Lord Mansfield in the case of Sir James Ross in 1780 (stone, 312) would commend themselves as more generally applicable t that can be set against them. His Lordship is there reported to have s while the assured must make a full disclosure of all he knows; if he assurers be equally ignorant of any fact, the assurers must stand the risk of course, does not mean that there may not be a warranty of a fact u but it means, I think, that in an ordinary contract of assurance, by a his own life, the presumption is not in favour of warranty of a fact u but rather the reverse.

In Anderson v. Fitzgerald, decided in the House of Lords in June 1853 (4 Clark, 484), there were two wilful falsehoods embodied in the made by the party for insurance on his own life, viz.,—1st, That no near relations had died of consumption, whereas he knew that two of h had died of that disease; 2d, That no application for insurance on his been either accepted or refused by any other insurance company, wh companies had accepted such proposals made by him, and other six had them. The Judge who tried the case had charged the jury that they satisfied of the materiality of the statements as well as of their falsch after great difference of judicial opinion, it was decided by the House that it was not necessary in that case for the insurance company to p materiality, and consequently that the charge in that respect was e There was no other question in the case, except the question whether m fell to be proved, and incidental remarks in the course of such a case c regarded as laying down a general rule for the construction of the word or the word "untrue" occurring in other contracts, and in answering q of a different description from those which were untruly answered there

In the case of Cazenove, &c. v. The British Equitable Assurance C 6th May 1859 (28 Law Journal, Com. Pleas, p. 259), the policy was hel respect of the untruth of the applicant's statement, that, with the exc one occasion about a year before the proposal, when he was confine house and his bed for a week by disordered stomach, and attended by D he had never since infancy had any disease requiring confinement, wh had, shortly after that illness, been confined for a week, and again atte Dr Roper, and subsequently he had had a dangerous illness, which confi for two or three weeks, and required the constant attendance for par time of two additional medical men, neither of whom were at all menti his statement.

Now, it is true that in that case the company withdrew their plea upo and relied upon their objection that the statements were untrue; but i from the nature of the illnesses, their recent date, and the calling i additional medical attendants, that the applicant, while he remembered and slight illness, could not have forgotten the subsequent and serious and consequently that he had, to say the least of it, palpably failed in of disclosure in answering questions directly put to him upon matte within his knowledge. Accordingly it will be seen that the learned J their opinions, while they certainly do not say that the untruth must b reason upon the answers very much as if that were the question at is Mr Justice Willes, professing to be of the same opinion with the Chie observes,—"The answers in the personal statement amount to more tha omission to state a particular illness, they contain a positive denial of a but one, and are such as would mislead any person." I cannot, therefo that case as ruling the present.

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he case of Fowkes, &c. v. The Manchester and London Life Assurance
ıtion, decided in the Court of Queen's Bench 1st May 1863 (32 Law
l, p. 153), Justice Crompton observed,—"We must first consider what
ıtract really means; and, in order to find that out, it is not immaterial to
ı that numbers of the matters mentioned in the policy are not material at
erefore we must see that the parties make it a condition that these things
be true,—literally and actually true."

remark as to the character of the averments, the untruth of which is to
the premiums and void the policy, applies here, for it could not have been
aterial although the applicant's father had died at sixty-one or sixty-two
ə of, as averred, at sixty-two or sixty-three, or although his mother had
ninety-eight in place of ninety-nine, or had died of some disease known
ical nomenclature in place of old age; and yet, as we have seen, the
of the declarations make no distinction between the consequences of the
ı of any one of the averments, and of any other. Forfeiture as well as
are equally to follow in either case. Consequently, before we can infer
nty, we must see, as Justice Crompton said in Fowkes' case, that the
clearly made it a condition that the things said to be warranted were to
ally and actually true.

ce Blackburn, in the same case, adds a remark with which I entirely
that in cases of instruments the language used by one of the parties is
ınstrued in the sense in which it might reasonably be understood on the
de;" and I think that rule is particularly applicable to contracts of life
ɔe which are daily entered into by all classes of persons, on the footing
ə questions put to them are not expressed in language which lawyers
ın understand, and which, as happens in this case, may be put to a
in the common rank of life without being previously communicated to
l on an occasion when no third party is allowed to be present.

eport of this case of Fowkes does not give the terms of the questions and
there under discussion, but the opinions and result are affirmative, I
f the important general principle that such contracts are not to be con-
avourably for the plea of warranty of facts not within the knowledge of
red party.

ınly other case I shall mention is the case, in this Court, of Hutchison
National Life Assurance Company, 21st February 1845 (7 D. 467). I
erved it for notice out of the order of its date to avoid breaking the con-
of the reference I have made to the English cases; but I attach to it
ıportance, as bearing, more directly than any of these other cases, upon
ent question of warranty, and as being a well-considered judgment which,
r as applicable, we are bound to follow.

Hutchison had stated that she had no disease nor symptom of disease.
ed out, on a *post mortem* examination, that the dropsy, of which she
d arisen from disease of the liver, which must have existed at and prior
ate of the contract of assurance. It had been stipulated, as in all the
ıat the declaration should be the basis of the contract, and the declaration
ter alia, as here, that if any untrue allegation was made the premiums
be forfeited and the policy void. The Court and the Lord Ordinary,
l discussion, concurred in holding that there was no warranty against latent
nown disease, and that, assuming Mrs Hutchison to have had no knowledge
cion of the existence of the disease of the liver, her representatives were
to recover the sum assured. I go along entirely with the judgment in
e, and with the general scope of the opinions delivered upon it. I think
. fair weight was given in it to the prior English cases, and that the
bearing of those of subsequent date has been confirmatory of the sound-
he views there laid down.

rming my opinion in the present case on the question of warranty I
ıfined myself entirely to what appears on the face of the written docu-
ɔoking to the proof only as establishing that, at the date of the contract,
ter, although excusably ignorant of the fact, had rupture, which after-

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wards caused her death. My opinion, both upon the point of negligence the point of warranty, is very clearly against the pursuers.

Lord Ardmillan.—In this very important and interesting case I endeavour to express my opinion so as to avoid recapitulation as much as I need not again read the declarations relative to the policy, as they h already read.

It will conduce to a clearer understanding of the case as it is now on the proof if we consider, first, the plea of the pursuers, that Mrs Fos held or concealed from the insurance company a material fact which bound to communicate, and failed to communicate.

I am of opinion that for this plea there is in the proof no foundation ing pursuers' allegations on record, and after attentive consideration of t I entertain no doubt of the entire good faith, honesty, and truthful int Mrs Foster. Indeed that has not been seriously challenged by the purs there is no ground whatever for doubting it. It is not necessary to ent details of the proof in this respect. The result is beyond doubt. I am that she did not withhold or conceal any fact which she knew, and which i duty to have communicated. I am quite convinced that at the date of t and at the date of her declaration, she was actually, honestly, and in ignorant of the existence of rupture, or of the existence of any sympto did to her indicate, or which can reasonably be held to be such as ough indicated to her, the existence of rupture, or of any other disease. T swelling referred to in the proof did not indicate to her, and cannot viewed as a symptom which ought to have indicated to her, either r any other disease. This innocent ignorance on her part is, to my min lished by the evidence, and my opinion is confirmed by the testimo Watson, an eminent medical man, speaking from the experience of a l tice. I think it scarcely admits of a doubt. Indeed the pursuers' ultimately put almost entirely on the more general plea, which I shall ceed to consider. It is not on the head of concealment that this polic reduced.

But the leading plea of the pursuers is, that apart from all question o ment, and assuming, as has been proved, the entire honesty and good Mrs Foster, still that this policy contains as a condition an absolute against rupture, whether known or unknown, and that on rupture havi quently been the cause of death the policy must be reduced as null and

I am anxious that my view of the real issue, the true controversy case, should be correctly understood and appreciated. I think there some attempt to escape from it. There has been some attempt to make turn on the effect rather than on the existence of a warranty.

The question is,—not whether an absolute warranty can be escape respect of the ignorance, even the innocent ignorance, of the party g warranty? If there be really absolute warranty unqualified and to t maintained, the warranty must be enforced, though the contract would one of extreme severity and ruinous result to the party assured. As served by Lord President Boyle in the case of Hutchison, such a const the contract as the pursuers contend for would practically put an end t surance. But the true question here is, whether in this case, under th there was an absolute warranty against disease, known or unknown,— against the existence of an obscure disease, confessedly not known t clarant, and proved to have been innocently unknown, that is to say, n ably within her cognizance,—a disease of which she was ignorant and ignorant. There is no presumption of such an absolute warranty in of insurance made by a party in a humble condition with an insurance the contract being framed and the words chosen by the insurance com

There is not only no presumption in favour of such an absolute all reasonable and equitable presumption is against it. It is, how alleged by the insurance company, and it must be clearly proved by th within the contract. In other words, it must be made clearly to a

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warranty against disease, known or unknown, was within the true and eaning of this contract. The Lord Advocate maintained that the mean- e parties was of no consequence if the legal meaning of the words has e out. I cannot admit that to be sound. I think that in a consensual he true and honest meaning of the parties, ascertained from fair con- of the words, is the legal meaning of the contract. In a bilateral con- e must be mutual good faith, concurrence of honest intention, *consensus lacitum*, and in a contract where, as in a policy of assurance, the highest evails, the mutuality of consent must be especially clear. That is the ing of my contract, which I desire the other contracting party to put ot that which, in my own favour, I wrap up in general phrase, or hide licity or generality of words, and mean to put upon it myself. Still hat be the true meaning of my contract, which neither party meant at but which afterwards, when fulfilment of the contract is demanded, I, rn benefit, attach to the words.

y of insurance should be so framed that he who runs may read. "No xpression should be there used by which the assured can be caught;" *hic sermo sed quod praecepit Ofellus*, certainly not *rusticus abnormis* These are the words of Lord St Leonards. They are in this case most ; and appropriate. So are the words of the same learned Lord,—"Unless sions in a policy are fully explained to the parties, a vast number of rill be led to suppose that they have made a provision for their families nce on their lives, when, in point of fact, the policy is not worth the which it is written." It was the belief of Mrs Foster that out of the eans of her widowhood she had provided by insurance for her orphan The pursuers say that, in consequence of the discovery of a disease to her, the policy is not worth the paper on which by them it was

be supposed that Mrs Foster would have entered into this contract if nown that she was giving a warranty,—a counter assurance,—against seases, including rupture, whether known or unknown to her? I think t. No person of ordinary intelligence would ever enter into a contract a warranty. The pursuers surely did not mean her so to understand act as to contain that warranty, for they must have well known that if inserted the words "known or unknown," she would never have so l. But can they now be permitted to put on the contract a meaning y did not venture to express, knowing that its expression would have the contract,—a meaning which they did not intend her to put on it? ably but very clearly of opinion that the pursuers cannot be permitted rpret and so to enforce a contract which they framed themselves, and ve made clear if they had chosen to do so. Lord Stair (4, 42, 21; 3, 3, 87), followed by all our best authorities, lays down two rules for ion of mutual contracts. The first is, the words are to be construed *oferentem*, against the framer of the writing; and the second is, that if e contracting parties be in humble life and acting without legal advice, s are to be understood in the "common and vulgar sense." To the t, and in the same just and equitable spirit, we have the words of Lord tice Cockburn in a recent case of Fowkes v. The Manchester Insurance ,—"The true reading of a policy is according to the way in which a r unlearned person) would read the words." That is the honest read- at is the reading which must have been intended. Any other reading one by which the assured could be caught. Therefore it is one which quity, justice and good faith, reject.

te warranty is a guarantee against all faults,—in this case all diseases, unknown. If it is established that the true reading of this policy is parties meant such an absolute warranty here, then there is an end of and the insurance of this poor widow, which she believed she had r her orphan family, is of no force or effect. Then was her mother's n, and her mother's hope a dream, and the thought of the provision for en, which was her earthly comfort in death, altogether without founda-

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tion. The policy, which she meant as a provision for her children, would be, according to the pursuers' contention, not worth the paper on which it is written. The question therefore is, does this contract of assurance, framed by the pursuers, and which ought to have been so expressed that he who runs may read, really contain, as its honest meaning, plain to the understanding of a layman, this absolute warranty against rupture, and ten other diseases, known or unknown?

It is clear that if there be no such absolute warranty as a consensual condition of the contract the pursuers have no case. If there is only a representation, or statement short of warranty, then the undoubted and entire honesty and innocence and sincere good faith of the representation will protect the policy.

It has been strenuously argued by the pursuers that the answer by Mrs Foster to the sixth question put by the medical officer, comprehending eleven diseases at least, and answered in the one word "No," is an absolute warranty against all these diseases, known or unknown. It was also contended, and was the logical sequence of the argument, that all the other answers to the questions of the doctor when given in unqualified terms, affirmative or negative, are also warranties whether the fact was known or unknown. The argument, boldly and broadly put, was that every unqualified answer amounted to such a warranty, and that in a question of proper warranty, materiality does not enter into consideration.

A dexterous effort was made by my learned and very ingenious friend the Lord Advocate to escape from the breadth and generality of this plea, and to limit the argument to what he calls the particular warranty here in question. In the pleading by Mr Shand and Mr Balfour the argument was broadly presented in its more general aspect. In order to do full justice to the pursuers' case I shall deal with the argument under both its aspects. All the answers to which I now refer are in words unqualified. Either they are all warranties, or in regard to some of them a qualification is understood though not expressed. 1st, Is each of these answers an absolute warranty of the fact, known or unknown? It is said that each of them is a warranty, because they are within "the basis of the assurance."

Let us see how this stands.

The first step in the procedure is the proposal by Mrs Foster. She makes a declaration, appended to the proposal, in the following terms:—"I, Mary Waugh or Foster, before designed, do hereby declare that I am at present in good health, not being afflicted with any disorder, external or internal; that the preceding statements are true, and that I have not withheld or concealed any important circumstance. And I (the party in whose favour the assurance is to be effected) do hereby agree that this declaration shall be the basis of the contract between me and the Life Association of Scotland, and that if any untrue averment be made therein, or in the answers to questions by the society's medical officer in reference to this proposal, all sums paid on account of the assurance shall be forfeited, and the assurance be null and void."

She here refers to answers to questions by the society's medical officer. This reference must mean answers given or to be given, for, in point of sequence, the examination by the medical officer comes after the proposal, and after the appended declaration. When examined she makes the replies to the questions put to her, her answers being written down by the medical officer of the company, and the only attestation of these questions and answers is by a second declaration on a separate paper from the proposal, signed by Mrs Foster, and declaring that "the above statements are faithful and true." These words are, in my opinion, important. I read them as meaning true according to her consciousness, knowledge, and good faith. Then the medical officer reports his opinion, and then the insurance company, having before them the proposal with the original declaration, and the answers to questions attested by the second declaration, bearing that the answers are faithful and true, thus deal with the proposal and declaration. They state in the policy that it rests on the basis of the declaration, and then they provide in the policy that "if anything averred in the foresaid declaration forming the basis of the assurance, or in the relative

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ements, be untrue, this policy and assurance shall be void, and all moneys l in respect thereof be forfeited to the association."

leading these provisions strictly, the only declaration which is in words ed to form the basis of assurance is the first declaration appended to the posal. That declaration does not mention rupture, and, taken by itself, it ld not support the pursuers' case. It might well be contended that the wers to the questions of the medical officer, being separate from the proposal, not within the basis of this assurance. Such a contention could scarcely be llenged by the pursuers, for it would not rest on a construction more strict or re than that which the pursuers urge against the defenders. But I am not osed to take this very strict view of the provision in the policy. I think ; the statements in answer to the doctor, being relative to the proposal, and rred to in the first declaration, may be brought within the basis of assurance. , in order so to bring them within the basis, they must be proved. Now, only proof of them is to be found in the attestation that they are "faithful true." It was maintained by the pursuers' counsel that these words, ithful and true," should not be taken into consideration. I am not of that nion. The attestation cannot be considered without them, and without the station the pursuers have no proof of the answers. That second declaration taining the words "faithful and true" must either be admitted or excluded. it is admitted, the words "faithful and true" must be construed, and must ive due effect. If it is excluded, the answers are not proved. The true aning of the qualifying words "faithful and true" can scarcely be doubted. y must mean that the answers are made in good faith, and are true to the t of the declarant's knowledge and belief. From the dilemma in which the suers are placed in regard to this second declaration it is difficult for them to ape. The admission of the second declaration brings in the element of the larant's good faith as qualifying her answers. The exclusion of the second laration shuts out all proof of the answers. The pursuers have no case with- proof of the answers. They have no good case, if the words "faithful and e" are held as qualifying the answers.

Even assuming that the answers are so referred to as to be brought within the visions of the policy, the next point is, are all the answers to these ques- ns, which are given without special qualification, warranties, on the accuracy which the validity of the contract depends? Let us take one or two of the stions. Take the answer given to question seven, in regard to the declarant's ther, viz.—That she died at ninety-nine, of old age. Suppose it turned out be incorrect in point of fact, because, unknown to the declarant, the mother l died at ninety-eight and of a specific ailment, or from the effects of an ident. I put the question to the pursuers' counsel whether that answer, nestly made, to the best of her knowledge, would have been fatal to this icy. His reply was that it would be fatal to the policy. I then put to the suers' counsel a question with regard to the eighth answer, wherein the larant states that she has two brothers alive and both healthy. Suppose that t of her brothers, unknown to her, was at that time ill in India, or that, un- own to her, he had died in India the day before her declaration, would that ccuracy make void the policy. The reply again was that it would make d the policy. I must say that my learned friend at the bar seemed a little ubtful as to his reply. But if it be the meaning of their plea it seems to me be a result so extravagant, so unjust, and so ridiculous, as to amount to a *uctio ad absurdum*, fatal to any reasoning which involves such a result.

But I am quite ready to take the other alternative, and assume these ques- ns to the counsel to be answered the other way, as the Lord Advocate ap- red to suggest, though he sagaciously declined to choose between the two rnatives.

f so, then the pursuers do not maintain that all the answers made to the tor's questions without special qualification amount to warranties. In some ances the qualification that the answer is morally truthful, made in good h, and according to knowledge and belief, is assumed or accepted. Why uld it be excluded or rejected in regard to the sixth question? It appears to

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me that, if there is any answer to which that reasonable qualification applies, it is the answer to the sixth question. Consider it in relation to the questions which precede it. The fourth question is, "Are you now, in your own opinion, in perfect health?"—Ans. "Yes." This answer, necessarily given from her own consciousness, is not disputed to be honest and perfectly true, though she had the hidden disease which was afterwards ascertained. The fifth question is, "What ailments and medical advice have you had?" That could only be answered according to her knowledge, and it is not disputed that it has been answered honestly. The sixth question is, "Have you had rheumatism, gout, rupture, fits," &c., including eleven named, and twenty or thirty unnamed diseases. She answers "No." In regard to these questions it is stipulated by the insurance company that no third party shall be present. Alone and unaided she was questioned, and it is said that then and there she undertook a warranty against disease, known and unknown. It is proved that this most comprehensive list of diseases was simply read over to her: no explanations were given her, and separate questions in regard to each particular disease were not put. Her answer was taken to the whole in one single word. I cannot help saying that I think this mode of questioning a rustic, and a widow, was misleading. The pursuers now say that they meant the answer to their question to be a warranty absolute against all these eleven diseases, known or unknown. But did they so mean, and conceal their meaning? They did not tell her that. They gave her no warning that they would hold her innocent ignorance to be as false to her as a wilful falsehood. If they so meant, then the question as now pleaded was put in order to obtain an absolute warranty, yet that was not explained to her, and the question was not even put separately to her in regard to each disease. Then what is the meaning of the expression, "Have you had such disease?" I think that question must mean, have you had consciousness of such disease. Are you conscious of having had such disease? I do not think that any one could answer that question, put in regard to eleven diseases at once, in the affirmative, except from personal consciousness of having suffered from one or other of the complaints. This lady had no such consciousness. She could not, according to her knowledge, have truly answered the question in the affirmative. She therefore answered it in the negative, faithfully, and, according to her knowledge, consciousness, and belief, truly.

On the alternative view which I am now taking of the pursuers' plea, and taking because the pursuers desired it, I must assume that every answer given without qualification is not a warranty. I must assume that the qualification of moral truthfulness and good faith is implied and understood in regard to some. But that seems to me fatal to the logic of the pursuers' argument. I can see no reason to support the distinction. For, if equity demands that the qualification be understood in regard to the seventh and eighth answers, then, how can it possibly be rejected in regard to the sixth answer given to a question framed, as we have seen, and put to this poor woman with reference to eleven diseases at once, without explanation, and even without separation of the question as applicable to the different complaints? I really do not know which alternative is most unfavourable to the pursuers. On either alternative I am satisfied that they have no just or sound case.

We are dealing with a declaration on a subject within the scope of personal consciousness in regard to an obscure disease in the declarant's own body. She had never consulted a medical man on the subject. She had never felt pain from it. She had never been conscious of the existence of it. Nay, more, it is well proved that she was innocently, as well as honestly, ignorant of its existence. Only from her own consciousness could she reply to the question, whether she had ever had that disease. She replied in the negative. She could not honestly have replied otherwise. She attested her replies as "faithful and true." And they were so.

I shall now proceed, very briefly, to notice the legal authorities in respect of which the pursuers maintain that this policy of insurance, of which the honesty and good faith on the part of Mrs Foster is beyond dispute, and which she be-

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xl to be a provision for her children, is nevertheless null and void, and the niums forfeited to the company.

he question on which authority in point of law is required to support the of the pursuers is, not authority to prove the inflexible character of an ab- te warranty, if such a warranty has been here undertaken. I think the citor-General did not raise any doubt on that subject. I certainly entertain a. The question really is, whether, in this contract, the answers of Mrs er to the questions put by the medical officer of the company must in law eld as amounting to an absolute warranty. The authorities urged on us by pursuers have all been English decisions. They are most interesting and ortant, and I have given to them my most respectful and attentive considera- . But it is not to be overlooked that the leading Scottish authority on the ect is certainly against the pursuers.

he decision in the case of Hutchison v. The National Life Assurance Company bruary 21st 1845, 7 S. and D. 467), is of very high authority. The judg- t of Lord Wood as Ordinary, explained by him in an elaborate note, was ned by the unanimous judgment of the Court, each Judge giving a separate decided opinion in favour of the assured, and repelling the plea of absolute anty against an unknown disease. When it is remembered that these Judges, ming the opinion of Lord Wood, himself a Judge of high authority, were Lord sident Boyle, Lord Mackenzie, Lord Fullerton, and Lord Jeffrey, it must be nowledged that the decision is entitled to the highest respect as a Scottish hority: and in this Court it has never since been challenged or doubted.

but I have felt no desire to escape consideration of the English authorities. ' my own part I have always cherished, as not only important and authorita- , but as precious and even sacred, the great rules and principles of equity for ich we are indebted to the jurists of England. I have therefore carefully lied the decisions which the pursuers' counsel have so earnestly and ably ed on us, and studied them with reference to these great principles of equity, I have come to the conclusion that none of these decisions meet the true stion raised in this case.

After the remarks which have been already made on these decisions I shall presume to enter on any further analysis of them. In every one of them re the decision has been in favour of the insurance company special grounds judgment can be discovered which distinguish the case from the present. re is no case in which an answer to the question of a medical officer, given this answer was given to a question framed as this question was framed, and ted to the policy as this answer is related to the policy, has ever been sus- ed by decision as an absolute warranty against a disease of the existence of ich the declarant was innocently ignorant. The case of Duckett v. Williams been strongly pressed on us. That was a case of re-insurance, the policy g on the life of another, and the life being not insurable. I do not think case in point. Where a person proposing to insure the life of another, and in r to obtain a policy is speaking in regard to the health of another, and makes lute and unqualified statements of fact, in regard to which he can have no onal consciousness or complete assurance, then he is going beyond the scope is knowledge and out of his ground; and, doing so voluntarily and to promote own ends, he is held to guarantee what he asserts. Besides the party so lying for insurance, and the party whose life is proposed for insurance, viewed as standing in a certain relation to each other; they are held as ectively agents for each other in the matter, and they are presumed to be in munication. If the one whose life is to be insured knows the truth and the r who proposes the insurance does not ascertain it, but being personally rant, makes a statement contrary to the truth, such ignorance is, under the umstances, not excusable ignorance, for he ought to have ascertained the h before he made the statement, and such ignorance cannot avail. In the of Sir William Forbes and Co., (9th March 1832, 10 S. 451), Lord President e said that the proposer of the insurance, and Lord Mar, on whose life the rance was proposed, stood in the relation of agents for each other, and that proposer was bound to know what Lord Mar knew in regard to his Lord-

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ship's habits and health, since he ought to have ascertained it. In the Hutchison, to which I have already referred, the case of Duckett v. W was founded on by the insurance company, and the distinction betw case of Duckett v. Williams and such a case as the present was fully re and clearly explained.

With the exception of this brief notice of the case of Duckett v. Wil do not think it necessary to trespass on the time of the Court by minute in tion of the English authorities quoted, because I concur in the remark Lord Deas has made on these cases. In none of them have the pursu sented the authority of express decision; and the judicial dicta founded be viewed as applicable to the special circumstances of the particular There are also dicta, not without great weight and authority, in the op Lord Mansfield in the case of Ross v. Bradshaw (1 Blackstone, 312-14), Denman in Sweete v. Fairlie (6 Car. and Payne, p. 1), and of Lord Chie Cockburn, in Fowkes v. Manchester and London Assurance Company (3 T. 440). I do not suggest these as decisions opposed to those quoted pursuers. But I think that the dicta of these distinguished Judges a appropriate to the immediate question before us than are some of the remarks on which the pursuers rely,—remarks made in cases of a very description.

The observations of the Judges in the case of Fowkes relate to the on which, in my humble opinion, this case ought to turn. I must again you that the pursuers' counsel maintained that the intention of the parti of both the parties to this policy, is of no consequence, but that the wor be construed and enforced strictly. I cannot think that proposition well in law or in equity. In a consensual contract the true intent and mea the parties must be ascertained if possible. Chief-Justice Cockburn, in of Fowkes, says that the intention of the parties is to be ascertained, a the words are to be construed *contra proferentem*,—that is, against the the insurance company. The other Judges express the same opinio Chief-Justice Cockburn follows up his remark by saying that the tru of the agreement is "that in which it would be understood by a layman," an unlettered man.

Now, it does not appear to me possible, according to reason or justice, that this poor widow, Mrs Foster, meant to peril her insurance on the verity of a statement of fact which she made according to her belief consciousness, and of which she could not otherwise have personal kn Nor can I, in justice to the pursuers, suppose that they meant to entrap a warranty, and that they intended that she should so peril her insuran out meaning it. That would be a fraud. I cannot believe it. The int thus against the warranty on both sides.

One of your Lordships put the question during the argument, whe pursuers maintained the same law in regard to a congenital disease of th unknown and unsuspected during life, and only ascertained on *post mo* amination. If I do not mistake, the answer was that such congenital would be within this warranty. If the pursuers' argument is well fou life policy could have been validly effected at any time by such a person he may have lived for many years, and on his death the policy would clared void and all the premiums forfeited. It is often said that heart d more common now than formerly, and if the pursuers' proposition is s law it is right that the proposition and the law should be known.

I do not mean to say that I have felt this question free from difficult argument for the pursuers has been no less able than urgent; and th occasionally been judicial remarks made in England on the enforce warranty which, if applied to this case, might create difficulty.

But, on the prior question, whether there is in this contract an warranty against this disease, known or unknown, I think there is no s opposed to the case of Hutchison.

According to my conviction, there is no such warranty here. Jus equity and good faith forbid it; and it is a relief to my mind to feel

: do, that no authority in point of law has been adduced, clear enough and ng enough, to compel me to decide against the good faith of the policy, and ivour of the insurance company. think that, on both grounds of action, the defenders are entitled to absolvitor.

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ORD JERVISWOODE concurred.

THE following interlocutor was pronounced:—"Having resumed consideration of the cause, with the proof for both parties, and heard counsel, sustain the defences; assoilzies the defender from the conclusions of the summons, and decern: Find the pursuers liable in expenses; allow an account," &c.

MELVILLE & LINDESAY, W.S.—M'EWEN & CARMENT, W.S.—Agents.

JOHN LANG, Petitioner and Respondent.—*Fraser—Mair.*
ROBERT BRUCE, Respondent and Appellant.—*Balfour—Lang.*

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atute—Glasgow Police Act, 1866 (29 *and* 30 *Vict. c. cclxxxiii.*)—*Dean of d.*—By the Glasgow Police Act, 1866, sec. 384, the Master of Works may otice require any proprietor of lands and heritages to fence the same, and a of notice is provided to which the proprietors may lodge objections, to be osed of by the Dean of Guild or Magistrate. Upon failure to comply with notice, or with the order of the Dean of Guild or Magistrate, the Procurator-l in the Dean of Guild Court may by sec. 325 enforce the same by applying he Dean of Guild for a warrant to execute the work therein specified . . . the Dean of Guild may grant a warrant to execute such work, and shall eafter ascertain and fix the cost thereof, and decern against the proprietor or rietors to whom notice was given for the proportion of such cost due by n. *Held*, in an application requiring the owner of a mill-lade to fence it, that it was irrelevant to allege as a defence that the mill-lade ran alongside public road, the trustees vested with which were bound and had been in to fence it; and (2) that, after the failure of the defenders to comply with notice, the Dean of Guild had erred in ordaining the proprietor to fence the -lade, and that a warrant ought to have been granted to the Master of Works ence the mill-lade, after which the Dean of Guild should fix and decern for cost thereof.

OHN LANG, the procurator-fiscal of the Dean of Guild Court of sgow, presented this petition to the Dean of Guild against Robert ce, setting forth that the respondent was proprietor, in the sense of Glasgow Police Act, 1866, of a mill-lade near South Woodside Road, sgow, which was not properly fenced; that the Master of Works had en him due intimation, in terms of sec. 384 of the Act, that the east k of the mill-lade from Old Kelvin Bridge south to where it enters defender's works was in a dangerous state, and required him within days to build a retaining wall, &c., to the satisfaction of the Master Works, and that the defender had failed to comply with said requisi-; and praying for a warrant to execute the said work, thereafter to rtain and fix the cost, and decern against the defender therefor, all in ns of sections 322, 325, and 384 of the statute.*

1ST DIVISION. Dean of Guild Court, Glasgow. M.

By sec. 384 it is enacted that the "Master of Works may, by notice given anner hereinafter provided, require any proprietor or occupier of a land or tage to fence the same, or repair any chimney, &c., which appears to be gerous, to his entire satisfaction."

ections 392–394 provide for the form and service of notices.

ec. 321 enacts that "the Master of Works shall, in every notice given by

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Mr Bruce, who had not lodged any objections to the notice sec. 322, put in answers to the petition, in which he admitted that l owner of the mill-lade, but denied that it was a land and heritage the meaning of the Glasgow Police Act, or that it was not pr fenced.

The mill-lade in question ran along or near the public road l through the village of Woodside, which formed the eastern bound Mr Bruce's property. The road was formerly under the care Barony Parish Statute-Labour Trustees, but by 9 and 10 Vict. c. Act to extend the municipal boundaries of Glasgow) was placed the charge of the Board of Police of Glasgow. Along the west side said road, between it and the mill-lade, there had formerly been a w paling, now fallen into disrepair, which was alleged by Mr Br have been erected and maintained for forty years by the Statute-l Trustees as a protection to the road, and which the petitioner ad that they or their successors, the Board of Police, had repaired in porary way for the safety of the public.

Mr Bruce (appellant) pleaded, *inter alia*;—(1) It being the d the Police and Statute-Labour Committee of the city of Glasgow (the petitioner represents), as coming in place of the Statute-l Trustees of the Barony Parish, to fence and protect the public roa the mill-lade in question, it is unnecessary and incompetent to the respondent to fence the mill-lade. (2) The said Statute-l Trustees and Statute-Labour Committee having for at least the las years fenced and protected the said public road from the said mil and the respondent and his predecessors never having been called during at least the last forty years to fence the said mill-lade, it is i petent in this process to change the prescriptive state of possessic the prescriptive use and wont, and duties and rights of parties.

After some procedure, the Dean of Guild (26th September 1872) or the respondent Bruce "to enclose the lade in question, which in its p exposed state is dangerous to the lieges; and before farther juc appoint the respondent, under the option given to him by the said

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him to any proprietor of a land or heritage . . . . describe the work req be executed, either directly or by a reference to plans, sections, or specifi or to a specimen stated as deposited in the head office of the board for ins and shall specify the period allowed for the execution of such work."

By sec. 322 any proprietor aggrieved by such notice may deliver objections, the procedure in disposing of which is described.

By sec. 325 it is enacted that "if the proprietor or proprietors to whon has been given fail to comply as aforesaid with the requisition contained notice, it shall be lawful for the Procurator-fiscal to enforce the same at a by applying to the Dean of Guild for a warrant to execute the work specified, in so far as not altered or varied by the Magistrate or Dean of and the Dean of Guild may grant a warrant to execute such work, an thereafter ascertain and fix the cost thereof, and decern against the said pr or proprietors to whom notice was given for the proportions of such cost them, and may award expenses to or against any of the parties to such tion; but no such application shall operate as a relief to any proprietor prietors from liability for any penalties which had been incurred by him previous to the date thereof."

By the definition clause (sec. 4) "lands and heritages shall mean la heritages within the city, and shall have the meaning attached to that sion" in the Valuation Acts. "Land or heritage in the singular numb mean one of such lands and heritages separately valued, or entered valuation-roll as separately occupied."

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tor, to state whether he is prepared to enclose the lade in question, in s of the notice by the Master of Works produced, or to erect such a ified fence along the lade as Mr James Cruickshank, after visiting premises, may specify."

r Bruce appealed, and argued;—That but for the proximity of the way the fencing of the mill-lade would be unnecessary, and that the d of Police, in whom the road was now vested, were the proper parties nce it. The defender was at least entitled to proof of his averment the Road Trustees had always fenced the road.

t advising,—

ND PRESIDENT.—This proceeding is purely statutory, and the petitioner, is the Procurator-fiscal of the Dean of Guild Court, has properly framed his on entirely on the statute. It proceeds on a notice given in terms of the 1 section, requiring the appellant, who is the proprietor of a mill-lade, to the same. Now, the statutory proceeding is plain enough, at least when whole clauses of the statute are brought to bear upon it. But in the mean- it may be useful to notice what the appellant's contention in the present is. He says that the proceeding is unwarranted; that though he is the r of this mill-lade, yet the only thing which renders fencing necessary is, the lade lies adjacent to the highway, and that the parties who ought to the fence are those in whom the road is now vested. These parties are the e Board, to whom the road has been transferred by the Police Act founded this case. He offers to prove that the road always was fenced by the Road ees, and says that it is their duty to go on fencing it or maintaining the , and that the only use of a fence is to protect persons passing along the

Now, all this appears to me to be utterly irrelevant. So long as this was a road in the country there was no one who had power to make the nt respondent fence it, and therefore, if it needed fencing, it was the ob- duty of the Road Trustees to erect a fence. But when this road is brought in the limits of the Glasgow Police Act, and under the Glasgow Police d, then the whole aspect of affairs is changed. Every proprietor is under Act obliged to fence his heritage, whatever it is. That being so, the neces- of fencing the road comes to an end. It is no longer the duty of the Road tees to fence, because the statute requires the owner of every heritage, and, g others, the respondent, to fence their heritage.

t us now see what the statute prescribes. The 384th section empowers the er of Works, by notice, to require any proprietor or occupier of lands or age to fence the same. That is the whole enactment. The notice itself is given in terms of sections 392-4, and it is not disputed that the notice his case was given precisely in terms of these sections. But section 386 es us back to the proceedings prescribed by a previous part of the statute, der to see what the course of procedure after delivery of the notices already tioned is to be. It carries us back to section 321 and following sections. ion 321 enacts that the Master of Works shall in his notice describe the t required to be done in a particular way, and shall specify the period red for its execution. It is not said that the notice given was disconform is section. Section 322 says that if the proprietor on whom the notice has served feels himself aggrieved thereby, he may within six days deliver to clerk written objections, whereon a certain procedure therein specified shall place. In this case the respondent did not avail himself of this oppor- y to state objections. The Procurator-fiscal therefore proceeded under the h section, which provides that if the proprietor fail to comply with the e given him within the specified time it shall be competent for the Procu- -fiscal to apply to the Dean of Guild Court for warrant to execute the work, empowers the Dean of Guild to grant warrant for the execution of the , and to ascertain and fix the cost thereof, and to decern against the pro- or for the same. Now, it is under this 325th section that the present peti- is presented, and the jurisdiction of the Dean of Guild is thereby most

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strictly defined. What he can be asked to do and can do is to grant w perform the work, to fix and ascertain the cost when executed, and decern against the proprietor. Now, the prayer of the petition is exactl formity with the provisions of this clause. It bears to be all in term the effect provided for by the said statute, and particularly of the 321s and 384th sections.

Now, if the Dean of Guild had proceeded strictly in conformity terms of this clause, nothing would have induced the Court to interf stead of that, however, unfortunately in both interlocutors of 25th 26th September he has ordained the respondent, the appellant here, to fence required. Now, he had no right to do that under the Act of Pa That is not the policy of the Act at all. If the proprietor had erected under the notice served on him he was the proper party to do so. having done so, he ceased to be the proper party. To that extent, th think the Dean of Guild has gone out of the statute, and this must be But on the merits of the case I think there can be no question. The Guild, being satisfied of the facts, could do nothing except grant the craved. What I propose, therefore, to do is to recall the interlocut plained of, and to remit to the Dean of Guild to grant the warrant crav terms of his statutory powers.

Lord Deas.—It is clear that it was quite competent for the Master to give the notice referred to in the petition, and for the Dean of enforce the demand so made; and I do not think that by raising the who was liable to perform the operations, or to pay the expense of t proprietor of the mill-lade relieved himself from the necessity of ob orders of the Dean of Guild acting under his statutory authority. It forth in so many words that the object of the powers conferred by th was to prevent danger to the public; but it is plain that that was at reason why such large powers were given. These powers, no doubt, many things in which danger to the public is not involved. It is pl ever, that an open mill-lade such as this, so near to the public street, row of inhabited houses, is a thing which it is proper and necessary to tected by a fence for the safety of the public. I entirely agree with y ship that the Dean of Guild's visit to the spot was a proper and suffici of ascertaining the facts. I further agree that it would have been qui and competent to have granted a warrant to some one to execute the w an order for payment against the proprietor of the mill-lade, leavin work out any right of relief he might have against others. Such a mi such a position is not to be left unprotected until all questions of lia the expense of fencing it are settled. The questions of liability raise defender may be competently tried afterwards. Indeed, if it were eve that other parties were likewise bound to do the work, or were liable in the defender, that would not affect the competency and necessity of this provision of the Act. There is, in short, no relevancy in any of t tions raised upon the ground of ultimate liability. Neither do we determine whether this petition might have proceeded at common law. 296 is in very broad terms with regard to the powers of the Master o and the petition is entirely laid on the statute.

I am not, however, quite so clear as your Lordship seems to be as t the party himself might not have been ordained to do the necessary wo tions 321, 322, and 324 point not only to this, that the proprietor m complied with the notice, and so put an end to the matter; but they like a provision that the Dean of Guild might have proceeded to comp do so. At all events, the substance of what the Dean of Guild did right enough, for there could be no incompetency in allowing the opportunity of doing the work himself if he chose. The defender, hov already had his opportunity, and the clearest course under the stat remit in the terms proposed by your Lordship.

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RD ARDMILLAN.—The appellant is undoubtedly proprietor of the mill-lade. important to observe that the parties alleged to be liable are not alleged to prietors of the kind of subjects in respect of which the statutory notice may ven. The term "lands and heritages" in the Valuation Act does not le roads, and therefore the Road Trustees could not have got a notice. the notice was in fact given to one who was proprietor of the mill-lade; he next point is that the notice determines the primary liability, and if the receiving it does not choose to protect the subject in question, the Dean of may grant to the Master of Works an order to execute the works, and, on being executed, a decree for the expense against the person failing to ob- r the first order. But here the question of nicety is as to the Dean of 's power to ordain primarily the execution of the work by the Master of , leaving the person held liable in the expense to effect at his own hand course he may have against others. I am of opinion that the question be- the appellant and the Road Trustees remains untouched. It is not clear er it is the road or the mill-lade that is "dangerous;" but leaving the question, it is at all events plain that the mill-lade is the cause of the .

RD JERVISWOODE concurred.

THIS interlocutor was pronounced:—"Recall the interlocutors of the Dean of Guild, dated respectively 25th May and 26th September 1872, and remit to the Dean of Guild to grant warrant for the execution of the work specified in the notice mentioned in the petition, and thereafter to fix and ascertain the cost of executing the said work, and decern against the appellant for the amount thereof, and to dispose of the matter of expenses: Find no expenses in this Court."

JOHN GALLETLY, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

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1ST DIVISION.
B.

S JANE WEDDERBURN JOLLY or KINMOND AND OTHERS (Alexander Kinmond's Trustees), First Parties.—*Watson—J. G. Webster.*
MRS JANE W. JOLLY or KINMOND, Second Party.—*Marshall—H. Johnstone.*

ccession—Testament—Legacy—Annuity.—A testator appointed his trustees y to his widow an annuity of £1000 a-year in lieu of her legal rights and of laims under an antenuptial marriage-contract, and disposed of the rest of his in legacies, some of which he directed to be paid within three months after eath, and others after the death of his widow. The income of the trust- was not sufficient to pay the annuity. *Held* that the annuity was prefer- to the legacies of which payment had been postponed, and that the widow ntitled to have it paid in full, whether the revenue of the trust-estate yielded mount or not.

E late Alexander Kinmond, merchant in Dundee, died on 5th uary 1872, survived by his widow, Mrs Jane W. Jolly or Kinmond. e were no children of the marriage. Mr and Mrs Kinmond had uted an antenuptial contract, but its provisions were superseded by of Mr Kinmond's trust-disposition and settlement and codicils, 30th August 1867, 12th August 1868, and 6th September 1870. e first purpose of the said trust-disposition and settlement was for ent of debts, funeral expenses, and the expenses of managing the . By the second purpose the truster directed his trustees "to pay to the Mrs Jane Wedderburn Jolly or Kinmond, my wife, annually, the sum 00, and that at two terms in the year, Whitsunday and Martinmas, ual portions, beginning the first half year's payment at the first of terms which shall happen after my death, and so forth yearly and

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termly during the whole of her natural life, provided she surviv with a fifth part more, &c. . . . . and further, I hereby legate a queath to my said wife the sum of £600, and appoint the same to to her within three months after my death; declaring always th provision herein conceived in favour of my said wife shall be held cluding all her rights and claims under our said marriage-cont otherwise, as my widow; and also declaring that, in the event of t Mrs Jane Wedderburn Jolly or Kinmond remarrying, the whole provisions herein contained in her favour shall from the date event cease and determine." By the third purpose of the trust were to be paid to the amount of £1300 within three months af testator's death. By the fifth purpose Mr Kinmond directed the p of legacies amounting to £18,500 to certain of his relations af Kinmond's death; and by the sixth purpose he bequeathed £ charitable and religious institutions, payable after Mrs Kinmond's But it was declared that, in the event of the trust-estate being insufficient to meet the debts, legacies, and others hereinbefore p for, the trustees should "restrict and reduce the bequests made sixth clause proportionally to such an extent as might be neces meeting all the others in full;" and in the event of the estate bei than sufficient for all the purposes herein specified, the legacies un fifth purpose should "be increased proportionally to their re amounts so as to exhaust the estate."

By a codicil dated 12th August 1868 the testator directed his "to pay to my wife, Jane Wedderburn Jolly or Kinmond, annua sum of £400, and that over and above the annuity granted to her settlement foresaid, making together an annuity of £1000, and s crease shall be paid to her at the same times, in the same manı under the same conditions and penalties as are provided for in re the said annuity of £600."

As there was not sufficient annual income in the hands of the to pay Mrs Kinmond's full annuity of £1000 a question arose l her and the trustees whether she was or was not entitled to have amount made up to her otherwise out of the funds of the trust.

The parties accordingly submitted this special case for the opin judgment of the Court on the following questions:—"(1) Is the party entitled, under the said trust-disposition and settlement and to an annuity of £1000, whether the revenue of the trust-estat that amount or not? (2) In the event of the first question being a in the affirmative, are the first parties bound to make up to the party any deficiency which there may be of income to meet the out of the capital of the trust-estate? (3)" (It is not necessary to the third question).

The undernoted authorities were referred to for Mrs Kinmc party of the second part.[1]

At advising,—

Lord President.—In this case the testator appointed his truste original settlement to give his wife the liferent of his house, and to p annually the sum of £600, at two terms in the year, during the who natural life. This sum is increased by a codicil to £1000 annually, t in the same way. He also bequeaths to her £600, to be paid to h three months after his death. By the literal meaning of the settle

[1] Knox's Trustees v. Knox, June 11, 1869, *ante*, vol. vii. p. 873; Shelley, L. R., 2 Ch. 644; Berry's Trustees v. Cox's Trustees, June 1 12 D. 1037.

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tees are as much bound to pay the £600 annually as they are bound to pay 0 once for all. No doubt the payment annually of the £600 is just what is d an annuity, but that makes no difference. The distinction between an uity and a liferent is that a liferenter can only take the fruits of the subject uted, whereas an annuitant is entitled to the amount of the annuity, whether fruits of the estate out of which it is to be paid fall short of that amount or

The annuity is due whether it comes out of income or capital. I do not n to say that trustees, properly administering their trust-estate, ought to pay nnuity out of capital if they have income sufficient, but that is a question of inistration, not of right.

lere there were certain legacies (besides Mrs Kinmond's) amounting to 00, payable within three months after the testator's death. These were nded to be preferable, but all the other legatees were clearly intended to be poned to the widow. On these simple grounds I hold the legacies in the as well as the sixth purpose to be postponed to the widow's annuity. In view the third question is unimportant.

ORD DEAS.—The testator in this case dispones his whole estate to trustees certain purposes, and, *inter alia*, first, for payment of debts and expenses of agement; second, for payment to his widow of an annuity of £600, which leclared to be inclusive of all her rights and claims under an antenuptial riage-contract, or otherwise whatsoever. Then by a codicil he increases the nity by £400, and it is quite plain that he puts the annuity, which is thus eased to £1000, on the same footing in all respects as the original annuity £600, for he says that the said increase shall be paid to her "at the same es, in the same manner, and under the same conditions and penalties as are vided in respect of the said annuity of £600." It is important to see the er in which the testator disposes of his estate. The very fact that this is t of the second purpose of the trust of itself indicates that it is preferable to the bequests coming after it, unless it had appeared from the deed that some- ng else was intended. But over and above that, it is material to observe that annuity is not to a stranger, but to the testator's widow, for whom he was ler both legal and natural obligations to provide. I have always understood t there is a presumption in favour of an annuity to a widow being preferable ordinary legacies. Though the trustees may have acted reasonably enough in ring the smaller legacies, I am not prepared to say that they were not bound see that there was enough to satisfy the widow's annuity before they paid se these. It does not follow that if there was not enough for the widow's im they were bound to pay any legacies at all. In the course of the discussion me legacies were spoken of as special legacies. That was inaccurate, for, rectly speaking, there are no special legacies here at all. If there had been cial legacies,—that is to say, legacies of particular articles, stocks, or invest- nts, &c.—a different question would have been involved. My opinion is that re is nothing in the nature of the legacies in this deed to bring them into petition with the widow's annuity.

LORD ARDMILLAN.—I concur. The real question is whether in a trust of this d the incidence of a deficiency attaches to the widow who has an annuity or the other legatees. On the grounds stated by your Lordships it is clear that must be distributed among the other legatees. The case of Knox is a clear thority for the proposition that an annuitant is preferable to residuary legatees, d the case of a widow is much more favourable than that of an ordinary nuitant. Any provision to a widow is most favourably considered by the r, but here there appears to have been an antenuptial provision to her, which engthens the case.

LORD JERVISWOODE concurred.

THIS interlocutor was pronounced:—"Find and decern, in answer to the first and second questions, that the party of the second part is

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entitled, under the trust-disposition and settlement and codicils of her deceased husband, to an annuity of £1000, whether the revenue of the trust-estate for the time yields that amount or not; and that the parties of the first part are bound, if necessary, to make up to the party of the second part any deficiency which there may be of income to meet the annuity out of the capital of the trust estate: Find that, in respect of the above finding and declaration it is unnecessary to answer the third question, and decern: Find the party of the second part entitled to expenses," &c.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—ALEX. HOWE, W.S.—Agents.

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Surtees v. Wotherspoon.

MRS ANNIE LAWSON or SURTEES, Pursuer.—*Sol.-Gen. Clark—Rhind.*
ROBERT WOTHERSPOON.—*Lord-Adv. Young—Lancaster.*

Marriage—Promise subsequente copula.—A man gave to a woman with whom he was cohabiting a written promise of marriage in the following terms:—"I, A, do hereby promise to marry B, and provide for her according to my means until circumstances warrant such marriage—always providing that in the interim she continues to lead a virtuous and exemplary life." *Held* that the subsequent cohabitation did not prove *de præsenti* matrimonial consent, and that no marriage had been constituted.

1ST DIVISION.
Ld. Mackenzie B.

Vide ante, vol. x. pp. 355, 866.

The case set forth by the pursuer on record was thus stated by the Lord Ordinary:—"The case of the pursuer, as averred in the record, is, that she is the widow of an officer in the East India Company's Service; that she became acquainted with the defender in 1865; that he paid addresses to her; that he professed the greatest love and esteem for her and his desire that she should become his wife; that on 20th November 1867 he gave her the promise of marriage, No. 6 of process,* in which he promised to marry her, and provide for her according to his means, when circumstances warranted such marriage, always providing that in the interim she continued to lead a virtuous and exemplary life; that, relying upon this promise, she was prevailed upon to allow the defender to have carnal connection with her, and that in consequence of this promise he repeatedly had carnal connection with her during the period between 20th November and 1st December 1867, and also in the months of December 1867 and January and February 1868, and subsequently."

A proof was allowed, and thereafter the Lord Ordinary pronounced an interlocutor:—"Assoilzies the defender from the said conclusions of the libel, and decerns: Finds the defender entitled to expenses since the interlocutor of 21st November 1871, in so far as these have not been already disposed of: Allows an account of said expenses to be given in," &c.†

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* "I, Robert Wotherspoon, iron-merchant in Glasgow, do hereby promise to marry Anne Surtees or Dewar *née* Lawson, and provide for her according to my means until circumstances warrant such marriage—always providing that in the interim she continues to lead a virtuous and exemplary life."

† NOTE.—(After the narrative above quoted)—"The promise of marriage, No. 6 of process, is admitted in the minute of admissions by the parties, No. 6 of process, to be holograph of the defender. The Lord Ordinary is of opinion that this document contains an absolute promise of marriage. Even although the proviso therein were held to apply to the promise of marriage, that would not, the Lord Ordinary thinks, make the promise conditional upon the occurrence of a future event, and so prevent it from establishing marriage along with connection on the faith thereof. It is an implied condition, in every promise of

suer reclaimed, and argued;—There was nothing to shew that se was intended for an improper purpose. The only condition hat the woman, after she has accepted such a promise, and so has lly contracted with the granter, shall lead a virtuous life.
ursuer has thus proved, by the writ of the defender, that he promised er.
romise of marriage is dated 20th November 1867; and the averment uer is, that on the faith of that promise she was prevailed upon to defender to have connection with her, and that he repeatedly had ection with her 'during the period between 20th November and 1st 1867, and also in the months of December 1867 and January and 868, and subsequently.' There was only one witness adduced by the support of this statement, namely, Jane Bird, who was her servant id of April to the end of December 1867. She depones that during between April and January 1867 the defender very frequently visited at night, and remained a considerable time alone with her, but she ny familiarity between them, except upon one occasion, a few days l granted her the foresaid promise of marriage. She states that he about eleven o'clock at night, and that, as the pursuer was unwell he was shewn into her bed-room. She further states that about one he morning she went into the bed-room to gather the fire, thinking fender had left, and found him in bed with the pursuer. That is the ce adduced by the pursuer in support of her averments of repeated ection between the defender and her on the faith of the said promise. her witness who gives evidence in regard to the relations between and the defender after 20th November 1867 is Christina Lang, a the defender, who was servant to the pursuer for nearly two months Bird left—that is, until the end of February 1868. She depones, fender called two or three times a-week and remained an hour, and wo or three hours, but that she never saw anything like familiarity m, and had no idea that there was anything of the kind.
therefore, as direct evidence is concerned, the pursuer has failed to verments of connection after 26th November 1867, the date of the marriage. She has also not proved that she is the widow of an officer, e defender paid his addresses to her. But it has been, in the opinion Ordinary, clearly proved by the defender that the pursuer is not the n officer; that in and for several years after 1855 she was a prostitute gh; that from 1857 to 1859 she kept a brothel in St James' Square, ; that before going there she kept a brothel in St David Street. ; that she thereafter went to Glasgow, where she accidentally met r in 1865; and that he, after visiting her from time to time, for the illicit intercourse, at last took her into keeping as his mistress in

rd Ordinary is of opinion that it is established by the proof, coupled fender's statements in his defences, that the pursuer continued to be down to 20th November 1867, when he granted her the above- promise of marriage. The evidence of Jane Bird and Christina Lang, nection with that previous relationship, and the statements in his o sufficiently establish, he considers, that there was no cessation of ntercourse at or prior to that date, and that sexual intercourse took en them for some time after 20th November 1867. But, if so, that continuation of the former illicit intercourse, and it cannot be said ith by the pursuer that it was on the faith of the promise of mar- ie 'was prevailed on to allow the defender to have carnal connection

suer maintained in argument at the close of the proof that there was f the illicit intercourse for some time prior to 20th November 1867. was living a respectable life. There is no proof of this, and the

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on which the pursuer consented to continue the intercourse was, that she should get the written promise. She may have declined to continue the

inferences to be drawn from the proof negative it. But if the pursuer had ceased to be his mistress prior to that date, and was leading a virtuous life, then, the being only one witness to one alleged act of connection after that date, there is not, in the opinion of the Lord Ordinary, sufficient evidence to establish copula after the promise. It is only by connecting Jane Bird's evidence, and also the evidence of Christina Lang, with the prior relations and illicit intercourse between the pursuer and defender, and with the defender's statements in his defences, that the Lord Ordinary has been able to hold that intercourse took place between them after 20th November 1867.

"The question has never been decided whether, if a promise of marriage is given during a course of illicit connection, and if connection continue thereafter as formerly, marriage will be thereby constituted.

"The rule of law is that marriage can be constituted by consent alone,—that mutual consent may be given in various ways, and one of these is by promise *subsequente copula*. Mr Erskine (Inst., 1, 6, 4) states that a *copula* subsequent to promise constitutes marriage 'from a presumption or fiction that the consent *de præsenti*, which is essential to marriage, was at that moment mutually given by the parties, in consequence of the anterior promise.' But the *copula* must have been permitted by the woman on the faith of the promise (Morrison v. Dobson, 8 Macph., 347. That presumption or fiction can therefore only arise in the case where it can be held that the woman has surrendered her person on the faith of the promise. But there is, he conceives, no room for such a presumption, where, as in the present case, the woman is, and has for a considerable time previously, been the mistress of the man who has granted the promise, where there has been no cessation of the illicit intercourse before the promise was granted, and where the intercourse has been continued thereafter without any return to virtue, and without anything having occurred except the granting of the promise. Such intercourse after the promise must, he thinks, be held to be a mere continuation of the former intercourse, and altogether independent of the promise, and that particularly where, as in the present case, the woman is at the time the pursuer in an action of declarator of marriage against another man, then depending in Court, and where it is evident, from the terms of the promise, that marriage in a short time was not in the contemplation of the parties. The presumption in such a state of matters is, that the pursuer and defender intended to continue their illicit intercourse, and to get married when circumstances should warrant their doing so.

"It appears from the reports of the cases of Sim v. Miles, 20th November 1829, 8 Shaw, 89, and Ross v. Macleod, 7th June 1861, 23 D. 972, and from Mr Brodie's Notes on Stair, p. 28, that Professor Hume stated in his lectures his opinion to be that marriage cannot be constituted by promise interjected in a course of illicit connection. Lord Pitmilly, in Sim v. Miles, stated that to be his own opinion. Lord Glenlee seems to have been of the same opinion; and Lord Cringletie thought it 'very doubtful whether we can lay it down in the abstract that promise followed by *copula* in all cases makes marriage.' In Ross v. Macleod, Lord Deas was of opinion 'that a promise given in the course of illicit connection does not necessarily make marriage.' In Morrison v. Dobson, already cited, Lord Ardmillan, whose opinion was concurred in by the Lord President and Lord Deas, stated that 'in order to the constitution of marriage by promise *subsequente copula*, the *copula* must be conceded by the woman on the faith of the promise;' and Lord Kinloch further remarked, that he considered it 'indispensable that she should satisfy the Court that the conduct of the man produced in her mind the will and intention to be married to him, and that she yielded her person to his embraces in the belief and purpose of becoming his wife,' which will be presumed, in the ordinary case, from the copula following on the promise. But that presumption must yield to proof which negatives it, as in the present case. Professor More, in his Notes upon Stair

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ercourse, and have consented on the footing of receiving his promise. e *copula* which followed constituted marriage.[1]

At advising,—

LORD PRESIDENT.—This is an an action of declarator of marriage founded on allegation of promise *subsequente copula*. The case is very simple as presented record. The pursuer says that she was of respectable parentage, and married an officer in the East India Company's Service; that she was early left a low, and became acquainted with the defender in 1865, having led up to that e a chaste and virtuous life. They cohabited together for two years, and in vember 1867 he gave her a written promise of marriage; and her allegation is, relying on this solemn promise she surrendered her person, and they had carnal nection. If this last allegation were true it would be very hard to find against ; but taken in this aspect the case is attended with some difficulty. The lence of connection following on the promise depends on the testimony of a le witness, who stands greatly in need of corroboration; and the difficulty is nced still further by the fact that the pursuer is obliged to admit that two rs earlier she had another action against a Mr Francis Dewar, in which she ges repeated promises of marriage, on the strength of which she surrendered person. She says also that this action was not well founded in fact, which can y mean that it was not true that she surrendered her person to Francis Dewar. s strange that she should have been involved in two adventures of the same d in four years, but it is still more strange that this lady, on her own shew- has made an untrue allegation of this kind. In these circumstances I think evidence of one witness is not sufficient. Therefore, in this aspect of the , I should be inclined to agree with the Lord Ordinary that she has failed to blish that she submitted to the defender on the faith of his promise. But case disclosed on the evidence is rather different, and I shall state in a few ds what is its important aspect. The pursuer and defender became acquainted 1865, and the result of their acquaintance was not an honourable courtship, but it intercourse, the pursuer being at the time simply a prostitute in Edinburgh, the keeper of several brothels there. At length the intercourse changed its racter a little, for she became his mistress for some time. She lived in a house which he paid, and he visited her there. This continued down to November 67, which is the date of the promise, and also subsequent to that—in short, intercourse was uninterrupted down to the institution of this action. If case had been different the proof of a continuance of the intercourse after promise might be doubtful; but here I think there is no doubt that it did tinue, and therefore this case is that of a man giving a promise in the course an uninterrupted illicit intercourse, and the question is, what is its effect. e case is not a very uncommon one. Such a written promise will by no ans necessarily constitute marriage, and will, in general, be insufficient. There one great peculiarity in the terms of the promise, which affords a ground of dgment which is sufficiently satisfactory. The defender in his writing thus presses himself—"I, Robert Wotherspoon, iron merchant in Glasgow, do here- promise to marry Annie Surtees or Dewar *née* Lawson, and provide for her

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13, also states that a promise to a concubine affords no presumption of rriage.

"After full and repeated consideration, the Lord Ordinary is of opinion that e proof does not establish marriage between the parties by promise *subsequente pula*."

[1] Stair, iv. 45, 19; Ferguson's Consistorial Law, p. 163; Sim v. Miles, ov. 20, 1828, 8 S. 89; Mackintosh v. Shillinglaw, March 6, 1829, 1 Scottish rist, 135; Craigie v. Hoggan, Feb. 17, 1838, 16 S. 584; Ross v. Macleod, ne 7, 1861, 23 D. 972; Morrison v. Dobson, Dec. 17, 1869, *ante*, vol. viii., 347; mpbell v. Honeyman, March 8, 1831, 5 W. and S. 144; Stewart v. Menzies, ne 6, 1833, 12 S. 179,—aff. 2 Rob. 547; Kennedy v. Macdowal, Feb. 12, 00, 2 Bell's Illustrations, 243.

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according to my means until circumstances warrant such marriage—alw viding that in the interim she continues to lead a virtuous and exempl What follows is unimportant. Now, what is the meaning of the provis the pursuer in the interim shall lead a virtuous and exemplary life. expressed as a condition of the promise, but whether it would be an condition is another affair. But the question is, what was the parties' n Looking to the fact that down to the moment of the giving of the writ mise she was living as the defender's mistress, and that the writing was the course of an illicit connection, the meaning is, that she was to contin ful to the defender as his mistress. If there had been any proof of ces intercourse, or of a refusal on the part of the pursuer to continue the co —the burden of proving which would lie on the pursuer—her case wou been very different; but this not being so, the proviso in the promise, only means that she is to continue her present life as his mistress. If it is provided by this arrangement that the promise is to be followed tinued intercourse to fill up the interval between its date and the celeb the marriage. It is in vain to say that this converts a promise of ma *futuro* into consent *de præsenti*. In this document the woman arranges person is to be at the man's command until his affairs admit of a marri is to remain his mistress until that time. It is matter of contract *copula* is not to constitute marriage. I think the Lord Ordinary is rigl

Lord Deas concurred.

Lord Ardmillan.—Notwithstanding the terms of the written prom given by the defender to the pursuer I am clearly of opinion that mar not been instructed in this case. Speaking generally, there is no doubt th mise of marriage, proved by written evidence, and followed by *copula*, is, a to Scottish law, sufficient to prove the mutual consent which creates the of marriage. It is the consent which makes the marriage. That con be proved in different ways; and the mode of proof of the consent her amounts to this, that on the faith of the promise the woman has surrend person. But the surrender of her person by the woman, and the pr the man, must be related to each other It is not the law that the mere of promise and *copula* uniformly and necessarily proves marriage. I r opinion on this point which I expressed in the case of Morrison v. Dol the connection was not given or permitted on the faith of the promise— purchased or given on a footing inconsistent with marriage—it cannot marriage, however clear the words of promise.

The character of the woman, and the fact of illicit intercourse prior t to the promise, so that no promise was necessary or appropriate to c concession or to secure its continuance, is a most important fact in co whether the *copula* subsequent to the promise was related to the pron was permitted on the faith of the promise.

I think that, where no special circumstances in the conduct and the of the parties are proved, but where the two facts of promise and su *copula* are in the position of proved and unexplained sequence, the pre must be that the *copula* was the response to the promise, and yielde faith of the promise.

But where the facts ascertained are such as to disconnect the *cop* the promise, and explain it on a different footing, and to make it mani marriage was not within the intention of the parties, then the consen tract of marriage cannot be held to have been formed.

I need say nothing of the character of the pursuer, nor need I add to what your Lordship has said in regard to the contradiction on the her statements on record. The surrender of her person to a man was a thi so easy, so frequent, so promiscuous, so purchaseable, that there was cer need for a promise of marriage to induce her to give it.

The Scottish law supposes, and experience proves, that a girl previo and virtuous may, on the faith of a promise, surrender her person.

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ı to surrender; and only in the exuberance of trust and on faith of promise he be supposed to render up the jewel of her honour and the possession of erson. We have no such case here.

t I take a case nearer the present. I suppose a promise made by a man to man who was his mistress. It is still possible that, in such circumstances, a ise might be given which, followed by *copula*, may constitute marriage. uch a case is surely different from this. The woman may have been con-

She may, under conscientious conviction, have insisted on breaking off ; connection which she felt to be guilty; and the man may then have given romise to prevent separation, to win her back, to allay her conscientious anctions, and to overcome her scruples, or her reluctance, and induce her mit renewed intercourse. Such a case is possible; but, in my opinion, it be proved. It is only by proof of such facts as these that, in a case the man and woman were living in illicit intercourse, the mere promise, e course of that intercourse, can be brought within the true scope and ing of the rule, that promise *subsequente copula* instructs the consent which itutes marriage. I admit the possibility of such a case. I think it is ex-mal, and that it must be proved.

t in this case there is nothing of the kind. There has been here illicit ourse without interruption, and certainly without disturbance by any con-tious scruple. This pursuer had nothing to yield on the faith of the ise which she had not yielded to the defender, and to many others, with-ny promise. Nay, more, it is proved that her life for years had been a f prostitution, and that money had often purchased the surrender of her n.

m of opinion that, however culpable and foolish the conduct of the de-r was—and of that there can be no doubt—the sacred and abiding relation arriage was not constituted. The condition here attached to the promise is ithout importance, and I do not think it a condition of virtue.

gree with the observations which your Lordship has made on that con-n; but I rest my opinion more especially on the ground which I have explained. The episode with Mr Dewar cannot be omitted. Shortly be-the date of this promise the pursuer had alleged in judicial proceedings, in tion of declarator of marriage, that she was married to another man, named r; and she avers that the defender, Mr Wotherspoon, knew of that action, certainly knew of her habits and character. That is not very consistent her claims in this action. And then, after the date of the promise, the er, who knew the Scottish law, and alleged it, solemnly declared that she ot married to any one, and had not been married to any one, according to w of England or of Scotland, or any other law.

gree so entirely with what your Lordship has already said that I really feel ecessary to add more.

e facts of the case are peculiarly clear, and especially unfavourable to the er; and it does appear to me that to hold the sacred relation of marriage to re constituted in this manner, and between these parties, would be to pre-a caricature of the Scottish law of marriage.

RD JERVISWOODE concurred.

THE COURT adhered.

D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—J. & R. D. ROSS, W.S.—Agents.

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Robertson v. Macknight.

MISS MARGARET TURNBULL ROBERTSON, Objector.—*Adam.*

IES MACKNIGHT, Common Agent in Locality of Fettercairn.—*Hall.*

inds—Locality—Valuation.—In two successive localities the teinds of cer-ands were localled on for more than the just proportion of each augmenta-in consequence of a previous decree of valuation not being produced; and

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the stipend so localled was paid by the heritor. In a subsequent locality the decree of valuation was produced. *Held* that as under the previous decree locality the heritor must continue to pay more of the old stipend than was just due in localling the augmentation she should be localled on for so much less the augumentation.

TEIND COURT.
Teind Clerk.

MISS MARGARET TURNBULL ROBERTSON was proprietor of the lands and teinds of Dalladies, in the parish of Fettercairn. The teinds of said lands were valued by decree of the Court of Teinds in 1810; but this decree was not produced in the localities, which became final in 1833 and 1853, and consequently more than the just proportion of the respective augmentations of stipend was in these localities laid upon the teinds of Dalladies, and was paid by the objector and her authors.

In the present locality the common agent prepared the state of teinds on the footing that the teinds of Dalladies were not valued, and fell to be taken at one-fifth of the proven rental, being £56. The interim locality was framed on the same footing, but the common agent was willing, on the production of the decree of valuation, that it should be rectified, so as to give effect to the decree of valuation in the augmentation which fell to be dealt with in this locality. In the state of teinds the amount of stipend payable from Dalladies was stated at £16, 7s. $7\frac{1}{10}$d. and the surplus teind at £39, 12s. $4\frac{4}{10}$d., while the valued teind would have been only £17, 12s. $2\frac{8}{10}$d., leaving a surplus of £1, 4s. $7\frac{7}{10}$d.

The objector, however, contended that the teinds should be so localled on that the whole stipend payable therefrom for the future should be in the proportion which the said teinds bore to the teinds of the other heritors in the parish having heritable rights to their teinds, and that such amount of stipend and no more should be laid on the teinds of Dalladies as would, when added to the old stipend, make the whole stipend payable therefrom amount to the said proportion.

The objector pleaded;—(1) In virtue of the decree of valuation referred to the teinds of the lands of Dalladies have been duly valued, and said decree of valuation falls to be given effect to in the present process. (2) The valued teinds of the said lands of Dalladies fall to be localled in the present process for such proportion only of the augmentation of stipend granted as shall make the whole stipend payable therefrom correspond to the proportion which the said teinds bear to the teinds of the other heritors who have heritable rights to their teinds. (3) General the condescenders are entitled to maintain the foregoing objections to the said interim locality, and to obtain a rectification thereof in so far as necessary to give effect to said objections.

The common agent pleaded;—(1) The objectors are not entitled to have the interim scheme in the present locality rectified in such a manner that the total amount of stipend payable out of the lands of Dalladies shall be the same as if the decree of valuation now founded upon by them had been given effect to in the localities of 1833 and 1853. The said localities being now final, the stipend thereby localled upon the lands of Dalladies must continue to be paid until the said localities be set aside by an action of reduction. (3) Admitting, as the respondent has always admitted since Miss Robertson's decree of valuation was produced that effect should be given to that decree in localling the present augmentation, the objections are *quoad ultra* unfounded, and, as objections in this locality, inept, and should be repelled, with expenses.

The Lord Ordinary (11th December 1872) pronounced an interlocutor finding "that, in localling the augmentation recently awarded, effect must be given to the decree of valuation produced and founded on by the objectors: Finds that the old localities, which are final and unreduced

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not be interfered with or altered in the present process until and less the said final localities are reduced and set aside; but finds that, in localling the augmentation, regard must be had not only to the decree of valuation, but to the amount of old stipend localled on the objector's teinds; and finds that the proportion of the augmented stipend to be localled on the objector's teinds must be such as, taken along with the old stipend payable by her, does not exceed the fair proportion corresponding to the amount of her valued teind, and so as to give the objector relief against any over-allocation, so far as can be done without interfering with the final localities; and to this effect sustains the objection of Miss Margaret Turnbull Robertson and her curator, and decerns: Finds the common agent liable in expenses," &c.*

The common agent reclaimed, and argued;—The previous localities are final, and could not be touched except by a process of reduction.

The objector argued;—She had paid too much already, and it was easy to rectify the disproportion,—and this was the only equitable course,—by taking into account the excess in the previous localities and laying so much less on her in this locality. A reduction was unnecessary, and would cost more than any benefit that would result to the objector.

At advising,—

LORD PRESIDENT.—There are certain findings in the interlocutor of the Lord Ordinary which it is impossible to dispute. He finds, in the first place, that in localling the augmentation recently awarded effect must be given to the decree of valuation produced and founded on by the objector;" and further, that the old localities which are final and unreduced cannot be interfered with or altered in the present process until and unless the said final localities are reduced and set aside." Now, by final locality is meant decree of locality, and I agree with the Lord Ordinary in this latter finding; but I go farther than he does, for I doubt whether in the circumstances it would be possible to set aside

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* "NOTE.—This is a curious question, and does not seem to be decided in any recorded case. At least the Lord Ordinary has not been referred to any decision, or even to any dictum or authority whatever.

"In the absence of authority, the Lord Ordinary thinks himself entitled to proceed on equitable principle, and to give the objector the relief she seeks, if it can be done without transgressing any fixed rule.

"The objector's teinds are valued. In the former localities, however, she or her predecessors did not produce the decree of valuation, and the consequence was that her teinds were localled on for a larger sum than they would have been if she had produced her decree of valuation.

"The localities became final, and the objector has paid under them without complaint, and she is still willing to do so. She explains that it is not worth her while to reduce them. The expense would exceed the benefit which she would obtain.

"Then comes the augmentation. And in the new locality the objector produces her valuation, and says, 'I pay too much already under the old locality; take that into view, and lay so much less augmentation upon me.' This can be done easily, and at once; and, without disturbing the old and final locality, the objector can obtain relief in localling the augmented stipend.

"There is strong equity in this; and, in the absence of any fixed rule to the contrary, the Lord Ordinary gives effect to the equitable plea. He understands there is no contrary practice, for although it is not uncommon to strike the free teind by deducting the old stipend, and allocate proportionally, this is done when no such specialty arises as in the present case. It is equally easy to take the gross teind and allocate proportionally thereon, and then make the old stipend part of the allocation. This would equitably provide for variations on the rental where teinds are unvalued and struck at one-fifth of the rent."

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these decrees by a reduction, and we must proceed on the assumption that are unreducible. Proceeding, then, on this assumption, the question is, wh in adjusting the locality of the augmentation Miss Robertson may not be dealt so as to give her relief against injury sustained in previous localities?—whe since she pays too much of the old stipend, she may be allowed to pay pr tionally less of the new stipend? The proposal is equitable, and if there i technical difficulty I am disposed to accede to it. In doing so an injury a certain sense done to the benefice, for if the relief craved were not give benefice would reap the benefit of the overcharge in the previous localities. on the other hand, if we do not accede to this proposal Miss Robertson n in the end have to pay to the minister something more than the whole tein her lands, and I do not think that any one could be heard in support of result, for it would come to this, that on account of a mistake the benefice v get more than the whole teind.

Thus, I think, the only question is between Miss Robertson and the heritors; and although I was startled by the novelty of the proposal subm to us, I do not see any objection to it in point of principle. It is a re which falls within the scope of a process of locality—which is the count of a multiplepoinding—and in such a process I do not think that it is unl take into consideration the present liabilities of parties.

The other Judges concurred.

THE COURT adhered to the interlocutor of the Lord Ordinary.

JAMES ALLAN, S.S.C.—JAMES MACKNIGHT, W.S.—Agents.

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Dennison v. Fea's Trustees.

JEROME DENNISON, First Party.—*Kinnear.*
DAVID BALFOUR AND OTHERS (Trustees of Barbara and Helena Fe Second Parties.—*Balfour.*

Succession—Testament—Confusion.—The proprietrix of lands held o Crown, subject to certain duties payable in kind to a donatary of the C executed a *mortis causa* trust-settlement, in which she directed her trust hold the said lands for certain charitable purposes, and to convey to certai sons named "all such lands, houses, or other heritable subjects, of wh nature or denomination the same may be, which I may acquire or succeed to the date of these presents." The testatrix subsequently obtained by purcl disposition from the Crown donatary of the said duties, on which she was i *Held* that the duties thus acquired were not to be regarded as a separate her subject from the land in the sense of the trust-deed.

1ST DIVISION. B.

BY trust-disposition, dated 21st July 1810, Misses Barbara and H Fea disponed to each other and the longest liver of them, and afte decease of the survivor to Patrick Neill, printer in Edinburgh, and J Dennison of North Myre, in Sanda, and others, as trustees, the v heritable and moveable estate then belonging to them, or which sl belong to them or either of them at death; and in particular the lar Arie and Mussater, in the island of Stronsay in Orkney. The e purpose of the deed appointed the said lands, with the mansion-hou Arie, and park and garden adjoining, to be held for certain char purposes therein specified. The tenth purpose of the trust appointe trustees to "assign, dispone, convey, and make over to and in fav the said Patrick Neill, and his heirs and assignees, all such lands, h or other heritable subjects, of whatever nature or denomination the may be, which I, the said Helena Fea, may acquire or succeed to the date of these presents: And further, we appoint our said truste like manner, after the death of the survivor of us, to assign, convey

e, and make over all such lands, houses, or other heritable subjects, of tever nature or denomination the same be, that I, the said Barbara . may acquire or succeed to after the date of these presents, to and in ur of the said Patrick Neill and James Dennison of Myre, equally rixt them, and to the heirs of the said Patrick Neill, and on the ire of the said James Dennison, to Janet Traill, daughter of Walter ll of Westove."

arbara and Helena Fea, at the date of their trust-deed, held the lands re mentioned under a crown charter of adjudication in favour of les Erskine, merchant in Kirkwall, dated 1st June 1799; disposition Charles Erskine to the said Barbara and Helena Fea, dated 24th ruary 1800, containing an assignation to the said crown charter, and rument of sasine in their favour proceeding on the said writs, dated 1 February. The reddendo of the charter was for payment of the feu blench farm, "aliasque divorias et servitia solubi. pro et ex terris que prædictis uti in prioribus juribus et infeofamentis earundem ent." These feu and other duties, which consisted of certain quan- s of bear, butter, poultry, and money, formed part of the earldom of ney, and were payable to Lord Dundas, to whom they belonged as in t of the Crown, conform to crown charter in his favour of, *inter alia*, earldom of Orkney, including therein right to the feu and other duties able by the crown vassals within the said earldom, dated 6th August 7.

he Misses Fea acquired the duties payable for the said lands for the e of £695, 10s., paid to Lord Dundas, and obtained a disposition from , dated 7th April 1817, on which they were infeft on 12th October 7. The Misses Fea held their lands of the Crown as superior, after as re the conveyance of the duties, but exempt from payment of any lendo.

n 17th October 1817 the Misses Fea conveyed to Charles Goar part he lands of Arie by a deed, with a double manner of holding, which le no mention of the duties applicable to the said lands and included he purchase from Lord Dundas. Goar was infeft.

iss Helena Fea died in November 1817, and Miss Barbara Fea in mary 1818. After their death a payment of £18, 6s. 9d. on account he above-mentioned duties was made by Mr Patrick Neill, as the only ing trustee under the said deed, three-fourths of that sum being paid Mr Neill himself, and the remaining fourth to Mr Dennison. Mr ill afterwards waived any claim he might have to three-fourths of the ies; and though Mr Dennison, who survived till 1849, never waived claim, no further payment was made to him on account of the duties, whole annual income from the trust-estate having been expended in administration of the trust.

Mr Dennison's eldest son, his heir-at-law and executor, having de- nded from the trustees now acting in the Misses Fea's trust a convey- e of one-fourth of the duties referred to (under deduction of those iring to the lands conveyed to Charles Goar), this special case was usted by him (first party) and the said trustees (second parties), in er that the opinion and judgment of the Court might be obtained on the owing questions:—"(1) Is the first party entitled, in virtue of the pro- on in favour of the late James Dennison of Myre, contained in the th purpose of the trust-disposition and settlement by the late Barbara Helena Fea, to one-fourth part of the duties purchased by them from d Dundas as above set forth, excepting therefrom the proportion of said duties effeiring to the lands of Hescome and others, conveyed by Misses Fea to Charles Goar; and are the second parties bound to

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convey the said fourth part (excepting as aforesaid) to the first party with entry as at Martinmas 1871, and to make payment to him of the sum of £279, 1s. 2d. as the arrears thereof? Or, (2) Were the said duties being at the date of the purchase by the Misses Fea payable from their own lands, extinguished *confusione* by such purchase, and by the disposition by Lord Dundas in their favour?"

It was argued for the first party;—The duties in question were acquired after the date of the trust-disposition in the meaning of the testator. The tenure of the lands had become feudal by the nature of the investitures taken by the Misses Fea's authors, and they held directly of the Crown, paying duties to Lord Zetland. These duties therefore were heritable irredeemable rights connected with the lands, and came under the tenth head of the disposition.[1] The question of confusion need not be argued, as this was a simple question of intention.

It was argued for the second parties;—The duties were mere money debts due to the superior, the right to which was heritable but not feudal. The Misses Fea intended merely to disburden their lands and not to acquire a separate estate. The deed of disposition or assignation by Lord Zetland was a mere transference of the power to exact, and could not create an intermediate feudal estate. The right could not be merged with the *dominium utile* by any of the ordinary modes of consolidation, but it was so merged by confusion.[2]

At advising,—

LORD PRESIDENT.—The answer to the first question depends on the construction of certain clauses in the trust-disposition and settlement of 1810; and everything comes to depend on what was the intention of the ladies in the tenth purpose of that deed. They convey their whole estate, heritable and moveable, to certain trustees, and after a number of purposes of a temporary nature they provide, in the eighth purpose, that the farms of Mussater and Arie, which are the chief heritable estate, and appear to have been the bulk of the estate generally, are to be applied to the purposes of a certain charity. Then, in the ninth purpose, the trusters appoint their trustees, after the death of the survivor of them, to convey to Patrick Neill, one of the trustees, "all such lands, houses or other heritable subjects, of whatever nature or denomination the same be, that I, the said Barbara Fea, may acquire or succeed to after the date of these presents, to and in favour of the said Patrick Neill and James Dennison of Myre, equally betwixt them, and to the heirs of the said Patrick Neill, and in the failure of the said James Dennison to Janet Traill, daughter of William Traill of Westove." Now, the son and heir of James Dennison of Myre, the first party to this case, has claimed, in virtue of this tenth purpose, one-fourth of certain subjects, said to have been acquired after the execution of the deed. The subjects are of a peculiar nature, and the question is, whether they fall within the tenth purpose.

It is necessary to consider what was the title under which the ladies held the farms. Whatever its original nature had been, the lands had become feudalised before coming into the hands of the Misses Fea, for their title stands on a charter to Charles Erskine, who did not take infeftment, but gave an assignation to the open precept in the crown charter, on which the ladies were infeft in the year 1800. The estate was held of the Crown for payment of certain duties, of which the amount was not specified, but was fixed by the use of payment,

[1] Dundas v. Officers of State, 1779, M. 15,103; 52 Geo. III. c. cxxxvii.

[2] Poldean, Elch. Her. and Mov. 8; 2 Jur. Styles, 335; Robertson v. Davison, 1751, M. 3044; Bell's Princ. 854; Ramsay v. Bank of Scotland, 1729, M. 3383; Burnett v. Burnett, 1766, 2 Pat. 122; Wrights v. Smith, 1716, M. 5209; Hogg v. Black, Dec. 11, 1832, 11 S. 198; Blantyre v. Dunn, July 1858, 20 D. 1188.

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as common in such cases in Orkney. There was no mid-superior of any kind; at Lord Dundas under his peculiar title was entitled, not as superior, but as signee of the superior's rights, to these duties, and had been in use to collect em and many others of a similar kind. We know from the annals of this ourt what is the nature of Lord Zetland's title, derived from the Earl of Mor-n, and it is set out in the report of the case referred to. The charter disponed Her Majesty's right of the feu and other duties, casualties, and services of all nd sundry the heritable vassals and others within the said earldom, with full nd sole power to the said James Earl of Morton and his foresaids, in her ajesty's place as remaining still their immediate superior, to enter and receive he said heritable vassals who now actually hold of her Majesty and the Crown, nd their heirs, and to grant charters and infeftments," &c. There followed o a conveyance of the casualties. It was found in the case referred to that is grant was beyond the power of the Crown so far as regards the power to ter vassals and intromit with casualties, the only right it effectually conferred ing the right to uplift the duties. It constituted no other relation between he grantee and the land. This being so, and Lord Zetland being precisely in he position of an assignee to the feu-duties, the Misses Fea purchased from him he feu-duties to which he had right, so far as they were leviable from the lands f Mussater and Aric. It is plain that they bought these feu-duties because ey were proprietors of these lands, and if their purpose was to disburden the nds of the feu-duties this was the most regular and habile way of doing so. ord Zetland was not in a position to discharge the feu-duties, having no title s superior; all he could do was to grant a conveyance of his right, *i.e.*, an signation.

The question, therefore, comes to be, whether this is the acquisition by the isses Fea of a separate heritable subject in the sense of the tenth purpose of he trust-disposition. In my opinion it is not. The way in which they dealt ith their lands, as shewn in the disposition to Charles Goar, is very good evi-ence of their understanding with regard to the purchase of the duties. They ave him in 1817, shortly after the acquisition of the duties, a testamentary isposition of part of the lands, with double manner of holding, but imposing o him no obligation to pay these feu-duties, as they would have done if they ad intended to keep them up as a separate estate. They thus shewed that ey had no intention to keep up this right as a right against the land, but that ey had bought the duties merely to disburden their property. If they had en disponing the rest of the lands, after the date of Goar's disposition, in vour of the trustees for the charity, there is no doubt that they would have ade the disposition just in the terms of the disposition to Goar, and by doing would have clearly shewn their intention to extinguish and sopite these feu-ties.

I therefore come to the conclusion, upon the construction of these deeds, that was clearly not the intention of the ladies to continue the feu-duties as a bur-en on the lands, but to free the lands from them. This is confirmed by the onduct of the parties. Immediately after the death of Miss Barbara Fea a all payment was made to Mr Neill and Mr Dennison on the footing that the signation of the feu-duties was the acquisition of an heritable subject in the nse of the tenth purpose of the trust-deed. But that payment was made only nce, and no demand was afterwards made. It is therefore clear that the first uestion should be answered in the negative, and it is needless to answer the econd.

The other Judges concurred.

THE following interlocutor was pronounced:—"The Lords having heard counsel on the special case as amended, In answer to the first question, find and declare that the party of the first part is not entitled, in virtue of the provision in favour of the late James Dennison of Myre, contained in the tenth purpose of the trust-disposition and settlement executed by the late Barbara and Helena

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Fea on the 21st July 1810, to one-fourth part, or any part, of the duties purchased by them from Lord Dundas, in terms of the disposition dated 7th April 1817; and find that, in respect of this finding and declaration, it is not necessary to make any further answer to the questions contained in the special case, and decern."

HAMILTON, KINNEAR, & BEATSON, W.S.—H. G. & S. DICKSON, W.S.—Agents.

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Lord Herries v. Maxwell's Curator.

The Right Honourable WILLIAM CONSTABLE MAXWELL, Baron Herries of Terregles, First Party.—*Watson—Kinnear.*
SAMUEL ADAMSON, *Curator Bonis* to Frederick Henry Constable Maxwell of Terregles, Second Party.—*Marshall.*

*Landlord and Tenant—Entail—Heir and Executor—Apportionment—*33 & 34 *Vict. c.* 35—*Lease.*—Farms on an entailed estate were let in accordance with local custom and the previous usage on the estate, with entry to the houses, grass and hay lands at Whitsunday, and to the lands under crop at the separation of the crops from the ground. The rents were payable at Martinmas and Whitsunday for the half year preceding. The proprietor died on 18th July 1872. In a question between his executor and the next heir of entail, *held* that the rents payable at Martinmas 1872 were rents accruing at the date of his death, and fell to be apportioned between heir and executor under the Apportionment Act of 1870.

1ST DIVISION.

THE late Honourable Marmaduke Constable Maxwell, heir of entail in possession of the estate of Terregles, died on 16th July 1872, and he was succeeded in the entailed estates by his nephew, Frederick Henry Constable Maxwell, who was insane, and to whom Mr Samuel Adamson was appointed *curator bonis*. Mr Marmaduke Constable Maxwell left a trust disposition and settlement, leaving his whole means and estate to William Lord Herries, whom he appointed his sole executor.

The farms on the entailed estate of Terregles were held under one or other of two forms of "terms and conditions of set," in both of which the stipulation as to entry and payment of rent was to the same effect:—"The entry to the farms shall be at Whitsunday as to the houses, grass and hay lands, and at the separation of that same year's crop from the ground as to the lands in crop, and the rents shall be payable half-yearly by equal portions, at the terms of Martinmas and Whitsunday, beginning the first term's payment at the first term of Martinmas after the entry for the half year preceding, and for the next half year at the Whitsunday thereafter, and so on half-yearly and termly during the lease, with interest and penalty during the not payment."

This stipulation was in accordance with the custom of the district, and the practice observed in letting the farms on the estate while in the possession of Mr Maxwell's father, the entailer. Although due at Martinmas and Whitsunday the rents were actually collected at Candlemas and Lammas following these terms respectively.

The rents of the estate falling due at Whitsunday 1872 were not collected at the time of Mr Maxwell's death.

The parties, Mr Maxwell's executor and the *curator bonis* of his heir-at-law, presented this special case for the opinion and judgment of the Court on the following question:—"Whether the first party, as executor of the late Honourable Marmaduke Constable Maxwell, is entitled to a proportion of the rents of the entailed estate of Terregles, payable at

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[artinmas 1872, corresponding to the period between Whitsunday 1872 nd the day of the death of the said Honourable Marmaduke Constable [axwell on 16th July 1872?"

Argued for the executor (Lord Herries);—The general rule was that nts due and exigible are regarded as *in bonis* of the deceased, and be- ng to his executor, whether they have been actually uplifted or not; nd there is no exception in regard to the forehand rents of an entailed state, provided that the custom of forehand rents has prevailed on the state, and has not been introduced by the deceased heir in order to dis- ppoint his successor.[1] This was clear law, and by the terms of the late pportionment Act it was equally clear that a proportion of the rents hich accrued from day to day during the term after Whitsunday 1872, ntil the death of Mr Maxwell, belonged to his executor.[2]

Argued for the next heir of entail;—Although by a rule introduced by ecisions the forehand rent payable at Whitsunday belonged to the ecutor of the proprietor who survived that term, and the rent which came payable at the Martinmas following would also have belonged to executor had Mr Maxwell survived Martinmas, yet that rent was not plicable to the crop of that year, nor was any part of it current or cruing during the half year in which he died. The simple rule in all ses, as Lord Monboddo expressed it in Kerr v. Turnbull, was the crop;[3] d as the rule established by decisions in regard to the rights of heir d executor to the termly payments of forehand rent had not been tended to cases of apportionment it was open to the Court to follow e simple and natural rule, to which the other was an exception. The nt payable at Martinmas 1872, of which apportionment was claimed, as not current or accruing during the half year preceding that term, but as legally applicable to a crop which was not then sown or reaped. It uld not, therefore, be considered "accruing" during that half year, and d not come within the words of the statute of 1870. The Court in tricating the rights of parties would look to the legal terms of payment here they were not foreclosed by express decisions.[4]

At advising,—

LORD PRESIDENT.—The late Mr Marmaduke Constable Maxwell was heir of tail in possession of the estate of Terregles until his death on 16th July 1872, d the present question arises between his executor and the next heir of entail. e rents payable by the tenants on that estate are forehand rents, and therefore e crops which, if they were payable at the legal terms, these rents would be ld to represent, were not reaped when the rents became payable. The leases e very distinct. In one form of lease the rent is payable "half-yearly, by ual portions, at the terms of Martinmas and Whitsunday, beginning the first m's payment at the term of Martinmas after the entry for the half year pre- ding, and for the next half year at the Whitsunday thereafter, and so on half- rly and termly." Now, as the entry to the farms was at Whitsunday, pay- nt of rent at Martinmas following was not a payment for a crop then reaped, d accordingly the lease bears "for the half year preceding," in which no crop as sown or reaped. The rent stipulated is a rent for occupation during that

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[1] Marquis of Queensberry v. Duke of Queensberry's Executors, Feb. 18, 1814, C.; Hunter on Landlord and Tenant, ii. 313.
[2] 33 and 34 Vict. c. 35; Guthrie's Bell's Principles, secs., 1047, 1497, 1499, &c.
[3] Kerr v. Turnbull, 1760, M. 5430—5 B. Sup. 876; Elliot v. Elliot, 1792, 15,917; Petley v. Mackenzie, 1805, Hume, 186; Swinton v. Gawler, June 1809, F.C.; Campbell v. Campbell, July 18, 1849, 11 D. 1426.
[4] Weir's Executors v. Durham, March 17, 1870, *ante*, vol. viii., 725; Queensberry v. Queensberry's Executors, *cit.*

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period of time, and not for a crop. In the other form of lease, which w duced by Mr Maxwell himself, the words as to payment of rent are exa same both as to the time of payment and the period to which the pay applicable, the entry being to the houses and grass at Whitsunday, an land in crop at the separation of the crop.

Now, we have heard, on behalf of the next heir, an argument founde cases as to postponed rents, especially in grass farms—cases which seem no kind of application to the present question. In such cases the between heir and executor is generally determined with reference to t terms of payment; because it is generally expressed in such leases that is payable for a particular crop and year. But apart from that, the ap of the rule founded on to forehand rents has never been allowed since of Lord Kilkerran. That eminent lawyer says, under the case of Mur nynmond v. Cathcart, 1739, Mor. 15,906,—"The meaning of the commo that the legal and not the conventional terms are the rule between heir cutor is no other than this, that the postponing the legal term by the co of parties, which generally is the case of tenants' rents, does not deprive cutor of the benefit of the legal term. But if, by the convention of annualrents, for example, be made payable before the legal term, the e will have the benefit of that convention; and the case would be the a forehand payment of rents of lands, for there is no instance of what is and exigible not going to executors."

No doubt that dictum does not immediately solve the question a application of the Apportionment Act, but it shews that the rents pa Whitsunday 1872 belonged to the executor, because, though not collec were undoubtedly due, and exigible, and were *in bonis* of the decease rule would not have been applicable to an entailed estate if forehand re a novelty on that estate—if, for example, the last heir who died had in forehand rents, having found a different system in existence at his successi would have been taking undue advantage of the next heir of entail; bu not the case here, for it is stated that forehand rents were the law of th It was both the custom of the district, and the rule had been adopte entailer, and continued in all the subsequent leases. Hence, on the aut the Marquis of Queensberry's case this is to be dealt with just as if i fee-simple succession.

The question remains, whether the rents for the period between Wh 1872 and Mr C. Maxwell's death are subject to apportionment under th of 1870. Mr Marshall says that that statute is not applicable, because do not accrue during the period before the term when they become payab is, the rent due at Martinmas is not current or accruing in the interval Whitsunday and Martinmas. It is payable at Martinmas by a mere stipulation, and is not growing. That argument, however, is fallacious, b reference to the words of the Act and to the terms of the leases. The l tinctly provide that the rent payable at Martinmas is "the rent for the preceding;" and it is very difficult to see how it is not current or not accr as much as if it were payable at the legal term. But however that ma terms of the statute are enough. The great object of the statute is to transactions by making everything apportionable. Accordingly it provi "all rents, annuities, dividends, and other periodical payments in the n income (whether reserved or made payable under an instrument in w otherwise) shall, like interest on money lent, be considered as accruing to day, and shall be apportionable in respect of time accordingly." I made matter of enactment that everything payable in the nature of inc be considered as accruing from day to day, and as such apportionable. thing of that kind growing due in the term during which a deceased p is therefore apportionable between his heir and executor.

The consequence is that the question put to us must be answered in the executor,—that is to say, in the affirmative.

The other Judges concurred.

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THE COURT pronounced this interlocutor:—" Find and declare that the party of the first part, as executor of the late Honourable Marmaduke Constable Maxwell, is entitled to a proportion of the rents of the entailed estate of Terregles, payable at Martinmas 1872, corresponding to the period between Whitsunday 1872 and the 16th July 1872, being the day of the death of the said Honourable Marmaduke Constable Maxwell, and decern."

MACKENZIE & KERMACK, W.S.—CAMPBELL & ESPIE, W.S.—Agents.

No. 67.
Feb. 6, 1873.
Parochial Board of Bothwell v. Pearson.

E PAROCHIAL BOARD OF THE PARISH OF BOTHWELL, First Party.—*Balfour.*
THOMAS PEARSON, Second Party.—*Lancaster.*

ocess—*Special Case—Court of Session Act*, 1868, *sec.* 63.—Parties are not ed to bring questions before the Court in the form of a special case when are not in a position to raise these questions under some other mode of pro- e known to the law.

ocess—*Special Case.*—The local authority in a parish, and a ratepayer in a l drainage district therein, presented a special case for the opinion and ment of the Court on the question whether the local authority was entitled arge certain expenses against the special district or the whole parish. that the special case was incompetent, in respect that (no assessment g been imposed or charge threatened), the only form in which the question w could have been raised was an action of declarator, and that in that case uld have been necessary to call more than a single ratepayer.

1st Division. B.

1867 the parochial board, as the local authority of the parish of well under the Nuisances Removal Act, and Sanitary Act, 1866, re- d, upon a requisition under the 76th section of the former Act, to a portion of its district into a special drainage district. That district finally sanctioned on 15th August 1868, and measures were taken for eeding with certain drainage works. Messrs Crawford and Poynter, rietors of land immediately adjoining to the special drainage district, cted to the sewage being directed into the Myres Burn, a stream ing through their lands, and raised actions to prevent the local ority from doing so.

xpenses were incurred by the parochial board (1) in giving the tory notices regarding the formation of the special drainage district; in defending an appeal against the resolution defining the special nage district; (3) in defending the actions before referred to; and (4) btaining plans of a proposed intercepting sewer, in order to a com- nise of the questions in dispute.

his special case was presented by the parochial board as the local ority of the said parish of the first part, and Mr Pearson, an owner and pier of lands within the special drainage district, of the second part. as not stated that any dispute had arisen between the parties, but the eedings taken in forming the special drainage district, and the litiga- with Messrs Crawford and Poynter were set forth as facts agreed n by the parties. The opinion and judgment of the Court were asked n the following questions:—" (1) Are the expenses which were incurred onnection with the formation of the special drainage district charge- against the special drainage assessment leviable under section 93 of 'Public Health (Scotland) Act, 1867?' Or (2) Are these expenses ral expenses incurred in executing the Act, and chargeable against assessment leviable under subsection 2 of section 94 of the said Act? Are the expenses incurred subsequent to the formation of the said

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special drainage district in connection with the actions before-mentione and with the proposed compromise of these actions, chargeable again the special drainage assessment leviable under section 93 of the 'Publ Health (Scotland) Act, 1867?' Or (4) Are these expenses general e penses incurred in executing the said Act, and chargeable against t assessment leviable under subsection 2 of section 94 of the said Act? (If the expenses incurred in connection with the formation of the spec drainage district, and the expenses incurred subsequent to the formati of the said district, or either of these expenses, are held to be charge against the assessment leviable under subsection 2 of section 94 of t said Act, is that assessment leviable on and within the special drain district alone, or upon the whole district of the local authority?"

At the debate, the Court raised the question whether this proceedi was competent under the 63d section of the Court of Session Act, 186 The parties were allowed to add to the special case an averment that th board, as local authority, proposed to assess the special drainage distri for the charges in question.

LORD PRESIDENT.—We have come to be of opinion that this special case i not one which we can entertain. The party of the first part is the local authori of the parish of Bothwell, and the only other party is Thomas Pearson, residi within the parish, whose only claim to be a party to this special case is that h is a ratepayer in a particular district of that parish. One particular portion o the parish of Bothwell lately applied to have itself separated, and erected into special drainage district. The question attempted to be raised here is, whethe the expenses connected with that proceeding form a charge upon the rates of th parish generally, or only upon that part of it which has been separated. Th parochial board, as the local authority, say that they mean to charge these ex penses against the rates of the special district, and that they are justified in doin so by the terms of the Public Health Act. Mr Pearson comes forward and say that they ought not to do this, but should charge the expenses against the ra of the whole parish. Now, I am always very unwilling to refuse to entertain special case which appears to come within the scope of the Act of Parliame We have now had a good deal of experience in the operation of the 63d secti of the Act of 1868, and I am of opinion that it introduced a very expeditio economical, and satisfactory method of bringing to a decision questions of la where the parties are agreed on the facts. But we must be careful not to con vert or pervert special cases to an improper use, or allow them to be brought b parties to try questions which these parties could not try under any other mo of procedure known to our law. For my reading of section 63d of the Court Session Act, 1868, is, that when there are parties who can come before us in a process known to the law, then if they are agreed on the facts, and dispute on on a point of law, they shall be allowed to bring that point to trial in the sha of a special case. The question here therefore is, whether the parochial boa of Bothwell and Mr Pearson could in any proper form of process have rais this question. I think they could not. This assessment has not been eve imposed, much less levied. It is only stated that it is in the contemplation o the board to impose it. Now, even if Mr Pearson had come forward to suspend the levying of an assessment already imposed I doubt if he could have succeeded If the assessment had been laid on, and Mr Pearson had suspended a threatene charge against himself individually, that might have been competent, but I do no see how he could raise the general question otherwise. Again, let us consid whether there is any other form of process which might have been used. An action of declarator is the only one. But if the parochial board had raised a action of declarator, and called Mr Pearson only, we should have declined t entertain the action with no more parties in the field. It appears to me, there fore, that, as this question could not be competently raised between the parti in any known form of process, it cannot be entertained by us under the cover o a special case.

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ORD DEAS.—I should not feel it quite safe to say that in all circumstances hich there might be an action in this Court a special case is also competent. I am clearly of opinion that there cannot be a special case unless an action een those who are parties to it would have been sufficient to try and settle uestion. Now, if this question had been raised between these parties in orm of an ordinary action the objection would at once have occurred that rties interested were not called. Then there is also the objection to which Lordship has alluded, namely, that no assessment has been actually imposed. nything we can tell no assessment may ever be imposed, and the question o us may consequently never arise. The question is, therefore, purely thetical, and we do not sit here to decide hypothetical questions. Then, , the case in another branch of it relates to the expenses of defending s, and I do not think that part of the case could have been entertained if the main question could have been so.

RD ARDMILLAN and LORD JERVISWOODE concurred.

THE following interlocutor was pronounced:—"The Lords having heard counsel for the parties on the special case, and considered the same, dismiss the special case, and decern."

ORTON, NEILSON, & SMART, W.S.—JARDINE, STODART, & FRASERS, W.S.—Agents.

No. 68.

Feb. 7, 1873.
Andrews v. Andrews.

(*First Action.*)
ROBERT ANDREWS, Pursuer.—*Scott—Rhind.*
Mrs ELIZABETH PEACOCK or ANDREWS, Defender.—*Trayner.*
JOSEPH STIRLING, Co-Defender.—*MacLean.*

(*Second Action*).
Idem v. Eosdem.

penses—Divorce—Husband and Wife—Conjugal Rights Act, 1861, *sec.* 7. n an action of divorce brought by a husband against his wife and a co-de- er with whom the principal defender was proved to have committed adul- the Court found the co-defender liable to the pursuer in his whole expenses, d as between agent and client, including any expenses of his wife for which ight be found liable.

OBERT ANDREWS raised an action of divorce against his wife, calling 2D DIVISION.
ph Stirling as co-defender. On the 26th of July 1872 the Lord Ordi- 1st Action.
r found that he had failed to prove his wife's adultery; and he re- Lord Jervis-
ned to the Inner-House. Before the reclaiming note came on for woode.
ing he raised another action of divorce against the same parties, libel- 2d Action.
acts of adultery which he alleged to have occurred after the proof in Lord Shand.
former case had been taken. A record was made up and proof R.
n in this second action; and on 21st January 1873 the Lord inary reported the case to the Second Division, and added the sub- ed note.*

he two actions came before the Second Division together. The Court 7th February 1873 conjoined the two actions, found the proof of

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"It appears to the Lord Ordinary that while on the one hand he ought not lay the proceedings in the present action till the issue of the other case, on ther hand he ought not to pronounce a decree of divorce, seeing that the t have at present under consideration the question whether a decree of ce ought to be granted in the action before them, which was instituted be- the present. As both cases are now ripe for judgment it appears to the Ordinary that they should be disposed of at the same time; and, indeed, ill be for the consideration of the Court whether they ought not to be ined."

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adultery with the co-defender in both to be sufficient, and in the conjoined actions pronounced decree of divorce against the defender accordingly.

On the question of expenses the interlocutor proceeded :[1]—

"FIND the co-defender liable to the pursuer in expenses, as well those incurred by the pursuer himself as those for which the pursuer may be liable in respect of the expenses of the defender: Further find that the pursuer is liable to pay the expenses incurred by the defender; and remit to the Auditor to tax the expenses now found due as between agent and client," &c.

A. K. MORISON, S.S.C.—CAMPBELL & SMITH, S.S.C.—T. J. GORDON, W.S.—Agents.

No. 69.
Feb. 8, 1873.
Ferrier v. Kennedy.

ANDREW FERRIER (Inspector of Poor of New Monkland), First Party.—*Black.*

D. M. KENNEDY (Inspector of Poor of Auchinleck), Second Party.—*Watson—Balfour.*

Poor—Settlement.—A pauper born in 1841 in the parish of A removed with his father's family in 1846 to the parish of B, where he lived in family with his father till the death of the latter in 1860. A few weeks after his father's death he enlisted and remained abroad in military service till February 1872, when he returned to Scotland, and became a proper object of parochial relief. *Held*, in conformity with Craig v. Greig and Macdonald (July 18, 1865, *ante*, vol. iii. 1172), and M'Lennan v. Waite (June 28, 1872, *ante*, vol. x. 90), that the parish of his birth was liable for his support, and not the parish of B, in which he had ceased to have a derivative settlement by emancipation at his father's death.

1ST DIVISION. M.

JOHN SYME was born in the parish of New Monkland in 1841. In 1846 his father's family removed to the parish of Auchinleck, where he continued to live in family with his father until the death of the latter on 11th April 1860. At his death the father had a residential settlement in Auchinleck. On 8th May 1860 John Syme enlisted in the army, and left Scotland. He remained in foreign service until the month of February 1872, when he was discharged, and returned to Scotland. There he became chargeable as a pauper on the parish of Kilmarnock in February 1872. The pauper was unmarried, and during his absence from Scotland had no house or place of residence in the parish of Auchinleck. It was admitted that he had no settlement in the parish of Kilmarnock, which intimated claims of relief against each of the parties to this special case.

The question presented for the opinion and judgment of the Court was "Whether the parish bound to support the said pauper is the parish of Auchinleck or the parish of New Monkland?"

It was argued for New Monkland, the first party, that the parish of Auchinleck was liable in relief, in respect that the settlement which the pauper had in that parish at the date of his enlistment was not lost through his compulsory absence on military service.[2]

It was argued for Auchinleck, the second party, that the parish

[1] Conjugal Rights Act, 1861, sec. 7.

[2] Hay v. Croll and Beattie, Feb. 5, 1858, 20 D. 507; Mason v. Greig, May 11, 1865, *ante*, vol. iii. 707; Roger v. Maconochie, July 5, 1854, 16 D. 1061; Beattie v. Leighton, Feb. 20, 1863, *ante*, vol. i. 434; Greig v. Miles and Macdonald, July 19, 1867, *ante*, vol. v. 1132.

ew Monkland was liable, in respect that, if the pauper had a residential ttlement in Auchinleck, it was lost by non-residence; and that the urish of his birth had become liable, in respect of his emancipation by s father's death, and that he had never acquired any residential settle- ent in his own right.[1]

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At advising,—

LORD PRESIDENT.—The pauper became chargeable on the parish of Kilmar- k in February 1872, when he was thirty-one years of age. He had no resi- ntial settlement, and therefore one would suppose that the parish of his birth ame liable for his maintenance. But it is said that he possessed a derivative ttlement at the age of thirty-one, and after being in foreign service for twelve ars. Any doctrine leading to such a result would be to my mind very sus- icious. It would indeed almost be a demonstration of its unsoundness. I am t, however, inclined to place my judgment on that ground, but rather to mine the facts. The pauper's father died when he was between eighteen d nineteen years of age. The father had a residential settlement in the parish Auchinleck. It appears that the pauper, his son, enlisted in the army a few eks after his death, and proceeded on that term of foreign service to which I ve referred. It is not said that the lad continued in family with his mother; is not said that his mother was alive. The only facts are those which I have ted.

I am of opinion that the son, not being then a proper object of parochial lief, was necessarily emancipated by his father's death, and that his settlement as necessarily in the parish of his own birth, for it was impossible that he uld have any residential settlement of his own. The principles settled in the es of Craig v. Greig and Macdonald, and M'Lennan v. Waite,[2] are quite con- ive. I said in the latter case,—"A person who has no residential settlement his own right is chargeable on the parish of his birth if he is above the age of berty; and as soon as he does attain the age of puberty, his father being dead, settlement is in his birth parish in preference to any derivative settlement ich he previously had." The whole Court concurred, and I thought it settled. at rule is directly applicable, and is sufficient for the solution of the case.

LORD DEAS.—In this case the father died when the pauper was nineteen ars of age. It is not mentioned in the case when the mother died, but I ume that she did not survive the father, for if she had a fact of such im- tance would no doubt have been stated. If the mother had survived the er a totally different question might have been raised, and what we now cide must not be held to decide the question whether a surviving wife, with family above pupillarity, but under majority, has a claim against the parish her husband's residential settlement, both for herself and her family.

The case which we are now dealing with is the case of a father leaving a son minority, who is not said to have been pauperised by the death of his father. ow, one result of the father's death was undoubtedly to emancipate the son; d if the son maintained himself during the three weeks between his father's th and his own enlistment, or if he fell into poverty only towards the end of e three weeks instead of twelve years afterwards, still, even in that case he uld have fallen into poverty after emancipation, and would have been charge- le upon his own parish. In the case of M'Lennan v. Waite there was no ubt thrown upon this doctrine by Lord Kinloch, whose opinion I adopted. hat Lord Kinloch as well as myself wished to guard against was the stringent plication of the rule in the case of children falling into poverty when forming rt of the mother's family. But in a case such as we are now considering, with o pauperism at the date of emancipation, and where the person emancipated

[1] Craig v. Greig and Macdonald, July 18, 1863, *ante*, vol. iii. 1172; Hume v. ingle, Dec. 22, 1849, 12 D. 411; Crawford and Petrie v. Beattie, Jan. 25, 1862, D. 357.

[2] M'Lennan v. Waite, June 28, 1872, *ante*, vol. x. 908.

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has afterwards become a pauper, he must go upon his own parish, which is here the parish of his birth.

It is thus unnecessary that we should deal with the question whether a residential settlement is lost by military service abroad.

LORD ARDMILLAN.—There are two simple facts in this case which leave no room for doubt.

The first is, that actual pauperism only took place in 1872, when the pauper was thirty years of age. This fact is important, because the time of poverty is the true time to consider, in order to ascertain what the pauper's settlement is.

The second fact is, that the pauper was nearly nineteen years old when his father died. If, when the father died, the pauper had been a pupil, it would have been very important to know when the mother died, for a pupil has no separate settlement of his own. A pupil is not personally a pauper, but is a burden upon his parents. But when a pupil becomes a minor he has the capacity to acquire and hold a settlement for himself. So when the minor is fully familiated by the death of his father he is no longer a member of his father's family, but *sui juris*. If poverty falls on him he must seek relief from the parish of his own settlement. In this case the only parish of his own to which he can go for relief is the parish of his birth, and that parish is chargeable.

It is not necessary to enter upon the question of absence, but no case has yet been decided to support the proposition that a man without home or family in this country can retain or acquire a settlement here while residing abroad.

LORD JERVISWOODE concurred.

THIS interlocutor was pronounced:—"Find and declare that the parish liable to support the pauper is the parish of New Monkland, and decern."

D. CURROR, S.S.C.—WEBSTER & WILL, S.S.C.—Agents.

No. 70.

Feb. 8, 1873.
Macbeth v. Innes.

DANIEL MACBETH, Petitioner and Appellant.—*Orr Paterson.*
GEORGE INNES, Respondent.—*Maclean.*

Process—Clerk of Court.—Held that it was incompetent for a Sheriff-clerk or his depute, who was his partner in business, to act as clerk in a process in which the Sheriff-clerk was a party.

Observed, that the proper course was to apply to the Sheriff to appoint a clerk to act in his stead for that process.

1ST DIVISION.
Sheriff of Renfrew and Bute.
M.

DANIEL MACBETH, the Sheriff-clerk of Rothesay, presented a petition in his own Sheriff-court for sequestration against Francis Troy and George Innes. The Sheriff-clerk-depute was a partner in business with the Sheriff-clerk. The respondent, Innes, lodged answers to the petition, and pleaded, *inter alia*;—Where a Sheriff-clerk is pursuer of an action in his own Court neither he nor his partner is entitled to officiate as Sheriff-clerk in such action, and all procedure in this action in which either of these parties have acted or may act in the capacity of Sheriff-clerk is illegal and invalid as being against public policy.

The Sheriff-substitute (Orr) repelled this plea. The respondent appealed.

The Sheriff (Fraser) pronounced this interlocutor:—"Sustains the appeal for the respondent, recalls the interlocutor appealed against; and in respect that the petitioner, Daniel Macbeth, is Sheriff-clerk of the county of Bute, finds that he is not entitled to institute or carry on an action in the Sheriff-court of that county: Therefore dismisses the petition, and decerns: Finds the respondent, George Innes, entitled to ex-

penses against the petitioner, Daniel Macbeth; allows an account thereof to be lodged," &c.*

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* "NOTE.—In a series of cases it has been decided that a principal or depute clerk of a Court cannot act as agent in it, and the Act of Sederunt of 6th March 1783 has been repeatedly found to be simply a declaration of the common law. The authorities to this effect will be found cited in the case of Manson v. Smith, 4th February 1871, 9 Macph. p. 492, and in M'Glashan's Practice, 4th edn., by Barclay, p. 77. After stating that a clerk of Court cannot act as agent in his own Court Dr Barclay lays down the law thus:—'The exclusion relates solely to clerks being agents for others, and does not preclude a clerk of Court or his depute from conducting an action at his own instance in his own Court, particularly if it cannot be competently raised before any other; but the libel when at the principal's instance should always be subscribed by his depute, and *vice versa*. Of course he is still more entitled to defend an action in his own Court.'

"The Sheriff is unable to concur in this opinion, after considering the whole cases referred to by the learned author, and the other decisions mentioned by the Lord Justice-Clerk in the case of Manson v. Smith.

"The Sheriff and the Sheriff-clerk, according to these decisions, must be regarded as coming under the same rule. Neither of them can be an agent for a debtor, and it would seem to follow necessarily that neither of them ought to be allowed to sue in the Sheriff-court in which he is a judge or clerk. If the Sheriff had a debtor in the county of Bute it is quite plain that a summons in his name against the debtor would be a nullity. Sometimes it has been tried to obviate this inconvenience by making the summons run, not in the name of the Sheriff, but in that of the Sheriff-substitute, which summons would also be a nullity, but upon another ground, viz., that the writ must run in the name of the officer who holds his commission under the sign manual. Now, whether rightly or wrongly, the Sheriff-clerk has been put in the same category in this respect with the Sheriff. Lord Neaves gave this explanation in the case of Manson v. Smith of the position and duties of a Sheriff-clerk:—'In the argument for the respondent the position of a clerk of Court was completely ignored. It is a most important office. He is not the servant of the Court, but an independent public officer, whose duty it is to record and to assist in carrying out the judgments of the Court, and in whom must be placed the greatest confidence. He must be as impartial as the Judge. In inferior Courts he is the keeper of the seal of the Court, for by his signature summonses are authorised and rendered valid. He authenticates writs. It is to his satisfaction that caution must be found, and in his hands consignation must be made. He is the taxing officer in many Courts, and is virtually the extractor of their decrees, which are only rendered the foundation of diligence by being authenticated by him. It is clear that a person in such a position should not attempt to be *actor in rem suam*. No man can rightly use his public functions or any trust he may hold so as to benefit himself. If a clerk of Court were permitted to be the instrument of summoning his adversary there would be an opening for great irregularities. His doing so in my opinion, not only creates a nullity, but amounts to a delinquency.'

"Two conflicting judgments have been pronounced upon the point, the one by the First Division and the other by the Second Division of the Court of Session. In Heddell v. Garrioch, 1st March 1827, 5 Sh., p. 473 (503), the Court held that the Sheriff-clerk of Shetland could sue his tenant for payment of a rent amounting to £8 in the Sheriff-court of Shetland. On the other hand, in the case of Campbell v. M'Cowan, 10th July 1824, 3 Sh., p. 245, 'the majority of the Judges considered that it was illegal in a clerk of Court to bring an action for his own debt before a Court in which he himself must necessarily officiate as clerk, and that, although there were no grounds for suspending M'Cowan from his office, yet that his conduct had been irregular.'

"The case of Campbell was pleaded to the Court in the case of Heddell, but was disregarded by the Second Division. At the same time (in this division of authority) the Sheriff is entitled to give effect to his own opinion, and he has

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The petitioner appealed, and argued;—The Act of Sederunt c applies only to the case of a clerk of Court acting as an agent in l Court. It would be a great hardship both to the Sheriff-clerk and litigating with him if it was necessary to come to the Supreme C

The respondent argued;—It was competent for the Sheriff to a clerk *pro tempore*. The depute-clerk was so dependent on his p that the respondent might decline to have his cause judged by h was open to the appellant to get redress from the Supreme Court.

At advising,—

LORD PRESIDENT.—In this case the Sheriff has pronounced an interl which he finds that, in respect the petitioner, Daniel Macbeth, is Sherif the county of Bute, he is not entitled to institute or carry on an acti Sheriff-court of that county.

I am unable to concur in that interlocutor. It proceeds on the footi is absolutely incompetent for a Sheriff-clerk to carry on litigation in the which he is clerk. Any such rule would occasion very serious incon not to Sheriff-clerks alone, but to all parties concerned; while, so fa Sheriff-clerk himself is concerned, it would result in an entire *denegatio* because there are some cases in which the Sheriff of a county has a privat diction, and if in such cases a Sheriff-clerk cannot institute proceedin own Court he will not be able to do so in any Court whatever,—a res I cannot contemplate as possible under our judicial system.

The Sheriff has gone far beyond anything pleaded by the responden only plea stated is, that "where a Sheriff-clerk is pursuer of an action i Court neither he nor his partner is entitled to officiate as Sheriff-clerk action."

The Sheriff-substitute repelled that plea, and the Sheriff recalled th substitute's interlocutor, but went far beyond the plea to which he g I disagree with the Sheriff-substitute, but I cannot concur with the She judgment. If we substitute in the plea referred to the word "depute word "partner" I think the plea would contain a sound expression of

Various authorities have been cited on both sides, but I think none are irreconcilable with the opinion I have expressed, which is quite in a with the latest decision in the case of Manson v. Smith. In that cas suer, a clerk of Court, signed a summons, and though that was in a s

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come to the conclusion that it is more consistent with the spirit of all the to declare the absolute incompetency of an action either at the instan Sheriff or the Sheriff-clerk in his own Sheriff-court.

"It is no answer to say that the sum here sued for could not be s an action in the Court of Session in ordinary circumstances. A Sheri entitled to justice, and if (for reasons of public policy) he cannot sue i Sheriff-court, the Court of Session is open to him even for a debt unde

"Nor is it any answer to say that all the work devolving upon the Court is done by his depute, as in the present case. The depute is ju name for his principal, and stands even in a worse position, so far a independent action, than a Sheriff-substitute, seeing that the appointm Sheriff-clerk-depute is during the pleasure of the principal. The Sheri no weight to the fact that the depute is the partner in business of his He goes simply upon the general ground that it is for the interest of t that a Sheriff-clerk should not be allowed to carry on actions for his o in his own Sheriff-court. This will no doubt cause inconvenience respectable class of officials, but it is an inconvenience that must be bo of the disadvantages of their office."

[1] Sellar v. Duff, Feb. 11, 1819, F.C.; Manson v. Smith, Feb. 8, 1 vol. ix. p. 492.

[2] Adam, July 5, 1824, John Shaw's Justiciary Cases, p. 117; Erak. Shand's Practice, i. p. 6.

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se,—a class of cases with regard to which review is excluded by statute,—notithstanding the Second Division set aside the judgment.

In this case, *pari ratione*,—nay, I am disposed to say *multo magis*,—the conct of the Sheriff-clerk in relation to the process was utterly incompetent. Mr acbeth did not sign a summons,—there was no summons to sign,—this being ummary petition. But there must be a warrant of citation which initiates d sets in motion the whole action. This warrant of citation is written by the heriff-clerk or his depute; and if a Sheriff-clerk, in presenting his own petition the Sheriff, writes the warrant, I think such an act vitiates the whole proedings. If the Sheriff-clerk be clearly incompetent to act in his own case ually so must be his depute, an official appointed by, and presumably entirely der the guidance of, his principal. But, further, we cannot leave out of account at the interlocutor of citation in this case contains a great deal more than the arrant of citation, viz., a warrant of sequestration. It had the effect of sending officer to inventory and seize the respondent's effects before the respondent d been heard at all. No occasion could be imagined where it is so necessary protect the interests of defenders.

I apprehend that the remedy, where the Sheriff-clerk desires to sue in his own ourt, is, that he should apply to the Sheriff to appoint a Sheriff-clerk to act in s stead in that process,—a course which I consider would be perfectly competent, d quite consistent with a carefully considered judgment in the case of Galbraith, D. 52. The same rule will apply in this case. If Macbeth had asked the heriff to appoint some one else I have no doubt the Sheriff would have agreed, d the Sheriff-clerk thus appointed for this particular cause would have written e interlocutor of citation, and he alone would have had the custody of the ocess. This is no small matter when it comes to be considered how important the position of the Sheriff-clerk as clerk of process. For example, it might be cessary to find caution, and the clerk of the process is the judge of the suffiency of the caution. Now, the impropriety of the Sheriff-clerk judging of the fficiency of the caution which he himself must find is manifest. Or he may called on to consign a sum of money in the hands of the clerk of Court—in his own hands.

All dangers would be avoided, the process would go on, and be conducted ith perfect propriety, and with due regard to all requisite safeguards, by adopting the proposed remedy, viz., that where a Sheriff-clerk is a party to a cause in s own Court another wholly independent should be appointed in his place.

In this view I am compelled to the conclusion that, while recalling the interutor of the Sheriff, we ought to recall all the interlocutors pronounced in the se, and dismiss the petition.

Lord Deas.—The Sheriff in his findings in this case attaches no weight to e fact that the Sheriff-clerk-depute is the partner in business of his principal. e goes entirely on the general ground that the Sheriff-clerk of a county "is not ntitled to institute or carry on an action in the Sheriff-court of that county." ow, if the law were as stated by the Sheriff the disadvantage would be at least great to the public as to the Sheriff-clerk. We have a good illustration of at in the present case, which is a sequestration of a small tenant, who might turally expect to be found liable in expenses. If the Sheriff-court of the unty is not the proper *forum* for the Sheriff-clerk to bring his action in, it llows of necessity that the Court of Session must be the *forum*, and if he is mpelled to go there, the unfortunate defender, whoever he may be, may be ulcted in Court of Session expenses, although the question be one which is ally only of small-debt importance. I do not differ from the Sheriff in holding at an action, if it cannot be brought elsewhere, may be brought in this Court. only differ from him in thinking that this action cannot be brought elsewhere. think with your Lordship that a Sheriff-clerk, equally with anybody else, ay bring an action before the Sheriff of the county, and that the only question as to how the action is to be conducted. I am not disposed to say that there only one way of getting over that difficulty, but I agree that the way proposed y your Lordship is the best way. We have Stair's authority for saying that

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where the clerk is disqualified his depute may act, though deriving his appointment from him. A man is not the less a public officer merely because he derives his appointment from another public officer, and although the latter may be disqualified from acting in a particular matter, it does not follow that the other is so also. If, therefore, the depute-clerk had not been the partner in business of the principal clerk I should have held it not incompetent for the depute to act in a case at the instance of the principal. It is true that the clerks in this Court must write the interlocutors with their own hand, unless where this is specially dispensed with by the Court. But that is not the practice in the Sheriff-courts, where any clerk in the Sheriff-clerk's office, whether he holds a commission or not, may write out an interlocutor, and I never heard of any nullity being supposed to arise therefrom. When I was Sheriff of Ross and Cromarty shires, my own clerk in Edinburgh frequently wrote my interlocutors, and I believe the practice of all Sheriffs is similar. We are therefore dealing with a case in which the Sheriff might allow anybody he chose to write out the interlocutor, and this makes a considerable difficulty in holding that even if the Sheriff-clerk had himself written out the interlocutor this would have inferred a nullity. The interlocutor would not have been his interlocutor, but that of the Sheriff who adopted him as his amanuensis. The difficulty would have been still greater in holding it a ground of nullity that the interlocutor had been written by the Sheriff-clerk-depute. The case does not come at all within the rule prohibiting a Sheriff-clerk from acting as procurator in a case in his own Court. I do not, however, differ in thinking that if there is any dubiety the best course is to appoint somebody else to act in room of the Sheriff-clerk *pro hac vice*. The chief objection I feel is to going back upon and nullifying the proceedings *ab initio*. Looking to the nature of the application there is a good deal to be said for the view that a necessity existed for the interlocutor being at once written out to initiate the process. Now, necessity goes far to dispense with all declinatures. And though there may have turned out to be, in point of fact, no urgent necessity for instant sequestration in the present case, it might have been otherwise. I think there was such a degree of necessity as ought to prevent our holding the first interlocutor an absolute nullity. But in other respects I am not disposed to differ from the result arrived at by your Lordships.

LORD ARDMILLAN.—I cannot say that I quite agree with the view taken in this case by the Sheriff. I am not prepared to decide that the Sheriff-clerk is not entitled to institute an action in the Sheriff-court of the county, or that he cannot defend himself in the Sheriff-court. I think that would be a penalty of the office, and, as your Lordship says, a denial of justice to the Sheriff-clerk which the law does not sanction. Justice—and accessible justice—the prompt, available, and cheaply-attained justice of the Sheriff-court—cannot be refused to the Sheriff-clerk. It is not in that aspect that the question is here presented to my mind. The Sheriff-clerk cannot act as agent in the Sheriff-court. He does not do so here; an agent, or procurator of Court, appears for him.

To me the true question appears to be, whether the duties of the Sheriff-clerk in this cause where the Sheriff-clerk was a party have been competently and legally discharged. The office and duties of Sheriff-clerk are certainly important, and he must be neutral and independent of both parties. I think that he himself cannot competently and legally act as Sheriff-clerk in his own cause. But another clerk may be appointed by the Sheriff. The occasions on which, on account of the Sheriff-clerk being a litigant, another clerk requires to be appointed cannot be numerous. When they occur the Sheriff must provide the remedy. It is in his power to do so, and he should be asked to do so. Such an occasion is an emergency, and the appointment by the Sheriff of a Sheriff-clerk for the temporary purpose of meeting that emergency seems to be a reasonable and competent proceeding; and it was so considered by the Court in the case of Galbraith. But the remedy must be provided by the interposition of the Sheriff. The Sheriff-clerk, who in his own case cannot personally act, cannot himself appoint his substitute to act for him. It was his part, as a litigant in the Court when he was clerk, to apply to the Sheriff, and crave from him the appointment

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person to act as clerk in the emergency. I rather think a motion might been sufficient.
ot having done so,—but having devolved the duties of clerk on his own te, representing himself, his *alter ego*,—I cannot think that the procedure correct; one of the protections by which law guards the neutrality and pendence of judicial procedure is weakened.
expressing this opinion I do not rely on the fact of the Sheriff-clerk-depute partner in business of the Sheriff-clerk, though that is a complication of natter. My opinion rests on the more general ground, and is in accordance that which your Lordship has stated.

ORD JERVISWOODE concurred.

THE following interlocutor was pronounced:—"Recall the whole interlocutors pronounced in the inferior Court, dismiss the petition, and decern: Find the respondent entitled to expenses in the inferior Court, and also to expenses in this Court, the latter expenses subject to modification to the extent of striking off one-fifth of the taxed amount; allow accounts," &c.

J. & A. PEDDIE, W.S.—J. & R. MACANDREW, W.S.—Agents.

No. 71.

JOHN IRVINE AND OTHERS, Petitioners.—*Lee.*
SIR JOHN HERON MAXWELL, Respondent.—*Duncan.*
REV. JOHN ANDERSON, Minister of Dornock, and the REV. JOHN urdoch, Minister of Kirkpatrick-Fleming, Respondents.—*Millar*— *oncreiff.*

Feb. 17, 1873.
Irvine v. Maxwell.

hurch—Erection of quoad sacra Parish—Statute 8 *and* 9 *Vict. c.* 44, *sec.* 8.
he Court of Teinds will not sanction the erection of a *quoad sacra* parish ly because a manse and stipend have been provided for the minister, but only do so when it is necessary for the spiritual interests of the district on unt of the distance of the parish church, or the growth of population, or e such circumstance.

TEIND-COURT. Teind-Clerk.

HIS petition was presented by John Irving and others for the disjunc- and erection of a district in the presbytery of Annan into a parish *ad sacra* in connection with an existing chapel-of-ease at Kirtle as its ish church. It was proposed to take for this purpose certain portions n the parishes of Annan, Dornock, Middlebie, Kirkpatrick-Fleming, Brydekirk. The proposed disjunction and erection had been approved the presbytery of Annan. The district contained a population of about 0, and was about six miles long by three broad.
he petitioners, who were the trustees for the constitution of the church, forth that a manse and stipend had been provided in conformity with statute 7 and 8 Vict. c. 44, sec. 8.
ir John Heron Maxwell of Springkell and other heritors, and also the isters of Dornock and Kirkpatrick-Fleming, appeared as objectors, the ground that the erection was unnecessary and inexpedient, and t the district was, both from its size and conformation, unsuited for tion into a parish *quoad sacra*.
fter several debates as to the boundaries of the proposed parish and site of the church, ultimately the objectors agreed to the formation of naller district into a *quoad sacra* parish in connection with the chapel- ase at Kirtle.
t advising,—

ORD PRESIDENT.—It is much to be regretted that so much discussion has

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taken place in this case; for great expense must thereby have been ca the parties. This, however, was inevitable from the opposition which wa to the erection from parties interested. The ministers of two neighb parishes which were affected, and also the heritors whose interests were in in a serious manner, have been heard to-day on the question, which districts—one larger and the other smaller—is to be assigned. We h had any argument to-day as to the general expediency of the erection.

Now, in sanctioning the erection of parishes, the Court has to exerci diction of a very unusual and difficult kind. It is too much taken for that if the parties have provided a church, and have made arrangements payment of the minister, it follows as a matter of course that the Co assign a district. If any such idea does prevail the sooner it is put an the better, for that is not the object of the Act of Parliament. The o the Act was to provide spiritual and pastoral care for districts which were d of it, either because they were situated far apart from the parish churc account of the large number of the population, or some such similar stance. The erection here proposed is in a part of the country which populous, and it is proposed to separate the lands from parishes which very populous. The necessity for the erection is not very apparent to m There is no part of the proposed new parish very distant from a parish except one part of Annan, but it is not of great extent. The part tak Middlebie is somewhat larger, but the parish church is adjoining. Th of Dornock is very small, but it is proposed to take away a part of i effect of this would be to make the proposed parish larger than the p Dornock. Neither Kirkpatrick-Fleming nor Middlebie is in need of a relief. The only parish which affords a feasible case is Annan, the no of which is some distance from the parish church. But the distance not very great. I have therefore great difficulty in holding that any n exists for the proposed erection.

This view of the case is confirmed by the opposition which has bee by the ministers of the two adjoining parishes of Kirkpatrick-Fleming a nock, which are proposed to be mutilated. They say that, in the int their parishioners, they think the erection inexpedient. We have also t owners raising the same opposition. Now, we must bear in mind tha erection is to be effectual, the people in the district will have to resor church. People are entitled to go to their parish church without any p whereas, if they go to the new church, they will have to pay seat-rents. people live far from their parish church this consideration might appea and of no importance; but where they reside near their parish church no necessity for their incurring such pecuniary cost. I cannot bring n any other conclusion than that the proposed erection is one which th should reject.

LORDS BENHOLME, ARDMILLAN, JERVISWOODE, and MACKENZIE concur

THE following interlocutor was pronounced:—"Refuse the p the petition, and decern: Find the respondents entitled penses, modified to one-half of the taxed amount thereof accounts to be given in by the respondents, and remit Auditor to tax the same and to report, reserving all object the petitioners to any part of the expenses claimed, as unnec incurred by the respondents, and authorise the Auditor, if h fit, to report specially on any such objection."

MENZIES & COVENTRY, W.S.—JARDINE, STODART, & FRASERS, W.S.—MORTON, N SMART, W.S.—Agents.

No. 72.

WILLIAM POMPHREY and OTHERS (James Newbigging's Trustees), and OTHERS, First Parties.—*Horn.*
WILLIAM POMPHREY and OTHERS (Thomas Steel's Trustees), Second Parties.—*Traynor.*

Feb. 20, 1873.
Newbigging's Trustees v. Steel's Trustees.

Succession—*Collation between heir and executor.*—*Held* that when an heir o is also one of the next of kin of an intestate dies without having collated heritage with the other next of kin his representatives are not entitled to a re of the moveable estate when they cannot collate the heritage.
Succession—*Vesting—Collation between heir and executor—Opinion* (per Lord Kinillan), that the right of an heir, being one of the next of kin, is not that a person primarily entitled to both moveable and heritable estate, but is a mary right to heritage which he may extend by collation so as to obtain a re of the moveables.

1ST DIVISION. B.

MARGARET STEEL died in 1841 intestate, leaving heritable and move- e estate, consisting of one-twelfth share of the heritable and move- e estate of the late James Warrock, then the subject of litigation an action of muitiplepoinding. She was survived by a brother, omas Steel, who died on 19th March 1860, and two sisters, Mrs Grace el or Newbigging, who died on 23d January 1860, and Miss Isabella el, who died on 23d February 1869. Miss Isabella Steel was con- ned executrix-dative to her sister Margaret, but no title was made up Thomas Steel, her heir-at-law, to the heritable part of her estate. On s death of Thomas Steel, his son, Peter Barr Steel, became heir-ap- rent to his aunt Margaret Steel, and on 4th December 1861 he was erned her heir in general, and made up a title to her heritage. He d on 19th May 1870, leaving a trust-disposition and settlement.

This special case was presented for the opinion of the Court, in regard the division of Margaret Steel's moveable estate. The first parties, ing the representatives of Mrs Newbigging and Isabella Steel, claimed argaret Steel's whole moveable estate to be divided equally between em *per stirpes*, on the ground that they were her next of kin, and that eir brother Thomas, who was entitled as heir-at-law to take up the ritage, did not collate or indicate any intention of collating. The cond parties, being the trustees of the said Thomas Steel, claimed a ird share of the moveable estate, on the ground that he was also one of e next of kin, and took no advantage from the fee of the heritable tate, which devolved on his son, Peter Barr Steel, and was taken up by im as his aunt's heir in general. Thomas Steel never attained to the ssession of any part of the heritable or moveable estate.

The question for the opinion of the Court was,—"Whether the trus- es of Thomas Steel are entitled to a share, and, if so, what share, of the oveable estate; or, whether it falls to be divided into two equal shares, ne for the representatives of Mrs Newbigging, and the other for the neral disponee of Isabella Steel?"

It was argued for James Newbigging's trustees and others, the repre- ntatives of Margaret Steel's sisters, that as collation had never taken lace or been possible neither Thomas Steel nor any one in his right uld claim a share of the moveable estate.

It was argued for Thomas Steel's trustees that he had never been in position to take benefit by the heritable succession, and therefore was t excluded from a share of the moveable estate. By 4 Geo. IV. c. 98 e right to a share of the moveable estate vested in him *ipso jure*, and as transmitted by his trust-deed.[1]

[1] Ersk. iii. 9, 3; 1 Bell's Com. 100, sec. 99.

No. 72. At advising,—

Feb. 20, 1873. Newbigging's Trustees v. Steel's Trustees.

LORD PRESIDENT.—The facts necessary for judgment in this case may b shortly stated. Margaret Steel died on 21st December 1841, leaving be heritable and moveable estate. Her nearest relations were a brother, Thom Steel, and two sisters. The brother, of course, was her heir in heritage, and t two sisters were the nearest of kin entitled to succeed to the moveable estat The two sisters died, the one in 1860 and the other in 1869. They had n opportunity of making up any title to the personal estate, for it was then t subject of litigation. The heir was very much in the same position, and accor ingly he never made up a title, and he died in March 1860. Now, after h death his son, Peter Barr Steel, became heir-apparent to his aunt, Marg Steel; and he made up a title to her, passing over his father. The quest now raised as between the trustees of Thomas Steel and the representatives his two sisters is, whether the brother's representatives are entitled to a shar the moveable estate along with the sisters of the deceased; and this they p pose to do without offering, or being able to offer, collation of the heritage. T question is too clear for argument. Thomas Steel had while in life no claim any share of the moveable estate. He might have had, if in fact he h brought the heritage into one mass with the moveables. But he did not do and the persons here claiming in his right are not in a position to do so. I a therefore, of opinion that the first alternative of the question submitted to must be answered in the negative.

LORD DEAS.—The claim here made by the executors of Thomas Steel is ma as in his right. The claim is made upon the footing that under the statute 4 Geo. IV. c. 98, the claimants are in the same position in which Thomas St himself would have been. We must therefore inquire what was the position Thomas Steel. Now, that position was that he could get a share of the mo able estate upon collating the heritage. He never collated, and it is not m proposed by those who claim in his place that they should collate; nor co they do so, for his share of the heritage to which he made up no title was tak up by his son, Peter Barr Steel, by serving heir to his aunt Margaret. Pet under the trust-deed of Thomas Steel, was a beneficiary, and took an inte under it; he was also liable for the acts and deeds, as also for the omissions of father, in respect Thomas Steel survived the intestate for nineteen or twe years, and possessed all that time on apparency. Notwithstanding all this t representatives of Peter Steel propose to pass over his father Thomas, and t the heritable property of Margaret Steel, and at the same time, as amongst h next of kin, to take a share of her moveable estate. That I hold to be out the question, and I concur in your Lordship's opinion.

LORD ARDMILLAN.—The right of an heir, being one of the next of kin, is n that of a person primarily entitled to both moveable and heritable estate, but is a primary right to heritage which he may extend by collation so as to obta a share of the moveables.

So viewing it, Thomas Steel, who was the heir in heritage, could not ha any right to moveables without collating the heritage to which he was entitle This he did not do. He died without collating or offering to collate, and it i not proposed now to do so.

LORD JERVISWOODE.—My opinion is the same as that of the rest of you Lordships.

The law of Scotland has great favour for the right of the heir in heritag He takes the whole heritage away from those as near as he himself is in relatio ship to the intestate. But it was never contemplated, nor would it be just, t give him an equal right along with them in the moveables without collatio which is practically what is contended for here.

THE following interlocutor was pronounced:—"The Lords havi heard counsel for the parties to the special case, find and decla

that the trustees of Thomas Steel are not entitled to any share of the moveable estate of the deceased Miss Margaret Steel, and decern."

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L. M. MACARA, W.S.—J. B. DOUGLAS & SMITH, W.S.—Agents.

JOHN LAURIE, Pursuer.—*Balfour.*
LLOYD AND COMPANY, Defenders.—*Guthrie Smith—Blair.*

No. 73.
Feb. 20, 1873.
Laurie v. Lloyd and Co.

ntract—Construction—Agent and Principal.—A commercial traveller agreed for a firm of wholesale tea merchants for a commission of one-third of the ence between the price quoted by his employers as the value of the tea, g the charge for brokerage and other expenses, and the money obtained e sale of the tea, his employers retaining the right of accepting or rejecting s. *Held* that this entitled him to one-third of the profits, if any, on each ffected through him, without deduction in respect of loss upon other sales.

2D DIVISION.
Ld. Ormidale.
R.

OHN LAURIE, a commercial traveller, entered into the employment of d and Co., wholesale tea merchants, London, in January 1871, on erms embodied in the following letter:—"Gentlemen,—In considera- of your employing me as traveller to sell tea for you in Edinburgh, h, Glasgow, and other places, as may be agreed upon, I hereby agree ulfil all the duties of such traveller with punctuality and fidelity, to accept as commission for my selling tea, and for money incurred aid by me for travelling and other expenses, one-third part of the rence between the price quoted by you to me from time to time as value of the tea, adding the charge for lot-money, brokerage, and r expenses, and the money obtained by the sale of the tea. And I her agree that should I at any time wish to leave your employ, ive you one month's notice of my intention of so doing, and to receive ame term of notice from you to leave your employment. All money e collected by you. This agreement dates from 2d January 1871.— ns, &c., JOHN LAURIE."

he pursuer continued in the employment of the defenders until January 2, when he raised the present action for payment of £146, 14s. 8d. pursuer averred that during the time he was with the defenders btained orders for them to the amount of £10,350, 16s. 1d.; that the fit thereon, calculated as agreed upon, was £710, 10s. 0d., and that refore the commission due to him, being one-third of that profit, was 6, 14s. 8d. On account of this commission the pursuer had received), and the present action was brought for recovery of the balance of 6, 14s. 8d.

he defenders admitted the terms of the agreement between themselves l the pursuer, and they also admitted that the pursuer had obtained ers for them to the amount of £10,350, 16s. 1d.; but they explained t £1083 of that sum had been lost through the failure of purchasers, l averred that the meaning of the agreement was that the pursuer was y to get a third of the *cumulo* profits, any loss arising from bad debts ng deducted, and not, as he averred, one-third of the profits on each nsaction. The defenders further averred in defence that, in addition the loss specified, a part of the price, amounting to £2850, had not n recovered at the date of this action, in consequence of the sales ring been made by the pursuer at a credit of four months, which period l not elapsed. They therefore pleaded that the £90 which they had d to the pursuer was the whole commission then due to him.

he Lord Ordinary allowed parties a proof. There were several letters ween the pursuer and defenders produced, among which the following

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were specially founded upon by the defenders as shewing the meanin their agreement with the pursuer as to commission.

Letter from the pursuer to the defenders, dated 5th June 1871, in wh he says,—"I think you need not deduct all my portion of Roxbu bad debt off at once." With reference to this letter the pursuer depo —"That debt of Roxburgh's was the first loss I had made to David L and Company, and as they had never received any money from Roxb and Company I felt so very much annoyed at it that I thought it w be right for me to risk losing a portion of that debt, although I conce that I was not bound to do so. I was to bear the loss by paying a tion of it, or by paying back a portion of the commission which I received upon that sale. Possibly I had got my commission on i that time."

Letter, defenders to pursuer.—"Mr John Laurie.—London, E.C., 14, 1871.—Dear Sir,—In reply to your letters of the 13th instant, I look into your account. I feel certain that nothing is due to you, a loss on L. Roxburgh and Co.'s account will be large."

Letter, defenders to pursuer.—"Mr John Laurie.—London, E.C., 7, 1871.—Dear Sirs,—In reply to your letter of the 3d inst., I herewith a *pro forma* account, which shews that if £5726, 14 is paid, £77, 3s. 8d. will be the amount of your commission to June."

The following account was enclosed:—

"Price at which goods were sold to customers, .	£5861 3
Loss on L. Roxburgh and Co.'s account, . .	134 9
Total sum received, . . .	£5726 14
Quoted price of the whole goods sold, . .	5495 2
Difference, ...	£231 11
One-third for traveller's commission, . .	£77 3

The Lord Ordinary pronounced the following interlocutor:—"H heard counsel for the parties, and considered the agreement and pro ings, including the proof, finds that the pursuer has failed to prov the sum libelled, or any part thereof, is due to him by the defen Therefore assoilzies the defenders from the conclusions of the sum and decerns." *

* "NOTE.—Whether the agreement made with the defenders by the pu as a traveller for the sale of their teas was or was not a hard or disadvanta one for him is not the question now in dispute. With that question the Ordinary has nothing to do. What he has to decide is, whether any, a any, what sum is due by the defenders to the pursuer under the agreemen 81 of process, the terms of which are accurately stated in the first article condescendence.

"The parties having differed, not only as to whether any, or, if any, sum was owing to the pursuer, but also as to the true meaning of the agre and especially as to the meaning of the expression in it 'money obtained' sale of tea, a proof was allowed, and has been adduced by them.

"On considering that proof, the Lord Ordinary has had no difficu assoilzieing the defenders.

"The meaning of the expression 'money obtained' is *prima facie* wit defenders. The Lord Ordinary thinks that, in the absence of all evide the actings or conduct of the parties to the contrary, it must be taken to money actually received or recovered by the defenders, and could not, a tended by the pursuer, be merely held to mean accounts incurred and them, although payment of these accounts should never be received or rec

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ne pursuer reclaimed, and argued;—The expression in the agreement ney obtained" meant either (1) money contracted for or due to the nders; or (2) money actually obtained by the defenders without any ction for losses. The pursuer was entitled to one-third of the profit ach transaction for which the defenders received payment, and when s was loss on a transaction the pursuer received no commission, use there was no profit, but he was not, on that account, to be sub- d to deduction from his commission on other transactions.

rgued for the defenders;—The commission was not due on each le transaction, but on the whole transactions. The pursuer, therefore, only entitled to a third of the profits made by the defenders upon he transactions entered into by the pursuer, after deduction of the s.

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any ambiguity that could be supposed to be attached to the expression , the Lord Ordinary thinks, be held to be satisfactorily cleared up and ved by the actings and conduct and statements of the parties themselves r the agreement. Thus, in their letter to the pursuer of 23d February (No. 515 of process), being in the second month of the business transac- , they say,—'We enclose particulars of sales made by you from 10th to the January, which shews that £27, 0s. 11d. will fall due to you for commis- if the amount of sales, £1160, 14s. 2d., is paid.' And in his letter to the nders of 9th February 1871 (No. 82 of process), the pursuer expressly says by the agreement he was to have 'one-third of the profits;' and it scarcely ired to be admitted by him, although it was so in his examination as a ess, that there could be no profit on bad debts, or on anything but accounts nent of which had been actually received or recovered. Then, again, in their rs to the pursuer of 12th June 1871, the statement in which was not re- ated or objected to by him in any way, they say,—'There is nothing due on, as the loss on Roxburgh and Company's account will be larger,' that is, any claim he could otherwise have had on other transactions. So far, ed, from repudiating or objecting to the defenders' statement in the letter referred to, the pursuer, on 5th June 1871 (No. 85 of process), wrote them a state of accounts, and added,—'I think you need not deduct all my portion Roxburgh's bad debt off at once.' On 7th July 1871 the defenders did mit to the pursuer, in a letter of that date (No. 517 of process), a tentative, as they term it, a *pro forma* account, shewing, as they stated, 'that if 26, 14s. is paid, £77, 3s. 8d. will be the amount of your commission to June;' and in the same letter the defenders added,—'You ought not to for money before it is due.' The Lord Ordinary does not see how it is pos- to reconcile these letters, and the statements which they contain, with the rpretation of the agreement now attempted to be fixed upon it by the pur- , or with any other interpretation of it than that contended for by the nders, and if so, it is clear on the proof that no sum whatever is due to the suer.

'In the course of the debate it was suggested, on the part of the pursuer, each transaction of sale of tea made by him should, in the matter of ac- nts, and in ascertaining whether any commission is or is not due to him, be ted at separately and independently. But in answer to this it is sufficient ay that the parties did not correspond or act under the agreement upon any h footing, and, besides, that is not the footing on which the pursuer libels or intains his action, as very plainly appears from his condescendence, and par- larly the third article thereof.

'The Lord Ordinary has only further to explain that the 'commission sheets' ich the pursuer, towards the end of his evidence, says he was to send to his at in order to be produced, have been produced, but after examination the d Ordinary cannot discover anything in them that can be held to affect ourably for the pursuer the views he has above expressed. They appear to Lord Ordinary to be adverse to him rather than otherwise."

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LORD JUSTICE-CLERK.—We are all of opinion that the first contention maintained by the pursuer cannot be maintained. It is not the meaning of the agreement that the pursuer should have a commission on all sales effected whether payment was obtained from the purchasers or not.

The next question is, whether, on the one hand, the traveller is entitled to a third of the profit on each transaction on which profit was obtained, or whether he is only entitled to one-third of the result of the profit on an indefinite series of transactions. On the whole, I am of opinion that the first proposition is correct. In regard to the construction of the agreement, which was made after the pursuer had been six months in the employment of the defenders, it is clear that he was not a partner in the business. The company retained to themselves the right of accepting or rejecting transactions. Whatever the nature of the pursuer's claim for one-third of the profits may be, it is certainly not that of a partner. In the same way the restrictions put upon the pursuer are quite inconsistent with the idea that he in any way guaranteed the sales. He was simply a servant of his employers, to be remunerated in a particular way. It is to be observed, too, that he was to pay his own expenses, which indicates that his position was not that of a joint adventurer, for in that case his expenses would have been a charge upon the joint adventure.

The question is, whether "money obtained" means aggregate profits or individual profits. Now, this agreement cannot be read intelligibly, unless, on the one hand, it is limited to individual transactions, or, on the other hand, some period is expressed for squaring accounts. No such period is expressed, and indeed the defenders maintain that as long as the pursuer remained in their employment his share of the profits could never be ascertained. From all this I gather that there never was any intention that there should be any such running account, but that the parties meant that the pursuer should be entitled to a commission on each transaction on which there was profit. The contention of the defenders would not be within the clause regarding remuneration, but would in effect be to make the traveller liable for bad debts. On the construction of the defenders, if after a long course of successful transactions the business had ultimately turned out to be unremunerative, owing perhaps to one bad debt, although the traveller might have secured a most lucrative connection for his employers, he would be entitled to nothing. I am unable to adopt this construction.

The most material point which is put against the pursuer is the view which he seems to have taken of his position in the letter of 15th June 1871. But as it stands, this letter amounts to an admission that bad debts should be deducted to a certain extent from his commission. This is unquestionably a difficulty which is increased by the letter of the defenders of 7th July 1871. But I do not think that the letters can be pressed so far against the pursuer as to prevent him from maintaining the true construction of the agreement itself. He may not have wished to raise any dispute about this bad debt of Roxburgh's and been willing to bear a part of the loss.

As to the record, when the pursuer came into Court, he certainly claimed up to the top of his demand. But there is nothing in the record to limit him to that particular demand. On the whole matter, I am of opinion that the pursuer is entitled to one-third of the profit on each transaction on which any profit was made. We have not the materials for determining the amount due to the pursuer, but I do not think there should be any difficulty in ascertaining it.

LORD COWAN.—The question, which has been chiefly debated before us was not so fully stated to the Lord Ordinary as its importance demanded. Still it had been stated, for at the close of his note the Lord Ordinary says,—"In the course of the debate it was suggested, on the part of the pursuer, that each transaction of sale of tea made by him should, in the matter of accounts, and ascertaining whether any commission is or is not due to him, be looked separately and independently." His Lordship's answer is,—"It is sufficient to say that the parties did not correspond or act under the agreement upon a

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footing, and besides, that is not the footing on which the pursuer libels or ains his action, as very plainly appears from his condescendence." The bservation is quite just, but is not conclusive against the plea; for it is to us, if necessary, to allow a plea to be added.

regards the first view maintained by the pursuer, which occupies almost hole of the note to the interlocutor, I quite concur with his Lordship that not be sustained. It seems clear that "money obtained" means money lly in the pocket of his employers. The Lord Ordinary rightly repudiated ntention that the pursuer was entitled to have his commission, whether rofit was made by his employers or not on the transaction. This is a view inconsistent with the terms of the agreement. Then comes the question, her "money obtained" does not merely apply to such particular transaction, ot to the aggregate amount of a course of transactions. I cannot read the ment in such sense as to affirm the last of these alternatives, having refer- to the true position of the parties.

yd and Company are wholesale tea merchants in London; they wished to d their sales in Scotland, and employed the pursuer Laurie, not as a partner, a commission agent, but simply as a traveller, to get orders. The agree- is as follows—(*Reads agreement*). There is not a word in this writing to ion the notion that an account for an indefinite period was to be kept of tea sales, and that this gentleman was to get no remuneration whatever the result of the whole transactions shewed an ultimate profit. In no this the position of a broker or an agent or a traveller, unless it is ex- y stated. Every transaction stands by itself. The agent sells, and gets mmission, if there is a profit on that particular sale. It is clear that this true and proper sense of the agreement—each transaction to stand by it- where there is a profit, the pursuer gets his commission; and where there profit, he gets no commission. This appears to me the true construction s writing. This is shewn, in the first place, by the agreement not fixing eriod at which the account is to be made up; and indeed this considera- n itself is to my mind almost conclusive against the defenders' construction. ld that the pursuer might go on labouring for a long period of years with- etting anything, and then that his labours should be all sacrificed by a bad occurring, it may be, towards the close of his employment, is a construc- which we could not adopt unless compelled to do so by express words. a, the pursuer had no authority finally to effect sales. He reported ales, and his employers were entitled, if they saw cause to do so, after ry, to repudiate them. And further, he was not allowed to collect a single y of money due to the company, with whom alone was left the right given lift the debts. All this shews that he occupied the position simply of ller, and not of partner, or agent, with a *del credere* commission, either of h positions, had it been established, might have made the pursuer respon- for the amount of his sales. He is not so as the case stands; and he must ntitled to his commission according to the true construction of the agreement. regards the letters, it is difficult to reconcile the terms of some of them the view that the pursuer was not liable for bad debts, except to the extent ot getting his commission. But I think that the explanation which has given is satisfactory, and in any view the letters are not sufficiently distinct as ve a construction to the agreement different from what its terms truly import.

RD BENHOLME and LORD NEAVES concurred.

THE following interlocutor was pronounced:—"Alter the said interlocutor: Find the pursuer entitled to a commission of one-third of the profits, if any, on each of the sales effected by him, but not on the sales which yielded no profit to the defenders: Appoint the defenders to lodge a state in process shewing the sales in question, and the amount of profit realised on each: *Quoad ultra* continue the cause, and reserve the question of expenses, and decern."

JAMES BUCHANAN, S.S.C.—WILLIAM B. HAY, S.S.C.—Agents.

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Black, &c. v. Edinburgh Tramways Co.

A. & C. BLACK AND OTHERS, Suspenders.—*Sol.-Gen. Clark—M'Laren.*
THE EDINBURGH TRAMWAY COMPANY, Respondents.—*Lord-Adv. Young—Mansfield.*

Private Act—Edinburgh Tramway Act, 1871, 34 *and* 35 *Vict. c.* 89—*General Tramways Act*, 1870, 33 *and* 34 *Vict. c.* 78, *sec.* 9—*Provisional Order.*—The Edinburgh Tramway Company were authorised by their special Act and relative plans to lay a double line of tramways in a certain street which at its widest part was not broad enough to afford a clear space of 9 feet 6 inches between the nearest rail and the footpath on each side. By an agreement incorporated with the special Act the whole provisions of the General Tramways Act, 1870, were made to apply as fully as if the special Act had been a provisional order obtained under the General Act. The General Act authorised the Board of Trade to grant provisional orders, which should only become effectual when confirmed by an Act of Parliament, and provided (sec. 9)—"No tramway shall be authorised by any provisional order to be so laid that for a distance of 30 feet or upwards a less space than 9 feet and 6 inches shall intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway, if one-third of the owners, or one-third of the occupiers of the houses, shops, or warehouses abutting upon the part of the road where such less space shall intervene aforesaid, shall, in the prescribed manner, and at the prescribed time, express their dissent from any tramway being so laid."

One-third of the occupiers of houses in the said street having applied for interdict against the formation of any line of tramway within 9 feet 6 inches of the footpath, as specified in sec. 9, *held* that the objection was competent, and interdict granted—(*diss.* the Lord President, on the ground that the special Act was to be regarded as a provisional order confirmed by Parliament, and that sec. 9 applied merely to the granting of orders by the Board of Trade and not to their construction when granted and confirmed by Parliament).

1ST DIVISION. Lord Gifford. M.

MESSRS A. & C. BLACK, publishers, Edinburgh, and others, who were occupiers of more than one-third of the houses, shops, and warehouses in North Bridge Street, Edinburgh, presented a note of suspension and interdict against the Edinburgh Street Tramways Company, incorporated by 34 and 35 Vict. c. 89, praying the Court to interdict the respondents "from making or constructing any tramway in or along the portion of North Bridge Street, Edinburgh, which extends from the south end of the North Bridge to the High Street of Edinburgh; or at least from making a double line of tramway in or along the said portion of the said street, or any tramway along the same, which shall be laid so that for a distance of 30 feet or upwards a less space than 9 feet and 6 inches shall intervene between the curbstone, or outside of the footpath or pavement on either side of the street and the nearest rail of the tramway there, and to decern and ordain the respondents to remove any tramway laid as aforesaid, and to restore the carriage-way to its former condition, in case the respondents shall have begun or completed their threatened operations before this note is advised."

By the Edinburgh Tramways Act, 1871, the Edinburgh Street Tramways Company were empowered to make various lines of tramways in and through the city of Edinburgh; *inter alia*, they were empowered to make and maintain the tramway after specified, viz.:—"(6 and 6A), a tramway No. 6, and a tramway No. 6A (being respectively 1 mile 5 furlongs and 8⅓ chains in length), commencing respectively opposite the north-west corner of North Bridge Street, at its junction with Princes Street (tramway No. 6 there forming a junction with tramway No. 1, and tramway No. 6A there forming a junction with tramway No. 1A), passing thence respectively by a curved line into and along North Bridge Street, thence along the roadway of the North Bridge, South Bridge Street, Nicol

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et," &c., "and terminating in that road at a point about 4 chains south ne point at which the Pow Burn passes under that road." * y section 44 it is enacted that "the agreements which respectively set forth in three schedules to this Act are hereby respectively con- ed and made part of this Act, and the same shall be carried into t accordingly." The first schedule referred to is an agreement be- n the Right Honourable the Lord Provost, Magistrates, and Town ncil of the City of Edinburgh, of the first part, and the several per- thereto subscribing, promoters of the bill then before Parliament, the said Edinburgh Tramways Act. The agreement provides, first, The parties hereto of the first part, as the local authority foresaid, l have the whole rights, powers, and privileges which the 'Tram- s Act, 1870,' or any other general Act relating to Tramways now orce, or which may hereafter pass during this or any future session Parliament, confer, or may hereafter confer upon the local authority ny district, and the whole provisions of the said Acts shall apply he Act of Parliament which the said second party is now promoting, o any Act of Parliament which they or the company may hereafter in, as fully in every respect as if the same were a provisional order ined under the 'Tramways Act, 1870.'" Second, The second party l and oblige themselves and the said company to proceed immediately r the said bill shall become law to lay down, construct, and work the ways described in the said bill, and shewn on the Parliamentary

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The sheet of letterpress appended to the Parliamentary plan contained further description of this tramway:—"The centre line of the proposed way No. 6 will be throughout at the distance of 4 feet 6 inches from and he left-hand side (proceeding from the commencement to the termination of tramway) of the imaginary centre line of each of the streets and roads ugh which it is intended to pass, except that from a point one chain north he north end of the bridge carrying the street or road called North Bridge r the North British Railway the centre line of the tramway will gradually ge from the said imaginary centre line until at the north end of the said ge it attains the distance of 8 feet 6 inches from and on the left-hand side ceeding as aforesaid) of the imaginary centre line of the roadway of the ge, and thence to the south end of the said bridge (at a point immediately r the south side of Low Market Street), it will continue at the last-men- ed distance from and on the left-hand side (proceeding as aforesaid) of the ginary centre line of the said roadway, and thence will again gradually ap- ach until in the length of one chain it reaches the distance of 4 feet 6 inches m and on the left-hand side (proceeding as aforesaid) of the imaginary centre s of the street.

'The centre line of the proposed tramway No. 6A will be throughout at distance of 4 feet 6 inches from and on the right-hand side (proceeding m the commencement to the termination of the tramway) of the imaginary tre line of each of the streets and roads through which it is intended to s, except that (1) from a point one chain north of the north end of the bridge rying the street or road called North Bridge over the North British Railway, centre line of the tramway will gradually diverge from the said imaginary tre line, until, at the north end of the said bridge, it attains the distance of eet 6 inches from and on the right-hand side (proceeding as aforesaid) of the ginary centre line of the roadway of the bridge, and thence to the south end the said bridge (at a point immediately over the south side of Low Market eet) it will continue at the last-mentioned distance from and on the right- nd side (proceeding as aforesaid) of the imaginary centre line of the said road- y, and thence will again gradually approach until in the length of one chain eaches the distance of 4 feet 6 inches from and on the right-hand side (pro- ding as aforesaid) of the imaginary centre line of the street; and (2)," &c.

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plans, from . . . . , and from the Edinburgh General Post-Office to New ington, and from Newington to Morningside, and from Morningside t Princes Street by way of the Lothian Road, and thereafter they shall pr ceed as speedily as possible to lay down, construct, and work the seve other tramways described in the said bill, and shewn on the said pl and the said whole tramways shall be completed within three years fr the passing of the said bill.

By the General Act, 33 and 34 Vict., cap. 78, entitled an "Act t Facilitate the Construction and Regulate the Working of Tramwa section 9, it is provided as follows:—"Every tramway in a town which hereby authorised by provisional order shall be constructed and ma tained as nearly as may be in the middle of the road; and no tram shall be authorised by any provisional order to be so laid that, for distance of 30 feet or upwards, a less space than 9 feet and 6 inches sh intervene between the outside of the footpath on either side of the ro and the nearest rail of the tramway, if one-third of the owners or o third of the occupiers of the houses, shops, or warehouses abutting up the part of the road where such less space shall intervene as aforesa shall in the prescribed manner and at the prescribed time express th dissent from any tramway being so laid." By section 3d the term "pr scribed" is declared to mean prescribed by any rules made in pursua of the said Act, and by section 64 the Board of Trade is empowered make such rules. The Board of Trade issued rules on 9th May 1870.

The General Act further contains provisions for publication of th order after it has been delivered by the Board of Trade to the pr moters; and then the 14th section provides,—"On proof to the satisfa tion of the Board of Trade of the completion of such publication aforesaid, the Board of Trade shall, as soon as they conveniently can af the expiration of seven days from the completion of such publicati procure a bill to be introduced into either House of Parliament, in re tion to any provisional order which shall have been published as afo said, not later than the 25th of April in any year, for an Act to confi the provisional order, which shall be set out at length in the schedu to the bill; and until confirmation, with or without amendment by Act Parliament, a provisional order under this Act shall not have any ope tion." Then it is provided that when a bill is introduced into Parliame it may be referred to a select committee, but when the bill is once pass then the Act of Parliament confirming the provisional order under th Act shall be deemed a public general Act.

The first objection by the suspenders was thus stated: Although th respondents are empowered by their Act to make and maintain a doubl line of tramway in the portion of North Bridge Street extending fro Princes Street to the north end of the North Bridge, they (the Tramwa Company) are not empowered to make any tramway or tramways in o along the other portion of North Bridge Street extending from the sou end of the North Bridge to the High Street of Edinburgh.

The answer to this was that the term North Bridge included Nort Bridge Street.

The suspenders further stated that they constituted one-third of th whole occupiers of houses and shops in the said section of North Brid Street, and that they objected to the formation of the line of tramwa nearer to the footpath than 9 feet 6 inches, in terms of section 9 of th General Act.

The suspenders pleaded;—(1) The respondents have no power und their Acts to make and maintain any tramway along the portion of Nor Bridge Street extending from the south end of the North Bridge to t

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1 Street of Edinburgh. (2) Under their Act of Parliament, and the isions of the public Act incorporated therewith, the respondents are ained from making and maintaining the tramway or tramways to be tructed on the said portion of street, so or in such manner that, for a nce of 30 feet or upwards, a less space than 9 feet 6 inches shall in- me between the outside of the footpath and the nearest rail of the ways. (3) The complainers, constituting more than one-third of the piers of houses and other premises in North Bridge Street, are, in e of the statutes and agreement founded on, entitled to interdict and ration of possession as craved.

he respondents pleaded;—(2) The respondents being empowered by ial Act of Parliament to lay down and maintain a double line of way, as shewn in the plans referred to in the Act, along the portion he street in question, and the lines which the respondents proposed y down, and which they are in the course of laying down, being in t conformity therewith, the complainers are not entitled to interfere 1 the said operations, and the note should be refused. (3) The sections he Tramways Act, 1870, founded on by the complainers, being inap- able, the note should be dismissed. (4) The complainers are not parties he agreement founded on by them, and have no right or title to found he provisions thereof; said provisions, moreover, are inapplicable to present case. (5) The respondents having proved compliance with he standing orders to the satisfaction of Parliament, the complainers not entitled to insist in the present application.

he Lord Ordinary on the Bills (Gifford) pronounced this interlocutor: Passes the note of suspension and interdict without caution; further in the meantime interdicts, prohibits, and discharges the respondents, all others acting for them, from making or constructing on or along portion of the North Bridge Street, Edinburgh, referred to in the ver of the note of suspension, any of the line or lines of the tramway ramways to be constructed by the respondents on the said portion of et, so or in such manner that for a distance of 30 feet or upwards ss space than 9 feet and 6 inches shall intervene between the outside he footpath on either side of the road or street and the nearest line of tramway; *quoad ultra* and *ad interim* refuses the interdict craved."*

"NOTE.—The questions raised in the present suspension and interdict are reat importance both to the interests of the Tramways Company and of the enders, proprietors, and occupants of shops and property in North Bridge et; the questions also affect the interests of the public, and perhaps may rn the making of the tramways in other streets than those referred to in present suspension. The questions turn entirely upon the construction of statutes, and this is a matter of considerable difficulty, arising chiefly from mode in which certain agreements have been incorporated in the respondents' . This having been apparently done while their bill was passing through liament, some portions of the Act do not harmonise very well with the incor- ted agreements, having been originally framed without reference to these ements.

Both parties conceded that the note must be passed, with the view of having questions raised definitely settled, and the only matter debated before the d Ordinary was whether there should be any, and, if so, what interim inter- . The question of interdict, however, involves the whole merits of the case. The Lord Ordinary has given it the best consideration in his power.

The first portion of the prayer for interdict seeks to prohibit the Tramway ipany absolutely from making any tramway at all, either single or double, on portion of North Bridge Street in question. This demand is founded on an ed omission of section 5, par. 6 and 6A, in the description of the streets over ch the tramway is to be made. It is said that this portion of the street or

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A record having been made up and closed the Lord Ordinary pronounced this interlocutor:—"Finds that, according to the sound construction of the line of road is not specified, and that, therefore, while the company may make their tramway up to the north end of the open portion of North Bridge, and may then begin again at the Tron Church, the intervening portion must be left unmade. Of course, this would be the grossest possible blunder in the Act, but it was urged that the Act must be strictly interpreted against the company whatever be the consequence.

"The Lord Ordinary cannot read the Act in the strict way contended for by the suspenders. He thinks he must put a fair interpretation on the Act, and the interpretation contended for by the suspenders is not only unfair, but manifestly nant. There is really, however, no reasonable room for doubt as to the meaning of the Act. The general title of the line of tramway in question is 'from the General Post-Office to Newington.' Of course the tramway must be continuous and the idea of a gap or a hiatus is absurd.

"The expression North Bridge, although sometimes used distinctively, fairly includes North Bridge Street as well as the open or central portion of the bridge. The expression roadway of the North Bridge may fairly be held as extending to the High Street, for, until close on the High Street, the roadway really runs on arches and on the bridge, although the arches are closed up by buildings, instead of being left open like the central arches. It is averred, and seems to be the case, that the total measurements, from terminus to terminus, specified in the statute, would not be made out without including the portion of street in question. On the whole, therefore, the Lord Ordinary has really no doubt whatever that the company are entitled to lay their tramway or tramways along the whole length of the North Bridge Street.

"The next point seemingly raised by the prayer is whether the company are entitled to make a double line of tramway at the place in question, or whether they can be compelled to confine themselves to a single line, which, it is urged, would be sufficient for traffic, and much more convenient for the occupants of shops. Here also the Lord Ordinary has no doubt. He thinks that, in terms of the statute, the company have power to make a double line, and that this cannot be ordained, at least directly, to make only a single line. The Parliamentary plan, which in this respect is part of the Act, distinctly shews a double line of tramway.

"The descriptive section (section 5) mentions two lines, the up line being called 'Tramway No. 6,' and the down line being called 'Tramway No. 5.' If, therefore, it is possible to construct a double line consistently with the other requirements of the Act the company have undoubtedly power to do so.

"And this brings the Lord Ordinary to the only point on which he has felt any difficulty. It appears that, in constructing a double line at the place in question, the company intend so to lay the rails that, for the greater portion, but not for the whole of the southern part of North Bridge Street, there will be less space than 9 feet 6 inches between the outside of the footpath and the nearest rail of the tramway; and the question is, whether this is or is not against the statute. It is important to note that the intention of the respondents so to construct their tramway, though fully admitted, was never in so many words intimated to the suspenders or the public. It is said it might have been discovered from the Parliamentary notices if anybody had taken the trouble to apply the measurements to the North Bridge. This may be so, but it required careful measurements and various calculations, which required some degree of skill; and the Lord Ordinary thinks that the suspenders are fairly entitled to say that it was only recently they became aware that the free space before the doors was to be so curtailed.

"The limitation to 9 feet 6 inches occurs in the 9th section of the General Tramways Act of 1870. Part 1st of that statute includes 'sections 4 to 12 inclusive.' Now, section 2 of the respondents' Act only incorporates 'part 2 and 3 of the General Act;' and if the matter had stood here, the respondents would have been no way bound by section 9 of the General Act, and this

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statute incorporating the respondents, being 'The Edinburgh Tramways Act, 1871,' and the statutes and agreements incorporated in the said Act, mainly their intention in promoting the Act. But pressure seems to have been applied in Parliament, and section 44 of the special Act was introduced, which makes certain agreements, and, *inter alia*, the agreement in schedule 1 of the statute 'part of the Act.' The agreement must now, therefore, be read as if it had been enacted in its terms.

"Now, section 1 of the agreement provides, besides giving certain powers to the 'local authority,' that the 'whole provisions' of the General Act shall apply to the respondents' special Act,' 'as fully in every respect as if the same were a provisional order obtained under 'The Tramways Act.' It seems plain, therefore, that not only parts 2 and 3 of the General Act are incorporated, but part 1 also. The 'whole provisions,' and still more the respondents' special Act, although an independent statute, is to be read in reference to the General Act 'as fully in every respect as if it were a provisional order.'

"It is true that part 1 of the General Act applies chiefly to the obtaining and granting of provisional orders, and to the conditions and powers which such orders must contain, and it was very forcibly urged that all these provisions can, in their very nature, have no application to a statute which is not, and never was, a provisional order, but which derives its force from the independent fiat of the Legislature. This is true, but then the Act is to be read just as if it were a provisional order, and a fair construction must be given to the enacted agreement. In truth, though it is now a statutory agreement, the rules of construction of agreements still apply, and what is to be sought for is, what was the true and real intention of the contracting parties.

"The Lord Ordinary holds that the meaning of the agreement substantially is that the company, although promoting an independent Act, were to be under the same fetters and restrictions as if they had been promoting a provisional order; and so, to come to the point in question, as they could not have got power in a provisional order to leave less sideway than 9 feet 6 inches, so they agreed they should not seek such power in their Act. Now, this is very important in construing the Act, for, although it may be true that if express power to contract the sideway at any particular place had been taken, that would overrule the general provisions, such power without express words will never be presumed.

"The Lord Ordinary is of opinion that no express power to contract the sideway to less than 9 feet 6 inches is given by the Act, and he thinks that such power cannot be presumed. The Parliamentary notices are not parts of the Act, and in strictness cannot be looked at, even if they were much more distinct than they are. There is no measurement prescribed by any of the statutes as to the space between the two lines of tramway, and, physically, there is nothing to prevent a double line of tramway being made, if the lines are kept only 3 or 4 feet apart. It may be that this proximity will involve danger, or an alteration in the construction of the cars, or the shutting of all access to the cars on the other side,—that is, the side next the adjoining tramway,—or some other precaution. All this is matter for the company to see to, and, if danger is unavoidable, they may be driven, *ex necessitate*, to a single line. In no case will they be entitled to cause danger to the lieges; but the rights of the occupants of shops, stipulated for in the agreement, and enacted by the Legislature, must not be disregarded merely for the company's convenience.

"It was urged that, although the statute does not in express words give a right to contract the sideway to less than 9 feet 6 inches, the Parliamentary plan shews such contraction, and that a nice measurement would shew so many inches less than 9 feet. In one view this is an engineer's question, but the Lord Ordinary cannot hold that the Parliamentary or deposited plan was intended for any such purpose. Its scale is too minute. The very thickness of the lines would interfere with the calculation, and the words of the Act seem to shew that it is only the general lines and directions which the deposited plans were intended to exhibit.

"Nor can the Lord Ordinary give effect to the plea that the incorporated

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the respondents had and have no right to lay down or construc tramway upon that portion of North Bridge Street extending fr High Street of Edinburgh to the open part of said North Bridge, for a distance of 30 feet or upwards a less space than 9 feet and 6 shall intervene between the outside of the footpath on either side road and the nearest rail of the tramway; and this in respect th third of the owners or one-third of the occupiers of the houses, sh warehouses abutting upon the part of the road where such less spac intervene as aforesaid have timeously objected thereto: Finds t within the portion of North Bridge Street above mentioned, the re ents' tramways are so constructed that, for a distance of 30 feet or u a less space than 9 feet and 6 inches intervenes between the out the footpath and the nearest rail of the tramway, the suspenders titled to have the same lifted and removed; and with these fi appoints the cause to be enrolled, reserving in the meantime all qu of expenses."*

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agreement can only be pleaded by the parties thereto. No doubt the Ma and Council made the agreement, and probably insisted on its incorp but when once made part of the statute, it is just like other parts, and be founded on by any one having interest. It contains stipulations as and tolls, and many other matters intended for the general or public beh

"On the whole, therefore, the Lord Ordinary thinks that the suspen entitled to the limited interdict now granted. The company strongly that if there was any doubt at all there should not be interim interdict, they should be allowed to take their own way in the meantime, of cours bound to reconstruct the whole disputed line in any way that may be ult fixed. There is force in this view, but the Lord Ordinary has come t that he cannot well sanction even an interim construction of the tramv manner which he thinks is against the statute. He may be quite mistak his view is that there will be less risk of the necessity of reconstruction i 6 inches are left than if that space is encroached on.

"At the bar parties waived all demand for caution."

* "NOTE.—When this case was argued before the present Lord Ordi the Bill-Chamber in April last, on the question of interim interdict, t documents produced to the Lord Ordinary, besides the statutes founded c a copy or tracing from the Parliamentary plan, No. 17 of process, and a the Parliamentary notice that the Act was applied for, the copy notic No. 19 of process.

"The copy of the Parliamentary notice of the intention to apply for was founded on by the respondents, but the Lord Ordinary was of opini it formed no part of the statute, and could not be referred to as explai controlling the words of the Act.

"Immediately before the closing of the record there was produced of the complete Parliamentary plans, prefixed to which, and numbere sheet of which, is a sheet of letterpress, containing a description of the p of the centre line of each tramway. This was seen by the Lord Ordin the first time at the debate on the closed record, and it certainly is a v portant part of the respondents' case, and meets to some extent the consid which, in the Bill-Chamber, induced the Lord Ordinary to grant interim in

"As the case now presents itself to the Lord Ordinary, he thinks it is a with very great difficulty. Indeed, the case is nearly one of contradic incompatibility between different parts of the respondents' statute; a question is, which portion shall be construed as overruling or controll other. This is always a nice and difficult question, but the peculiar the present case are such as greatly to enhance the delicacy of reach true construction of the statute as a whole.

"After much consideration, aided by the very able argument with he was favoured on both sides, the Lord Ordinary, though with much

The respondents reclaimed. They argued;—The company are bound, under their Act and relative agreements, to construct the tramways accord-

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man, adheres substantially to the view which he expressed in his note in the Bill-Chamber, of date 13th April last. Although much shaken in his opinion of the production of the Parliamentary plan, and relative letterpress, he has not been displaced, and he has not been able to come to the opposite conclusion from that at which he arrived in the Bill-Chamber. The Lord Ordinary respectfully refers to his note of 13th April last, and, without repeating the views therein expressed, he will merely indicate the reasons which have led him, notwithstanding the Parliamentary plans and letterpress, to adhere to the results then arrived at.

"1. Beyond all doubt the agreement between the Lord Provost, Magistrates, and Council and the Tramway Company, dated 29th March 1871 and subsequent dates, forms part of the respondents' Act. It is expressly embodied therein, 'made part of the Act, and to be carried into effect accordingly.' It forms schedule No. 1 of the Act.

"Now, the first head of this agreement expressly provides that the whole provisions of the General Tramways Act, 1870, shall apply to the respondents' special Act, then passing through Parliament, 'as fully in every respect as the same were a provisional order obtained under the Tramways Act, 1870.'

"It is plain some effect must be given to this enactment, if at all possible. It must be held to mean something, and the most natural meaning which can be given is, that the respondents, although they were getting a special Act, should be held to be in no different or more favourable position than if they had obtained a provisional order confirmed by Act of Parliament. The respondents did not want this; they wanted something better than a confirmed provisional order, and, accordingly, they only proposed to embody in their Act parts 2 and 3 of the general statute, leaving out part 1, where the clause now founded on appears. But they were defeated, and compelled by the Parliamentary agreement to take the whole of the General Act, part 1 as well as parts 2 and 3, and in particular section 9 of the General Act, which is contained in part 1 thereof; and, as if to make sure that section 9 should not fail, it was stipulated that the whole of the General Act should apply to the respondents' special Act 'as fully in every respect as if the same were a provisional order.'

"It is thought that, in virtue of this provision, the respondents' special Act, with all its relative plans, and their embodied letterpress, must be read as if it were a provisional order enacted by Parliament; and this may afford a rule of interpretation to be applied if apparent contradictions appear. The special Act of 1871, though obtained as an Act, is to be read as if it had been obtained in the form of a provisional order.

"The respondents argue that part 1 of the General Act has no application at all, for it only regulates the mode of obtaining provisional orders. But this is a mistake; for, besides providing rules for obtaining provisional orders, it declares (section 9) what powers provisional orders shall confer, and prescribes a time (section 18) when such powers shall expire.

"The difficulty which the respondents have to meet is, that unless these clauses apply the first head of the agreement which is made part of the Act is absolutely meaningless. The provisions as to the method of obtaining a provisional order did not and could not possibly apply to the Act which the respondents were carrying through Parliament; and if the incorporation of the 1st meant nothing else, it would have no effect at all. But in reading a statute and agreement a conclusion like this is to be avoided, if another possible and reasonable interpretation presents itself. The Lord Ordinary feels himself compelled to adopt the view that the special Act must be read and interpreted as if it had been a confirmed provisional order.

"4. But even then the difficulty remains, raised by the terms of the Parliamentary plan, and the sheet of letterpress, that this is a provisional order

shall intervene between the outside of the footpath on either side of and the nearest rail of the tramway, if one-third of the owners or object.' The question is, how are these apparently conflicting prov be interpreted or reconciled.

"5. Now, the Lord Ordinary feels himself compelled to give effect 9 of the General Act, even although it in one view overrules and co the Parliamentary plan, taken in connection with its sheet of letterp has come to this conclusion because the words of section 9 are express, w is only by implication that the Parliamentary plan and its letterpre rise the tramway to be laid nearer the curbstone than the prescribed di

"There is no ambiguity in the provision of section 9,—there is bility of misunderstanding it; and if it applies to the respondents' the Lord Ordinary thinks it does), then it is an express enactment a to every narrow street like the North Bridge at the parts embrace present suspension.

"Now, it is no answer to an express enactment that there is an power the other way, and the power given by the plans is merely a power. The plans do not shew that less space will be left outside the than 9 feet 6 inches. Even the letterpress does not mention this. Al tions is that the tramways are to be a certain distance from an imagina line; and it is only by a careful measurement on the ground of the self that any one could possibly discover that the space outside the would, at certain points, be less than the specified breadth. If it be mere implication must always yield to express enactment then the ex actment of section 9 must overrule the implication deducible by the aid mensuration from the plans and letterpress.

"If it had been intended to overrule section 9 in the case of th Bridge there should have been an express exception. For example, been enacted that section 9 shall not apply to the North Bridge, or been said in so many words that the space outside the rails at the Nor shall only be six or seven feet, instead of being 9 feet 6 inches, then would have been overruled by an express enactment. As the Act stan 9 is the leading enactment. The position of the rails deducible from must be held as subordinate thereto.

"6. It was admitted by both parties that if section 9 applied present suspension was timeous notice by the objecting owners and c for the rules of the Board of Trade were only issued 9th May 187

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ard of Trade. The respondents' Act was to be read as a provisional ler which had passed the Board of Trade, and had been confirmed by rliament; no objections could now be taken as to notice.[1]

The complainers argued;—The special Act is only passed subject to e control and regulation of the General Act, and if there is any incon- tency between the two the special Act must give way. The plans are ly incorporated so far as to settle the directions and levels, and certainly not be held to override an express enactment. If the respondents nd that they were unable to comply with the terms of section 9 they ght to have obtained express special powers dispensing with them.

At advising,—

Lord Deas.—The complainers are occupiers of more than one-third of the ses, shops, and warehouses, in that portion of North Bridge Street of inburgh which extends from the open arches of the Bridge to the High Street, d in that character they claim the right which they say the Edinburgh Tram- ys Act, 1871, confers on them, to object to what admittedly has been done *ex erso* of their premises, viz., the laying of the nearest tramway rail for a space 30 feet or upwards within less than 9 feet 6 inches of the outside of the tpath on the sides of the street.

The complainers, in the record suggest a distinction between the rights con- red on the Tramway Company by their Act over the portion of North Bridge reet which is *ex adverso* of the complainers' premises, and that portion of the e street which extends from Princes Street to the south end of the open hes of the bridge. But I agree with the respondents that there is no such tinction. The respondents say, in their answer to article 3d of the record,— The terms 'North Bridge' and 'North Bridge Street' are used indiscriminately, d the former expression is well known to refer to and include the street ex- ding from Princes Street on the north to the South Bridge or South Bridge reet on the south; and thus refers to and includes the portions of street at the rth end of the North Bridge, and also at the south end of the said bridge, d extending to the High Street, as well as the bridge itself."

All your Lordships know that this is correct and consistent with the everyday nguage of the city. We cannot read that portion of the statute which occurs der the head of "Edinburgh General Post-Office to Newington" and doubt at it describes the tramway from Princes Street to High Street, and southward at the front of the College, &c., as one continuous line, including the roadway ross the open arches of both bridges, as well as those portions of the roadway hich are lined with buildings.

It is quite true, therefore, as the respondents say, that the question is a serious e for the interests of the company. Although the complainers have chosen limit their application for interdict to that portion of the tramway which is *adverso* of the premises occupied by them, the result of their success must cessarily be the discontinuance of the double line of rails acrosss the open hes of the North Bridge where the roadway is very much narrower than it is *adverso* of the complainers' premises, and consequently the continuity of the uble line of rails from Princes Street southward must be interrupted. That owever, will not relieve us from the duty of enforcing the Act, if the complainers' jection be well founded.

That is a question of construction of the Act and in deciding it we must keep mind that the Act bears to proceed upon, and incorporates with it, three agree- nts, to which the parties of the first part were respectively the Magistrates d Council of Edinburgh, the Road Trustees, and the Magistrates and Council f Leith,—and the parties of the second part were the promoters of the Edin- mways bill, then before Parliament, in whose place the respondents the mway Company, now come. The Act is thus nothing more nor less than a

[1] Wauchope v. Edinburgh and Dalkeith Railway Company, Dec. 14, 1837, S. 227, 1 Bell's Appeals, 252.

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Parliamentary agreement, and, like every other agreement, it is to be c according to its fair meaning, and in consistency with the probable i and good faith of the parties to it.

The three agreements are scheduled and referred to in the Act as p portions of it. Section 44 bears,—"The agreements which are respec forth in three schedules to this Act are hereby respectively confirmed a part of this Act, and the same shall be carried into effect accordingl first head of these agreements is the only one we have here directly to c and as it is the same in each of the three it will be sufficient to quote it first agreement in which the Magistrates and Council of Edinburgh a nated as the parties of the first part. It is in these words:—"First, th hereto of the first part, as the local authority foresaid, shall have t rights, powers, and privileges, which the 'Tramways Act, 1870,' or a General Act relating to tramways now in force, or which may herea during this or any future session of Parliament, confer or may hereaft upon the local authority of any district; and the whole provisions of Acts shall apply to the Act of Parliament which the said second part promoting, or to any Act of Parliament which they or the company r after obtain, as fully in every respect as if the same were a provisio obtained under the 'Tramways Act, 1870.'"

It is important to observe in the outset that this first head consists ex of stipulations by and in favour of the local authority. Two things are s for, viz.,—First, that the local authority shall have all the powers, & the existing or any future General Tramways Act had conferred or migl on any local authority. Second, that the whole provisions of these gen should apply to the Act which the second party was then promoting i ment, that is, to the Edinburgh Tramways Act, 1871, which has sinc or to any Act which the promoters or the company might "thereafter c fully in every respect as if the same were a provisional order obtained u 'Tramways Act, 1870.'"

This at once raises the question, what would have been the provisio Edinburgh Tramways Act, 1871, so far as regards the matter now ur sideration, if that Act had been a provisional order?

To solve this question we have only to turn to section 9 of the Ger of 1870, which, together with the other provisions of that Act, is decl of the special Act, and there we find that "no tramway shall be authc any provisional order to be so laid that for a distance of 30 feet or u less space than 9 feet and 6 inches shall intervene between the of the footpath, on either side of the road, and the nearest rail of the t if one-third of the owners or one third of the occupiers of the houses, warehouses abutting upon the part of the road where such less space sh vene as aforesaid shall in the prescribed manner at the prescribed time their dissent from any tramway being so laid."

If, therefore, the Act had been a provisional order, the complainer clearly have been entitled to object to the tramway rail coming so near to path or foot-pavement as it does *ex adverso* of their premises. A con no doubt added in section 9 that the objectors "shall in the prescribed and at the prescribed time express their dissent from any tramway laid." And by section 7 it is enacted that, in considering an applicati provisional order, the Board of Trade "shall consider any objection the may be lodged with them on or before such day as they from time to point, and shall determine whether or not the promoters may proceed application." But the Board of Trade appointed no time for objectin visional orders till 9th May 1871, when the regulations issued were su promoters themselves could not and did not attempt to comply with t the notices, on the one hand, which might have been met by objection other. Besides, as the respondents themselves plead (Ans. to Stat. rules as to notices and time for objections have no application as no pr order ever was applied for. It is not surprising, therefore, that, as t Ordinary states in his note, "it was admitted by both parties that if t

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m the present suspension was timeous notice by the objecting owners
rs," as the rules issued by the Board of Trade, so late as 9th May
l not possibly apply, as regards this case, either to the one party or

ot contended before us that any error had been committed in making
ion, and I can see none. The question here is not one of time, but
e. There is nothing about time in the first head of the agreement
s part of the local Act of 1870. It is there substantially agreed
1 9 of the General Act shall apply to the local Act as fully as if the
ad been a provisional order. If the Act had been a provisional
complainers would have had an opportunity of objecting to what
ed to be done in front of their premises; and the question is,
ccording to the fair meaning and good faith of the agreement
n the Act, this portion of the agreement, or in other words, this
e Act, can be held, as the respondents contended to us, and as the Lord
ays they contended to him, to be "absolutely meaningless?" The
1 44, already quoted, incorporating the agreements with the Act, says
ame" (that is, the agreements) "shall be carried into effect accord-
it the contention now is, that this part of the agreement shall have
t all, which is not, I think, a construction to be put upon any
if by any reasonable reading such a result can be avoided.
ith the Lord Ordinary in the note to his last interlocutor, correcting,
iew taken in the note to his previous interlocutor, that, taking the
connection with the Parliamentary plan and relative letterpress, it
d that the respondents are authorised, and indeed taken bound by
o lay a double line of tramway from Princes Street southward along
f North Bridge Street. But this does not create, in my mind, the
lty which it appears to have done in the mind of the Lord Ordinary,
authority and obligation, as I read the statute, are not absolute but
—the condition in both cases being that no objection shall be made
l either of the owners or occupiers of premises abutting upon that
roadway where the nearest rail comes within the prescribed distance
inches of the footpath. There is thus nothing contradictory between
y and obligation on the one hand, and the right to object on the
as quite consistent with the agreement that statutory authority should
make the line, because otherwise the line could not have been made,
whole owners and occupiers had been desirous that it should be so in
ing opposed to it. But, if I construe the Act rightly, this authority
subject to the *proviso* that if one-third of the owners or occupiers
rail should be actually laid within the prescribed distance of the

lainers, whatever notices had been given to them, could not have
passing of the Act. The answer to them would have been that the
ed and gave effect to the very agreement on which they founded,—
would have the option stipulated for of objecting to any rail being
the prescribed distance of the footpath *ex adverso* of their premises,
y had therefore no ground for opposing the Act.
however, as the respondents proposed to construct the tramway in
now complained of in front of the compainers' premises it was
n the part of the complainers, as is admitted in the record (Ans. to
at they objected to this being done, and the present application for
s then presented, and interim interdict obtained. This interim
s sometime thereafter recalled, by arrangemeut of parties,—the re-
eing willing to take the responsibility of forming the tramway in
ie, subject to removal if so ordered by the Court, and the complainers
us to avoid the risk of a claim of damages if the interim interdict
e confirmed. Consequently, as the Lord Ordinary states in his note,
minute, No. 20 of process, the tramway has been provisionally
ect to removal if the suspenders' pleas are well founded."
on is, that the complainers' second and third pleas, taking them not

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separately, but together, are substantially well founded; and if t required confirmation, which I think it does not, from the probabiliti case, that confirmation would be amply afforded by examination of t and other productions, shewing the position and the measurements at points of the street called North Bridge Street now in question, or insp the street itself, and the consequent danger to the public from a doub rails being laid down there, when reference is had to the purposes nc served by that street, which neither have been nor could be dispute respondents.

As I have already observed, North Bridge Street, or, as it is familia "The North Bridge," extends, as the respondents correctly state in the rec Princes Street to High Street, and the effect of adhering to the Lord C judgment will necessarily be to prevent a double line of rails in any pa street. But this, I think, is just what the *proviso* was intended to en owners or occupiers of premises in that street to enforce, if they wished It is, I admit, surprising that a matter so important to the public should have been left to the option of these private complainers. The f ment on each side of the street, where it crosses the open arches of the barely broad enough to admit of three persons walking abreast. The rails at each side come within 13 inches or thereby of the foot-paveme tramway cars project some 6 inches or thereby beyond the rails. sequence necessarily is, that if the street is crowded, or if a storm of r rain, with or without the protection of umbrellas, causes any of the pe who are next the outside of the pavement to swerve from the perpend that exposed position, or if men's cloaks or greatcoats, or ladies' dres in the wind, the danger is imminent of their being caught by the pas and if any of the blind men who pass there habitually from and to t Asylum happen to be met with there must either be a collision w throw both parties in the way of the car, or the passenger who has his must step partially off the foot-pavement to let the blind passenger pa risk of being cruelly killed upon the spot, as happened to a highly re citizen, known to us all, since this case was last debated, although he w in vigorous health and in full possession of all his faculties. Then, t the space between the two lines of tramway, it is barely sufficient single carriage, so long as that carriage keeps precisely in the centre two tramway cars, going opposite ways, happen to come parallel to e and to the carriage which is in that position, the deviation of little mo few inches to either side, from the restiveness of the horse or agitati driver, may, at any moment, cause a collision fatal alike to the carriag occupants. These are results which no ordinary care could avoid. Or centre space, where one carriage cannot pass another without going rails, the occupants of two carriages, be these carriages of what sort or tion they may, must await the fate which providence and the Tramway have in store for them; and I need not tell your Lordships that all thi a street which forms the only great and properly available highway what are, in local position, two great and growing cities, although now n a common name,—viz., the old and new towns of Edinburgh,—there b two other possible ways of crossing the great valley which lies betw and both of these ways being unfitted, by their windings and gra accommodate the bulk of the traffic which consequently passes, almost along the street in question.

But, while it must thus be admitted to be surprising that the local should ever have agreed to a double line of tramway rails being author laid along such a street as North Bridge Street, with so uncertain against that authority being acted on as was afforded by the option en a few private individuals to object to it in the form of an expensive l would have been still more surprising if no means whatever of objec preventing a result so incompatible with the safety of the public had pulated for by the local authority, to whom it belonged to protect t interests. For the credit of the local authority it was necessary to

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with that view; and while I think it should not have been left to a mber of private individuals to prevent a result which ought never to allowed to be possible, I think, at the same time, that it is impossible the stipulation as meaning nothing at all, and that it luckily proves, lt, to be legally sufficient for its purpose, which must be presumed to not merely the protection of private interests, but the prevention of danger to human life.

RDMILLAN.—An important and interesting question has been here he facts out of which the question has arisen are few and simple. The f the case is in the construction of the statutes, and the relative agree- r which the tramways in Edinburgh have been formed.
mway Company hold an Act of Parliament, passed in 1871, empower- o form and lay down tramways in different parts of the city of Edin- d one of these tramways is described as "a tramway from the General Post-office to Newington, passing along North Bridge Street, ay of the North Bridge, South Bridge Street," &c., to Newington.
with the Lord Ordinary in disregarding an objection taken by the rs to the terms of the statutory description of this line. I think that ay must be continuous; that the line is sufficiently described; and atutory authority and provisions must be held as applying to the whole this point I have nothing to add to what Lord Deas has so clearly

47th clause of the Act of 1871 it is enacted, "that nothing herein shall be deemed or construed to exempt the tramways from the provi- ay General Act relating to tramways now in force, or which may here- " &c. If there be in any General Act relating to tramways a clause for the public security, then it is the law of this statute that such the General Act shall affect the tramways constructed under this Act. e public safety and welfare was not left by its approprite guardians till further protection. An agreement relative to this Act of 1871 was to between the Lord Provost, Magistrates, and Town Council of Edin- the one part, and the promoters of the bill for the Edinburgh tramways ner part. By the 44th clause of the Act of 1871 it is enacted, "that nents which respectively are set forth in three schedules to this Act y respectively confirmed and made part of this Act, and the same shall into effect accordingly."
agreement which is thus made part of the Act of 1871 (being set forth t schedule above mentioned), it is provided that "the whole provisions l Acts" (meaning the Tramways Act, 1870, and any other General Act o tramways), "shall apply to the Act of Parliament which the said arty is now promoting, or any Act of Parliament which they or the may hereafter obtain, as fully in every respect as if the same were a al order obtained under the Tramways Act, 1870."
lar provision is contained in the agreement No. 2, between the City of h Road Trust and the promoters, set forth in the second schedule of ; and another between the Magistrates of Leith and the promoters, in the third schedule of the Act; and these are also made part of

appears,—1st, That the tramways constructed under the Act of 1871 xempt from the provisions of the General Tramways Act of 1870; 2d, agreement set forth in the first schedule is part of the Act of 1871, and force of statute; and 3d, That the whole provisions of the Act of 1870 rce of that agreement, and of the statute incorporating it, made applic- le Act of 1871, and to the tramways constructed under that Act. If a clause in the Act of 1870 affecting the public safety and welfare, then ifest that the question whether, to the present system of tramways urgh, that clause is now applicable and effectual, is one of great im-

h clause of the Act of 1870, called the General Tramways Act, is in

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the following terms:—"Every tramway in a town, which is hereafter authorised by provisional order, shall be constructed and maintained as nearly as may be in the middle of the road, and no tramway shall be authorised by any provisional order to be so laid that for a distance of 30 feet or upwards a less space than 9 feet 6 inches shall intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway, if one-third of the owners or one-third of the occupiers of the houses, shops, or warehouses abutting upon the part of the road where such less space shall intervene as aforesaid shall in the prescribed manner and at the prescribed time express their dissent from the tramway being so laid." The word "prescribed" at the end of this clause is explained by the statute to mean prescribed by any rules made by the Board of Trade under the Act. No rules have been prescribed which exclude the objections. It is clear beyond dispute that this 9th clause of the General Act does affect the public safety, and that, if this 9th clause of the General Act is applicable to the tramway now complained of, then the complaint is well founded. The complainers have undoubtedly the interest which the statute recognises; their number exceeds that which the statute requires, and no good objection has been urged against the manner or the time of their expression of their dissent, if the clause is applicable.

The real question, and indeed, I think, the only question here is, whether the complainers can found on the 9th clause of the Act of 1870.

The first part of the Act of 1870, viz., from the 4th to the 21st clause, relates to procedure by provisional order by the Board of Trade, afterwards confirmed by Parliament. According to the agreement, "the whole provisions" of this General Act, no exception being made, are declared to apply to the Act of 1871; and among these whole provisions I cannot help including the provisions in the 9th clause, more especially as these whole provisions are in the agreement declared to be applicable "as fully in every respect as if the same were a provisional order obtained under the Tramways Act, 1870."

We are called on by the company to construe this agreement in such a manner as to hold the Tramways Company free from the force and obligation of the 9th clause of the General Tramway Act. Of the meaning of the 9th clause there is no doubt. It is said that the promoters have escaped from it; but it cannot be that promoters can easily escape from a clause of this nature. The argument urged is, that the promoters did not proceed by provisional order, but by Act of Parliament; and therefore it is said that the 9th clause does not apply. This argument is, in my opinion, not well founded. The Lord Provost and Magistrates, charged with protecting the interests, and especially the safety of the inhabitants of Edinburgh, were not content to leave the reference to the General Act as it stood under the 47th clause of the local Act. They, by the agreement with the promoters, brought the local Act within the reach and scope of the whole provisions of the General Act, *inter alia*, within the provisions of this 9th clause.

In the view which I take of the 9th clause as affecting not only the interest of the owners of houses on the street, but the interest and safety of the public, I think this is the construction of the agreement, which is to be presumed as being most in accordance with the duty and the presumable intentions of the parties to the agreement.

It has been contended that the words "provisional order obtained" must be obtained as a confirmed provisional order, having the force of statute, and if so it is argued that the 9th clause is not applicable, because its effect would be to prevent confirmation by Parliament, and the result of confirmation would be to exclude the previous provisions. I think that, in order to deal with this argument, it is important to ascertain the meaning of the word "obtain," as used in the Act, with reference to a provisional order. I am of opinion that the word "obtain" is used in the Act of 1870 in reference to an unconfirmed provisional order, or a provisional order in the course of procedure prior to confirmation, and therefore that there is no ground for contending that, in respect of the use of the word "obtain" in the agreement, the provisions in regard to the public procedure are shut out. This would be to defeat the true meaning of the Act

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very narrow technical objection. I may mention that the word "obtain" used with reference to unconfirmed orders in the 4th clause, and so also in 10th and 21st clauses. Still more important are the provisions of the 12th se, which enacts that a provisional order, being then unconfirmed, shall be ered by the Board of Trade to the promoters; then, by the 13th clause, the r so delivered shall be published; and by the 14th clause, on proof of the ication of the order thus delivered, the Board of Trade obtain confirmation sof from Parliament; after that the order has the force of statute. Now, I k that when this delivery for publication, with a view to confirmation, is a, the provisional order may be truly said to be "obtained by the promoters hom the delivery is made," the counterpart of the delivery being the accep- n or obtaining of the order.

ther instances might be given of the use of the word "obtain," but it is cessary. In my humble opinion, the whole provisions of the Act of 1870 pplicable to the Act of 1871. The construction proposed to us, by which words of the agreement are so read as to disengage the local Act from the isions of the 9th clause of the General Act, is far too narrow and critical to ound or safe.

n construing together the agreement of 1871, the local Act of 1871, and the eral Act of 1870, I think we must keep in view that the great end and aim he Legislature in regard to the construction of tramways in the streets of a t city must be, and doubtless was, the securing the public safety, and we t read this agreement bearing this in mind. If there be a doubt or difficulty onstruction we must read the agreements and the Acts so as to abate, if ible, the hazard to human life. The 9th clause affords important protection he public. It is on no light grounds that we can hold the clause of the Act Parliament excluded by force of construction of an agreement such as this. he company had proceeded by provisional order they could not, against the of these complainers, have laid down this tramway where it is and as it is. In present state and position the tramway complained of is unquestionably in ation of the 9th clause of the General Act, and it is complained of by parties itled to complain. It is equally clear that the tramway, as now laid along North Bridge, forming a continuous line with the portion specially com- ned of, is not laid in a manner consistent with the public safety. The space between the rail and the footpath is generally too small, and is in some es dangerously small. Of this fact we had recent painful experience.

by no means leave out of view the pleas founded on the Parliamentary plan the relative letterpress, which are certainly important, and which were ibly and ably urged in the judicious argument of Mr Mansfield. But I am prepared to say, either that, in respect of the Parliamentary authority given in tion to these plans and relative letterpress and notices, the 9th clause is re- ed, or that the company became entitled to set aside the provisions of the 9th se, and indeed to set them at defiance, or that the objections of the com- ners are now excluded as too late. The argument was ingenious, but not to mind conclusive.

Unless the 9th clause of the General Act was intended to be continued as a tection to the public, and unless it was imported into the local Act, I cannot why the first head of the first agreement was made part of the local Act at or why the whole of the General Act,—and not merely the second and third ts,—should be made applicable to the local Act. I observe that the Lord linary asks this question, a very natural question, I think, and I have heard satisfactory reply.

I cannot admit that the parties meant to introduce into this important part of agreement words without meaning. That is never presumed, and there is no on to believe it here.

In the whole matter, I cannot suppose that the Legislature intended in 1871 ject as inapplicable the protection to the public contained in the important vision made in the 9th clause of the General Act of 1870. Nor can I suppose the Lord Provost and Magistrates of Edinburgh, charged with the duty of ecting the public interests and guarding the public safety, in a matter neces-

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sarily calling for anxious and cautious provision, did agree to liberate th pany from this most important statutory limitation of their powers.

The extent of free space on the street along the line of tramway is, opinion, a matter of the deepest importance, not only to the interest o complainers, but to the safety of the public. The effect of enforcing clause of the General Act is to prevent the construction of a double tramways in this narrow thoroughfare, contrary to the expressed dissent complainers. A single line would leave the necessary free space. A dou in that place, and as now laid, is dangerous. The authority or provisio subsequent local Acts must, I think, be viewed as given under the c that the persons interested as these complainers are do not dissent.

Taking that into consideration, and fairly construing the statutes agreement, I concur in the judgment which the Lord Ordinary has pro

LORD JERVISWOODE.—I may state that on all the points which appear to the determination of the question here raised I concur in the judgm posed to be pronounced by Lord Deas and Lord Ardmillan.

LORD PRESIDENT.—As I have the misfortune to differ not only from t Ordinary, but from all your Lordships, I think it right to state the gr my opinion in some detail. The complainers are occupiers of houses, s warehouses in or abutting upon the portion of North Bridge Street which from the south end of the North Bridge to High Street. They const they say, more than one-third of the whole occupiers of the houses in tha of the street. Their complaint, and the remedy which they seek, is entirely to that portion of the street. I am not, therefore, inclined, n consider myself entitled, to offer any opinion as to the rights of the Tr Company in that part of the North Bridge which is not between the ho is open, for no such question can, by any possibility, be raised by thi The prayer of the note of suspension and interdict distinctly limits the to that portion of the street which extends from the south end of th Bridge to the High Street of Edinburgh. Now, the ground of the com that the tramways, in traversing that portion of the street, approach near feet 6 inches to the curb-stone of the pavement for a space of more than in length, and the complainers maintain that that is illegal under the A Tramways Company. If I were entitled to consider this as a questio pediency I should be inclined to agree with a great deal of what has b by your Lordships, for I consider that nothing could be more undesira the construction of such a tramway as now exists upon the North Bridg city. But it appears to me that such considerations are irrelevant in t tion, which depends entirely upon the construction of an Act of Parliame 5th section of the special Act provides that, "subject to the provisions of t and the Acts and parts of Acts incorporated herewith, the company ma form, lay down, and maintain the tramways hereinafter described, in the l according to the levels shewn on the deposited plans and sections, and i spects in accordance with those plans and sections, the tramways herein scribed, with all proper rails, plates, works, and conveniences connected th and may enter upon, take, and use such of the lands delineated on the sa and described in the deposited books of reference to those plans respect may be required for that purpose." Now, in order to understand precisely the power thus given to the Tramways Company; it is, of course, indispe look at that part of the plan applicable to the North Bridge, for the purpos ing what are the lines and levels according to which the tramways are to down. The first thing that we observe, upon looking to the Parliamentary that throughout the whole course of the North Bridge, including both po North Bridge Street, both that at the north end and that at the south end, laid down upon the plan a double line of tramways. There is therefore pow to lay down a double line of tramways along the whole way, and the Pa tary plan contains not only drawings, but also certain printed descrptions, w of the highest importance. Upon that sheet of the drawings we have this "For description and position of centre line in each tramway see sheet N

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is, sheet No. 1 of the volume entitled "Parliamentary Plan." Now, when we s to sheet No. 1 of that volume, which is thus made part of the statute, for purpose of affording an accurate description of the works to be executed, nd this statement:—That there are to be several lines of tramways connect- he different parts of the city, and the sixth of these lines is a line which from the Edinburgh General Post-Office to Newington. The tramways g that line are called in this part of the Parliamentary plan, and are also d in the body of the statute itself, No. 6 and No. 6A. No. 6 is the eastern of the double line of tramways along the North Bridge, No. 6A is the western —here again shewing how distinctly the company are authorised to make ne line, but two lines of tramways along the whole of the North Bridge. description proceeds to shew how, after passing the North Bridge, the double of tramways is continued along the South Bridge, Nicolson Street, and various r streets, until it reaches Newington, and then there occurs this passage, h appears to me to be of vital importance in this question:—"The centre of proposed tramway No. 6 will be throughout at the distance of 4 feet 6 s from and on the left-hand side (proceeding from the commencement to the ination of the tramway) of the imaginary centre line of each of the streets oads through which it is intended to pass, except that from a point one a north of the north end of the bridge carrying the street or road called the h Bridge over the North British Railway the centre line of the tramway gradually diverge from the said imaginary centre line, until at the north end e said bridge it attains the distance of 8 feet 6 inches from and on the left- l side (proceeding as aforesaid) of the imaginary centre line of the roadway he bridge, and thence to the south end of the said bridge (at a point imme- ly over the south side of Low Market Street) it will continue at the last-men- d distance from and on the left-hand side (proceeding as aforesaid) of the inary centre line of the said roadway, and thence will again gradually approach l in the length of one chain it reaches the distance of 4 feet 6 inches from and he left-hand side (proceeding as aforesaid) of the imaginary centre line of the t." And then there is a corresponding description of the western tramway a the same ground, which is called Tramway No. 6A. This is a very minute ription, and it is perhaps clothed in rather too many words. It might be com- d in a very small number of words, for it amounts to no more than this, that of the two tramways passing along the North Bridge and North Bridge Street be at its centre 4 feet 6 inches from the centre of the street, except that in open part of the bridge it is to be a great deal further from the centre. At open point it is to be 8 feet 6 inches from the centre. I have already said it is needless to deal with that portion of the bridge which is unenclosed houses, because it is not within this case in any form whatever, and therefore only important point here is, that the centre line of No. 6, and equally the e line of No. 6A, in passing along North Bridge Street, must be 4 feet 6 inches, her more nor less, from the centre line of the street. Now, that being matter sitive enactment, from which the Tramways Company cannot escape, let us what the necessary consequence of this is. It is stated in the 9th article of the descendence that "the distance between the curb-stone on the west side and the b-stone on the east side of the North Bridge Street measures only from 31 feet inches at the top to 32 feet 6 inches at the bottom of the said street; and if uble line of rails is laid down in said street, with the usual distance between two inner rails, the space intervening between the outside of the footpath either side of the road and the nearest rail of the tramway will be less than and 6 inches." That is admitted. Parties, therefore, are agreed on that; it is better not to leave a matter of such vital importance in the construction statute even to the admission of parties, and I therefore proceed to shew it is certainly the case, and that it is physically impossible otherwise to truct the tramways. The total breadth between the footpath at the nar- t part is 31 feet 10 inches, one-half of which is 15 feet 11 inches. One of the street, therefore, on each side of the imaginary line of the centre is t 11 inches from the curb-stone. The centre line of each tramway is 4 6 inches from the centre line of the street; and must be, as a matter of

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statutory enactment. That leaves 11 feet 5 inches of breadth from t
line of the tramway to the curb-stone. The breadth of the guage of t
way is fixed by section 25 of the General Act at 4 feet 8½ inches. No
one-half of that space, viz.,—2 feet 4¼ inches from the remaining bread
feet 5 inches, there remain only 9 feet and ¾ of an inch between the c
of each tramway and the curb-stone. It seems to me, therefore, to b
matically demonstrable that it is impossible to construct the lines of t
authorised by this Act of Parliament in such a way as to escape
result that the space between the outer line of each tramway and the c
shall be less than 9 feet 6 inches. If, again, you take the broad p
street, where the total breadth is 32 feet 6 inches between the curb-st
will find a corresponding result. The distance, then, between the out
the tramway and the curb-stone on each side will not be so small
former case, but it will still be under 9 feet 6 inches. It seems t
monstrable, then, that this Act of Parliament has authorised the
Company to make a double line of railway along the North Bridge, an
it in such a way that in that part of North Bridge Street to which th
complaint refers there must be, throughout the whole of it, a less spac
the outer line of each tramway and the curb-stone than 9 feet 6 inche
it is quite possible that, notwithstanding this very distinct authorit
the Tramways Company by their statute, there may be other clauses i
of Parliament which prevent the company from carrying it into execu
I understand it to be the opinion of your Lordships that the line is
to be laid down as it has been laid down, but that, notwithstanding it
authorised to be laid down, it is illegal. That appears to me to be
construction of an Act of Parliament; but still it may be so. Som
Parliament are very oddly framed, and even self-contradictory; and w
quite sure we have not such an Act of Parliament to deal with here.
immaterial to notice, in connection with the authority so given to
tramways, without reference to the 9 feet 6 inches measurement, that
clause in this special Act which contemplates the construction of
within 9 feet 6 inches of the pavement, and provides a remedy, or at
vides for the abatement of any inconvenience thence arising. The 8
provides that "where in any road in which a double line of tramw
there shall be less width between the outside of the footpath on eith
the road and the nearest rail of the tramway than 9 feet 6 inches, the
shall, and they are hereby required, to construct a passing-place or p
necting the one tramway with the other, and by means of such passin
places the traffic shall, when necessary, be diverted from the one tramw
other." Now, surely, if there is in this statute, either by incorporat
any other way, a provision that there shall be no tramway within 9 fee
of the pavement, this was an unnecessary clause. But it was a necess
if that authority which I have shewn had been given to the company
full force, and is not derogated from by any other part of the statute.
said that there is anything in the clauses of the special Act itself, or
the general statutes incorporated with the special Act, that affects this
or that could be construed so as to derogate from the authority giv
leading section of the special Act—the fifth section—with the relati
mentary plan. But it is said that there are three agreements, which
porated with the statute, and which have the effect of introducing
statute a provision that no line of tramways shall be constructed in
complained of in this suspension and interdict. It is needless, as y
ships have said, to refer to more than one of these agreements, for th
substantially the same; but it is of some importance probably to obs
the present complainers are not parties to any of these agreements.
mean to say that the complainers or any of the other inhabitants of E
may not be very well entitled to avail themselves of stipulations made
of the community by the Provost and Magistrates. But it must be
mind that they are not parties to this agreement, and at the same time
Provost and Magistrates, as the local authority, are bound by these ag

h as the Tramways Company. Now, there is one clause in the agree-
en the Tramways Company and the Magistrates of Edinburgh which
ne to be of great importance. Under the statute all that was done
power the Tramways Company to make these lines of tramway.
ey might be compelled to make them we need not consider, but so
nguage of the statute is concerned they were only empowered and
to make the lines. But under the second head of this agreement
ound to make the lines, and they are bound to make them precisely
) the description in the Parliamentary plan. Here is the section :—
d party bind and oblige themselves and the said company to proceed
r after the said bill shall become law to lay down, construct, and
amways described in the said bill, and shewn on the Parliamentary
Haymarket to Leith, and from the Edinburgh General Post-Office
on," and some others particularly mentioned. Now, here stands an
which the Lord Provost and Magistrates are entitled to enforce, and
ll we know, they are prepared to enforce. We must assume that
epared to enforce it, and to compel the Tramways Company to lay
lines upon the North Bridge and North Bridge Street, according to
entary plan. And is it to be said that, under an Act of Parliament
g this agreement, there is another party who is entitled to interfere
' that shall not be done." What is the Tramways Company to do in
stances? Are they to fulfil the express terms of their agreement to
thority—the Provost and Magistrates—or are they to comply with
ction of a clause of this agreement which the occupiers of houses in
ge Street are seeking to enforce against them, to prevent them from
which the local authority requires them to do? It is a very singular
that be the case, and it is about the last conclusion that I should
lopt—that either the Act of Parliament or an agreement embodied
of Parliament should place the promoters of an undertaking in such
hat they must do, and at the same time not do, the very thing autho-
Act of Parliament. But the real question comes to be, whether the
f the agreement which has been referred to is really susceptible of
ction that has been put upon it. It consists, I think, of two parts;
s of any practical force or effect at all. It is of some consequence to
between these two parts. The first is this,—"The parties hereto of
rt, as the local authority aforesaid, shall have the whole rights,
l privileges which the Tramways Act, 1870, or any other general
; to tramways now in force, or which may hereafter pass during this or
session of Parliament, confer or may hereafter confer upon the local
f any district." Does that mean anything, or does it really confer
al authority, the first party to this agreement, anything that they do
without it? They shall have all power which any Act of Parliament
r may give. Is there any virtue in that? If there be, still it was
, for it is contained in one of the clauses of the special Act, viz., the
provides,—"Nothing herein contained shall be deemed or construed
e tramways from the provisions of any general Act relating to tramways
, or which may hereafter pass during this or any future session of
" It is not very easy to see how people are to be subject to the ope-
ubsequent Act of Parliament, unless that Act of Parliament applies
d if the Act of Parliament applies to them, the antecedent agree-
ecessary, so that really the whole of this first half of the first head
t consists of words without meaning. Now, we proceed to consider
art,—"And the whole provisions of the said Acts shall apply to
'arliament which the said second party is now promoting, or to any
iament which they or the company may hereafter obtain, as fully in
t as if the same were a provisional order obtained under the Tram-
370." Now, I quite agree that before we can make anything of this
of the agreement we must distinctly understand what is meant by
' obtained under the Tramways Act, 1870." It is said, although
r a recent discovery in the arguments, that a provisional order ob-

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tained in this way means a provisional order obtained from the Board of Trade but not confirmed by Parliament. The Lord Ordinary is of an opposite opinion. He holds that it means a provisional order obtained and confirmed by Act of Parliament. And the counsel for the complainers, in stating the argument before us, adopted the same construction; but that was withdrawn, and cannot now be founded on. But let us consider the question on its merits. If the special Act of Parliament is to be dealt with as a provisional order "obtained from the Board of Trade, but not confirmed by Parliament, what is the consequence? The Tramways Company cannot lay down a rail, or use a spade, pick to raise a stone of the street. They have no authority whatever, because provisional order, until confirmed by Parliament, is absolutely worthless. It is to say that a special Act of Parliament which has passed both Houses of Parliament, and received the royal assent, is to be in the same position as a provisional order obtained from the Board of Trade, and not confirmed by Parliament is surely too startling a proposition to receive ready assent. If it is to be a provisional order still unconfirmed it surely, at least, must have the right to procure confirmation. Now, in what form is Parliament to confirm an Act which they have already passed? How is the House of Commons to entertain a bill for the purpose of confirming an Act of Parliament which has already obtained the royal assent? These are questions I cannot answer, and it is partly because I cannot answer these questions that I am driven to the necessity of adhering to the construction adopted by the Lord Ordinary,—that the provisional order intended under the first head of this agreement means a provisional order not only obtained from the Board of Trade, but subsequently confirmed by Parliament. The object of framing a provisional order by the Board of Trade is nothing more nor less than to save the time of Parliament. Instead of both Houses of Parliament appointing committees to consider a bill, the whole thing is done by the Board of Trade putting the matter in the form of a provisional order; and it seems to me a convenient and handy arrangement for the purpose of expediting public business. But the Board of Trade has no more right to make an Act of Parliament, or to give the authority to make a tramway, than any private person. That department merely prepares materials for Parliament, and when the provisional order is framed and adjusted and delivered to the promoters it has to be laid before Parliament, in order that it may be confirmed and converted into an Act of Parliament. But when it is converted into an Act of Parliament it is to be read just like any other Act, and therefore, if this special Act is to be dealt with as a provisional order confirmed by Act of Parliament I cannot see what benefit any person obtains from that greater than would have in dealing with it as a special Act. In short, in the result, a provisional order confirmed, and a special Act, is one and the same thing. somehow or other it is said that a provisional order could not have been obtained without having in it the provisions contained in the 9th section of the General Tramways Act. Now, that is a very unintelligible proposition to me, and I cannot see how it is arrived at. The first part of the General Tramways Act provides almost exclusively for the way in which provisional orders are to be obtained and carried through, not for the way in which they are to be construed after they are carried through; not for the way in which tramways are to be constructed under them; and not for the way in which tramways are to be managed after they are constructed,—for the construction of a tramway and the mode of management form the subject-matter exclusively of the second and third parts of the General Tramways Act; and, accordingly, the second and third parts of the General Tramways Act are incorporated by force of that General Act itself into every special Act and every provisional order alike. There is, however, no mention of the incorporation of the first part either in a special Act or provisional order, for this very obvious reason, that the whole functions of the first part of the statute have come to an end when either a special Act or a provisional order has been obtained,—that is to say, obtained in the sense of having passed through Parliament. The promoters of the undertaking, when they proceed to apply for a provisional order, are obliged to give notice and deposit documents, very much in the same way as if they were applying for

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cial Act. The Board of Trade is authorised by the 7th section to con- er the application, to make various inquiries, and then, after this inquiry, y are authorised to make a provisional order. Then we are told what that visional order is to contain. It is to contain all provisions necessary to regu- the form, construction, and use of the tramways. In other words, it is just ontain everything that would be contained in a special Act. And then s the 9th section :—"Every tramway in a town which is hereafter autho- by provisional order shall be constructed and maintained, as nearly as may in the middle of the road; and no tramway shall be authorised by any pro- nal order to be so laid that for a distance of 30 feet or upwards a less than 9 feet and 6 inches shall intervene between the outside of the foot- on either side of the road and the nearest rail of the tramway, if one-third he owners, or one-third of the occupiers, of the houses, shops, or warehouses ting upon the part of the road where such less space shall intervene as afore- shall, in the prescribed manner and at the prescribed time, express their nt from any tramway being so laid." Now, this is plainly nothing more a direction to the Board of Trade, just like a standing order of either se of Parliament. It would be just as easily expressed in a standing order at any committee of this House shall authorise," and so forth, and that ding order shall be binding upon the House of Parliament that enacted But when an Act is passed that has received the royal assent, of what l is a standing order? If this special Act of Parliament had been a pro- nal order obtained from the Board of Trade, and subsequently confirmed Parliament, and contained, as this special Act does, authority to lay down s rails in the manner objected to, this 9th section could have been of no l. To shew how completely this portion of the statute deals entirely with e preliminary proceedings, it may be worth while to shew what follows this section :—The nature of the traffic has been specified in the provisional r; then the costs of the order are provided for, and then we come to the very of the order by the Board of Trade to the promoters, and the provi- for the publication of that order before it can be confirmed by Parliament; then the 14th section provides,—"On proof to the satisfaction of the rd of Trade of the completion of such publication as aforesaid, the Board of le shall, as soon as they conveniently can after the expiration of seven days a the completion of such publication, procure a bill to be introduced into er House of Parliament, in relation to any provisional order which shall have a published as aforesaid, not later than the 25th of April in any year, for an to confirm the provisional order, which shall be set out at length in the dule to the bill; and until confirmation, with or without amendment, by Act Parliament a provisional order under this Act shall not have any operation." n it is provided that when a bill is introduced into Parliament it may be re- d to a select committee; but when the bill is once passed then the Act of liament confirming the provisional order under the Act shall be deemed a lic general Act. And if this had been a provisional order in its original n and conception it would now be as much a public general Act of Parlia- t as this special Act really is. I think, therefore, that this reference in first head of the agreement, referred to in the special Act of Parliament, ly gives no aid whatever to the complainers in their present contention. nnot be held absolutely to annul and abrogate the powers which the spe- Act contains. Unless it can do that it can be of no avail, for there is ct and express powers to make these two lines of tramway along North ge Street within a less distance than 9 feet 6 inches of the pavement of r side; and nothing but an express contradiction or a repeal of that can ibly take away the power. I am, therefore, constrained, without considera- of those other matters that have been imported into the discussions, to to the conclusion that, upon the construction of this Act of Parliament, lines of tramways could be constructed in no other manner than they have constructed, and are authorised to be constructed; and that the Tramways pany, by their special Act incorporating the agreement with the town of

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Edinburgh, are compellable so to construct these lines. They have no For these reasons I differ from the judgment pronounced by your Lordsh

THE following interlocutor was pronounced:—"Adhere to the Ordinary's interlocutor, and refuse the reclaiming note, a the motion of the complainers, decern and ordain the respo to remove the tramways laid by them in and along the por North Bridge Street, Edinburgh, which extends from the end of the North Bridge to the High Street, and decern and the respondents to restore the carriage-way of that por North Bridge Street to its former condition: Interdict, p and discharge the respondents from making or constructi tramway along the said portion of North Bridge Street i manner that for a distance of thirty feet or upwards a les than nine feet and six inches shall intervene between th stone of the pavement on either side of the street and the rail of the tramway, and decern: Find the complainers ent the expenses of process, allow an account," &c.

MILLAR, ALLARDICE, & ROBSON, W.S.—LINDSAY, PATERSON, & HALL, W.S.—A

No. 75.

Feb. 22, 1873.
Lord Advocate v. The Clyde Steam Navigation Co.

THE LORD ADVOCATE (for Board of Trade and Commissioners of Cu Pursuer.—*Sol.-Gen. Clark—Rutherfurd.*

THE CLYDE STEAM NAVIGATION COMPANY, Defenders,—*Watson Lancaster.*

Ship-Measurement—Merchant Shipping Act, 1854, *sub-sections* 4 a *section* 21.—A ship was constructed with an awning deck above the tonnage deck, and separated from the forecastle and poop by two gap tings extending completely across the vessel, the cuttings being closed b able planks or hatches not fastened down or rendered water-tight. *H* that the space between the awning deck and main deck was not "a pa closed-in space on the upper deck available for cargo or stores, or for the l or accommodation of passengers or crew," in terms of sub-section 4 of se of the Merchant Shipping Act, 1854 (17 and 18 Vict., 104); and (2) t vessel had not "a third deck, commonly called a spar deck," within the m of the provisions of sub-section 5 of section 21 of the said Act.

2D DIVISION. Lord Gifford. R.

THIS was an action at the instance of the Lord Advocate, on of the Board of Trade and Commissioners of Customs, again Clyde Steam Navigation Company, to have it found and declare the steam-ship "Bear," of Glasgow, belonging to the defenders, wa tonnage of not less than 585·46 tons, and that the defenders were to deliver up a former certificate of registry, under the penalty, i failed to do so, that the vessel should no longer be considered as a l vessel, or entitled to the privileges thereof.

The "Bear," which was built on the Clyde, was contracted for defenders in January 1870; and when ready she was registered examination by the registrar of shipping at Glasgow, as of 331·97 n tonnage. After trading with the vessel for some time the def made certain alterations upon her, whereby her tonnage was incr and the defenders intimated this fact to the registrar of shipping a gow, with a view to the correction of the register and certificate of try. The increase of tonnage consequent upon these alterations w more than seventy tons; but the surveying officer, under the dir of the Board of Trade and Commissioners of Customs, increased he tered tonnage from 331·97 to 585·46 tons. This increase was i

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the ground that the vessel was three-decked, or had a "permanent ered-in space" on the upper deck, and that the space between this er deck or covering and the tonnage deck, which had not been in- ed in the past survey of the ship, should be included in the measure- t of the ship's tonnage, under the Merchant Shipping Act, 1854, sec- 21, sub-sections 4 and 5. The defenders denied that there was a l deck, or a permanent covered-in space, within the meaning of the isions of the statute, and averred that the covering under dispute was rricane deck, covering portions of the ordinary deck, "making the more safe, and insuring the greater comfort of the passengers gene- , especially of steerage passengers, and also so far protecting cattle other live stock, but not forming a spar or third deck, and not in- sing the carrying capacity of the vessel, and not forming a closed-in e in the sense of the statute, but having, on the contrary, a variety ermanent openings." The openings measured respectively 13 feet ches, and 8 feet 6 inches wide, and extended completely across the el.

he Lord Ordinary pronounced an interlocutor, remitting to Mr William lumford, Lloyd's surveyor, Glasgow, to examine the "Bear" as to present state and condition of the main deck of said vessel, and of erections, structures, and coverings thereon, as far as the same relate r bear upon the question as to the measurement of the registered nage of the said steam-ship."

Mr Mumford accordingly examined the vessel, and reported, *inter alia*, the upper deck in dispute was an "awning deck," which the reporter not consider a continuous deck, as it was separated by openings com- ely across the vessel, which were only covered by moveable planks, fastened down or rendered water-tight. The reporter defined an ning deck" as a lightly-constructed deck over a main or weather , the main deck being fitted with coverings and hatches, as in the of a deck entirely exposed to the weather. It also appeared from report that a considerable portion of the main deck was necessary for working of the ship; that the "awning deck" was not water-tight, so o ensure the safety of cargo placed upon the main deck; and that if "Bear" were loaded as a three decked ship usually is she could not safety be sent to sea.

he Lord Ordinary, on 12th November 1872, pronounced this interlocu- —"The Lord Ordinary having heard parties' procurators, and having idered the closed record, the report by Mr Mumford, No. 12 of process, whole process, finds that, according to the sound construction of 'The chant Shipping Act, 1854,' and relative regulations, the space above the a or tonnage deck of the steam-ship 'Bear,' intervening between the aft of the forecastle and the front of the poop, ought not to be measured ncluded as part of the register tonnage of the said steam-ship, reserv- to measure any separate deck-house constructed on the main deck reen said points; and to this extent and effect assoilzies from the de- atory conclusions of the action, and decerns: And, with the above ing, appoints the cause to be enrolled, that parties may agree upon, or a remit may be made to ascertain, the measurement in conformity the above finding: Finds the defenders entitled to the expenses erto incurred by them, and remits the account thereof, when lodged, e Auditor of Court to tax the same, and to report." *

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* NOTE.—The Lord Ordinary had occasion to consider the question raised e present process in a similar action which he decided in the beginning e present year.

No. 75. The pursuer reclaimed. At advising,—

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LORD JUSTICE-CLERK.—The question involved in this case is of some no The action is one at the instance of the Lord Advocate, as representi

"The question related to the steam-ship 'Danzig,' of Leith, and the Ordinary's judgment is dated 30th January 1872. This judgment was esced in by both parties, and the 'Danzig' was measured in conformity with.[1]

"The Lord Ordinary still adheres to the views expressed in the note judgment in the case of the 'Danzig;' and as the question in the present turns upon the same clauses in the Merchant Shipping Act, and invol same considerations, the Lord Ordinary ventures respectfully to refer to terlocutor and note of 30th January 1872, which he holds as repeated he is No. 19 of the present process.

"But although the questions and principles raised in the present ca tive to the steam-ship 'Bear' are of the same nature as those formerly relative to the steam-ship 'Danzig,' still, as the construction of the s somewhat different, the application of the principles and rules of the must be carefully considered in relation to the actual structure of the ship 'Bear,' and the Lord Ordinary must acknowledge that he feels t much greater difficulty and nicety in dealing with the 'Bear' than wi 'Danzig.'

"Indeed it was very ingeniously and forcibly urged by the pursuers t reference to the 'Bear' there was just the element which was awanting case of the 'Danzig,' viz., a complete closing in of the whole space und awning deck, by planking both fore and aft; while in the 'Danzig' the always an opening aft, and it was maintained that the 'Bear' was just an i of the case put under the fifth head of the Lord Ordinary's note in the 'D case, and no doubt it is just here that the difficulty of the case arises.

"On the whole, however, the Lord Ordinary has come to be of opini the space under the awning deck of the 'Bear,' including the space f between the forecastle and the awning deck, and the space aft betwe awning deck and the poop, are not measurable for tonnage under the Of course the Lord Ordinary leaves out of view any engine-rooms o houses under the awning deck, which, as closed-in spaces, fall to be sep dealt with.

"Two views were urged by the pursuers, both leading to the conclusi the whole space between forecastle and poop fell to be measured and in in the tonnage of the ship.

"First, it was maintained that, looking to the structure of what is the upper or awning deck of the 'Bear,' with the coverings which con that deck with the forecastle in front and with the poop behind, the really formed, in the sense of the statute (section 21, sub-section 5), 's deck, commonly called a spar deck.' Of course, if this is the case, th whole space under the spar deck must be measured in terms of sai section 5.

"The answer to this seems to the Lord Ordinary to be satisfactory, t covering in question is not a 'spar deck,' but only 'parts of an awning This is expressly reported by Mr Mumford, whose report has not in an ticular been objected to.

"Now, an awning deck, as its very name implies, is quite different f spar deck. Its purpose is not to form a third deck, constituting a hold tween-decks below it, but merely to form a shelter or awning for the m weather deck, which remains complete as before. Nothing can be carr the top of the awning-deck, which is not in any way protected by bulwar

[1] This case (Leith, Hull, and Hamburg Steam-Packet Company v. the Advocate) is reported *postea*.

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ard of Trade, and the summons concludes to have it found and declared that s steam-ship "Bear" of Glasgow is of a tonnage not less than 585·46 tons, and t the defenders, the owners, are bound to deliver up a former certificate of istry, under the penalty that, if they fail to do so, the vessel shall no longer considered a British vessel, or entitled to the privileges of one.

[It seems that this vessel, the "Bear," was built on the Clyde, and registered 1870 in usual form. Her tonnage was then registered as 331·97. She

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ich is a mere cover stretched over the proper bulwarks of the ship, and thus ltering as an awning does the main deck of the ship. The scuppers and other al openings are all on the main deck, just as if there was no awning deck, l there is no provision for closing these so as to make the space between the in deck and the awning deck in any sense of the word one of the 'tween-ks of the ship.

"It would be most unjust to deal with this awning deck, or parts of an awn-g deck, as if it were a third or spar deck, for this would be to compute the nage of the ship as if she might be loaded so as to sink her main or middle k below the water line,—a thing utterly impossible with the 'Bear,' as is ly explained by Mr Mumford in the last answer of his report, and in the tch annexed thereto.

"The Lord Ordinary, therefore, in the face of Mr Mumford's report to the trary, cannot hold the 'awning deck,' or 'partial awning deck,' of the 'Bear' be a 'spar deck' under the statute. But—

"Second, the alternative view was chiefly insisted in by the pursuers, that all events the space under the awning deck was a 'closed-in space' or 'per-nent closed-in space' in the sense of sub-section 4 of section 21 of the statute d relative regulations. It was ingeniously contended that the plankings or agways, by means of which the cuts or gaps fore and aft of the awning deck ight be closed up in a storm were permanent closings, just as a door or hatch-ay is a permanent closing, though they are made to open and to shut.

"This seems to the Lord Ordinary to be the only difficult point in the case. t the Lord Ordinary has come to the conclusion that these plankings, which, er all, are only occasionally used, do not constitute a permanent closed-in ace within the meaning of the Act.

"They are only used in storms, and to avoid or prevent to a great extent seas om being shipped on the main deck. They are not caulked, and cannot be id so as to exclude the water. The doors at the sides also would admit large antities of water, varying according to the pressure, and the space below uld not possibly in a storm be kept dry. Now, to justify measurement, the ace to be measured must not only be 'permanent,' or 'permanently closed in,' t it must be 'available for cargo, or stores, or for the berthing or accommoda-n of passengers or crew.' This does not refer to deck cargo or deck stores, e space for which is never measured, but to perishable cargo, which must be pt dry; and it is plain from Mr Mumford's report that such cargo could not stored there, nor could passengers or crew be berthed there. Still, further, e space is to a large extent necessary for the working of the vessel, and for cesses to the engine-room, coal and ash-shoots, and to some of the pumps d sounding-rods. The statute never intended such spaces to be measured as ailable for cargo.

"In the whole circumstances, therefore, and while feeling that the case is tended with nicety, the Lord Ordinary adopts the view of the defenders. If could have been shewn in this case, or if it shall appear in any other case, at an attempt is made merely to evade the provisions of the statute, and to t the benefit of a proper hold or 'tween-decks, without having it measured, e Court will at once defeat such an attempt. Even when the matter comes to a nice question of degree the Court would be slow to interfere with the judg-nt and discretion of the Board of Trade officials; but in the present case it pears to the Lord Ordinary that they are seeking to include as tonnage mea-rement space which, according to the sound view of the statute, cannot be nsidered as such."

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thereafter was engaged in the trade between the Clyde and Ireland. O some alterations in the cabin accommodation of the ship it became neces her again to be registered; and on this occasion the surveying offic directions, it is said, of the Board of Trade, increased her registered ton the amount specified in the summons, that is, from 331·97 to 585·46. I not to be disputed that the greater part of this addition arises from the s having included a space between the forecastle and the poop as being sul measurement which had not been so included in the former survey. The have resisted this addition, and hence the present action has been brough

The question involved depends on the meaning of two sub-sections of the clauses of the Merchant Shipping Act, 17 and 18 Vict. c. 104. had been previous statutory provisions on the subject, but this statute intr from section 20 to section 29, very detailed rules for ascertaining the t of vessels prior to their entering the register. I need not go over the pr detail, but the object is by ascertaining the cubic contents, and thereafte ing them by a given formula, to ascertain, not the absolute, but the carrying capacity of the vessel for many important purposes. These rules suffer modifications, first, in the case of a vessel "having a break o or other permanent closed-in space, on the upper deck, available for cargo or or for the berthing or accommodation of passengers or crew," which case vided for in sub-section 4 of section 21; and secondly, if the ship has " deck, commonly called a spar deck," which is provided for in sub-section 5 same section. There are other modifications of the general rule in reg engine space and otherwise, which need not be referred to. The question we have to consider is, whether this vessel has a third deck, commonly c spar deck, in the sense of sub-section 5, or whether the space in questi break or poop, or other permanent closed-in space, on the upper deck, sense of sub-section 4.

The Lord Ordinary has not allowed a proof of the averments of parti remitted to Mr Mumford, Lloyd's surveyor, to report on the vessel. T fenders, the shipowners, were anxious to have a proof, but this was resi the part of the pursuer, and the case now comes to us as a concluded ca Mr Mumford's report. I am not disposed to disturb the Lord Ordinary's in that matter, although the report, which is very able and distinct, leave facts not altogether cleared up. The state of the vessel is so clearly descri the report, and in the very lucid note of the Lord Ordinary, that I shall c myself with very shortly expressing my opinion on the two questions wh thus raised for judgment.

I am of opinion, in the first place, that the raised portion of the vessel the main or tonnage deck is not a third deck in the sense of the 5th sub- of the 21st section. It is quite true that when the openings in this upp struction are covered there is a continuous platform from stem to stern. appears that the ship is to a large extent worked from the top of this uppe although it is also true that the main or tonnage deck retains to some exte character of a weather deck, and that the scuppers or outlets for water are there, and not on the upper deck. But the conclusive ground on whic impossible to hold that this covering or platform, although capable of being continuous from stem to stern, can be considered as a third deck is, that the at the termination of each of the openings of the space in question, which down nearly to the level of the main deck, are not so constructed as to be capa resisting the pressure of the sea. The answer of Mr Mumford to the last qu makes it clear that the result of this is that it is impossible to load the to the depth to which, if this were a proper third deck, she ought to ad being loaded. It would also seem that the fact of the scuppers being plac and opening from, the main deck has the same effect. If the vessel were l to the depth to which a three decked vessel ought to be capable of being l she would not be seaworthy.

The second question is one of more difficulty. The words of sub-sec are singularly deficient in precision; but, taking the report which we h the only evidence in the case, I am unable to say that the space in questi

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manent closed-in space which is available for cargo or stores, or for the thing or accommodation of passengers or crew. I think the space is permanent, notwithstanding that the covering of the two openings is removeable. is capable of being permanently used in its closed condition, and that is all ich is required by this section. It is certainly also closed in where the planks laid across these openings. But then, on the information we have before us, annot affirm the proposition that this space is available for cargo—understanding thereby perishable cargo—or for the berthing of passengers or crew; d for this simple reason, that, as this vessel is constructed, the space in ques-n is not water-tight,—it is not protected from the action of the water while sea. The report brings out quite distinctly that the doors are not of sufficient ength to resist the action of the sea or to exclude the water, and that the vering is in no respect adapted to protect or secure the space below from jury by the waves. The only doubt which I have had in this matter is ether, although this is undoubtedly the state of the vessel as she appeared hen surveyed, she might not, with very little mechanical contrivance, be made rely water-tight as to the space in question; and I observe that Mr Mumford, hen asked the question whether these openings might not be made water-tight being covered by tarpaulins, does not answer the question, but contents him-lf with saying that there is no evidence of any fastenings having been provided adopted for that purpose. If it had appeared that the nature of the con-ction of these openings was such that any ordinary appliances might have cured and protected the cargo below, I should have thought that the existing te of the vessel was a mere evasion of the Act. But we are left without any idence on that matter, and the Crown has asked for a judgment on the case it stands. The defenders, on the other hand, entirely deny that they have ed or can use this space for the purposes of the stowage of perishable cargo. ey say, and I have no reason to doubt the statement from the evidence before , that the main object of covering the space in question is to protect the deck go, viz., the cattle, which form a main staple of their trade between the Clyde d Ireland. The clause in the statute can only be read as applicable to perish-ble cargo, which requires to be protected during its transit; and there seems tle doubt on the description of the vessel which is given us that, as it stands, e space in question would not be a proper or legitimate place in which to stow ishable cargo.

Something was said in the debate as to the effect of the closing in of the space question in a case of general average. I think it unnecessary to deal with is illustration, because I think it inapplicable. It may quite well be, looking the more modern views on the subject, that the removal of the deck cargo m a position where it would impede the navigation of the vessel, and the ditional protection afforded by the covering, might entitle the owner to the nefit of general average, although the space might be entirely unfitted for the owage of perishable cargo or for the berthing of passengers.

This is not so clear a case as that of the "Danzig," but I concur in the Lord dinary's judgment.

The other Judges concurred.

THE COURT adhered to the Lord Ordinary's interlocutor.

W. J. SANDS, W.S.—WEBSTER & WILL, S.S.C.—Agents.

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Feb. 22, 1873.
Nimmo v. Nimmo.

DAVID NIMMO, Defender and Appellant.—*Orr Paterson.*
WILLIAM NIMMO, Pursuer and Respondent.—*Gloag.*

Loan—Proof—Deposit-Receipt.—In an action brought for payment of a sum of money, "being the amount contained in a deposit-receipt in name of the pursuer uplifted by the defender," the defender stated that he had received the deposit-receipt bearing the pursuer's endorsation from a third party, the true owner of the money, and to whom he had accounted for it. *Held* (1) that in so far as the action was or might be rested on an alleged loan by the pursuer to the defender such ground of action could not be proved by parole evidence, and that the only writing of the defender founded on in proof of it, being the defender's name written on the back of the deposit-receipt, was not legal proof of such loan, nor sufficient to render parole proof admissible; (2) that, in so far as the action was rested on the defender's alleged intromission with the pursuer's funds, the parole evidence had negatived the pursuer's case.

2D DIVISION. Sheriff of Stirlingshire. I.

IN December 1871 William Nimmo raised an action in the Sheriff-court of Stirlingshire against his brother, David Nimmo. The summons concluded for payment of £34, "being the amount contained in a deposit-receipt, dated the 27th day of October 1862, granted by the agent of the Commercial Bank of Scotland at Linlithgow in favour of the pursuer, and which amount was, on or about the 27th day of August 1863, uplifted by the defender from said bank; together with the sum of 11s. 5d., being the interest which had accrued on said principal sum, and for which sums the defender has refused or delayed to account to the pursuer, with interest on said respective sums, at the rate of £5 per centum per annum from the said last mentioned date till payment."

The pursuer averred,—"(1) For the period of five years or thereby preceding the 27th day of October 1872 the pursuer was employed as a ploughman, and during that time he almost invariably, on receiving payment of his half year's wages or fee, handed a proportion of the same to his mother, in order that she might place the same in bank to his credit, and she accordingly deposited the said sum of £34, which amount consisted of several accumulations, in the Commercial Bank at Linlithgow on said 26th day of October 1862, in the pursuer's name and for his behoof, the money so deposited being the pursuer's property. (2) On or about the 22d day of August 1863 a sale of the pursuer's father's effects took place, at which the defender was present and made several purchases. The defender, who was then in the knowledge that the pursuer had money in bank, came to the pursuer and informed him of the purchases which he had made at the sale, representing at the same time that he was short of cash, and would therefore be unable to pay for his purchases unless he obtained assistance from some one, for which assistance he solicited the pursuer. (3) Yielding to the solicitation of the defender, and in order to oblige him, the pursuer went to his mother (who had the custody of the said deposit-receipt for behoof of the pursuer), and he obtained delivery of the same from her. The pursuer thereupon endorsed the said receipt, and delivered the same to the defender, upon delivery of which the defender went to the bank at Linlithgow and uplifted the proceeds, together with 11s. 5d. of interest which had accrued thereon, and he applied the same in payment of his purchases at said sale, or otherwise for his own purposes. (4) About three months after the date of the sale above mentioned the pursuer, who was then in need of his money, went to the defender and asked for repayment of the sum which he had previously advanced. The defender stated that he was not in possession of the necessary funds at this time to repay the loan, but, in order to accommodate the pursuer, offered to give him an authority to uplift an account

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mounting to £17, which the defender alleged to be due to him by Mr ardie, farmer, Little Kerse, Polmont. The pursuer, however, declined take the said account as part-payment of the sum contained in said posit-receipt."

The defender stated in answer,—"The defender, on or about the 27th gust 1863, received from his mother, Mary Robertson or Nimmo, a posit-receipt with the Commercial Bank, Linlithgow, for £34, dated on about the 27th October 1862, with instructions to cash the same for r, which the defender did, and accounted to her therefor at the time. he deposit-receipt is believed to have been originally in name of pursuer, t it had been endorsed by the pursuer, and was held by the said Mary obertson or Nimmo prior to her handing it to defender to cash for her. deed, it is believed and averred by the defender that the money in said posit-receipt never belonged to pursuer, but was solely the property of e said Mary Robertson or Nimmo."

He pleaded;—Preliminary—(1) The action being incompetently laid, d its averments being insufficient to support its conclusions, fell to be missed. On the merits—(2) The claim was prescribed. (3) The leged loan could only be proved by writ or oath of defender. (4) The fender having accounted to Mary Robertson or Nimmo, the holder of e said deposit-receipt, and the party who authorised and instructed im to cash it, was not responsible farther therefor.

The Sheriff-substitute (Bell) repelled the defender's first and second eas, and before further answer allowed to both parties a proof *prout de re* in support of their respective averments, and to the pursuer a con-junct probation.

The defender reclaimed against this interlocutor, to which the Sheriff (Blackburn) adhered.

Proof was led.

Mrs Mary Nimmo, the mother of the parties, deponed that the pursuer ad from time to time lodged part of his earnings with her, but that he ad got most of the money back again. She further stated,—"I deposited 34 of my own money in his name in bank at Linlithgow. I did this cause there was a law-plea going on with my husband, and I was afraid e money might be lost. That was money which my mother had left e when she died. It is nearly twenty years since my mother died. I t £65 at her death, and I had £40 of it for many years in my own me in the Clydesdale Bank. The other £25 I had used from time to me. I had not given David any of said money. I had lent him money, hich he always paid back. I think I had lodged money once in David's me in the Clydesdale Bank. I had at one time lodged £30 in George's me in the National Bank. That was since I lodged £34 in pursuer's me. It was previously that I had lodged money in defender's name. still have money lodged in George's name. I reminded him lately of is, since his examination in this case. I may have told William that I d £34 in bank in his name; but I did not tell him it was his, or as od as his. My husband's effects were sold off at the instance of Mr dam Smith, while the money, £34, was still in bank in pursuer's name. efender bought some of my husband's effects, and he was short of a tle money to pay for his purchases. I lent him what he needed on the y following the sale. I think it was £12, and he would have got more d he required it. That was part of the money which had been deposited pursuer's name. He signed the receipt, and we got the money. I had ked him to sign his name on the receipt which I brought to him in our wn house for that purpose."

The pursuer and defender repeated their statements on record.

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The Sheriff-substitute pronounced the following interlocutor:—kirk, 5th June 1872.—Finds that, in terms of the deposit-receipt, of process, of date 27th October 1862, the pursuer became creditor Commercial Bank at Linlithgow for the sum of £34 sterling, whic been paid into the said bank in the pursuer's name by his brother, (Nimmo, acting under the instructions of their mother, Mrs Mary E son or Nimmo, to whom the pursuer had been in the habit of payi wages from time to time: Finds that the defender has failed to ove the presumption arising from the terms of the receipt in the pu favour, so as to prove that his mother, and not the pursuer, was th owner of the deposit-receipt: Finds that the said deposit-receipt w 26th August 1862, endorsed by the pursuer at the defender's requ order to enable the latter to pay for certain purchases which he had at the sale of his father's effects on that day: Finds that on the foll day the contents of the deposit-receipt, being £34, with 11s. 5d. of in accrued thereon, were uplifted from the bank by the defender, endorsation the deposit-receipt also bears: Finds, in law, that th fender, by uplifting the contents, became the debtor of the pursu the amount, and was bound to account to him therefor: Finds th has not accounted, except to the amount of 30s., as stated in the scendence: Therefore finds that the defender is bound to repay pusuer the sum of £33, 1s. 5d., with bank interest as in deposit-r from 27th August 1863 until the date of citation in this summon with interest on said sum at 5 per cent thereafter until payment: the pursuer entitled to expenses."

The defender appealed to the Sheriff, who adhered.

The defender then appealed to the Court of Session, and argued Loan of money can only be proved by writ or oath.[1] (2) If parol was competent the pursuer had failed to prove that the money was

The pursuer answered;—The defender, having admitted that ceived the money, was bound to account to the pursuer, in whose n was deposited.

At advising,—

Lord Benholme.—The summons seems to raise a case of intromissi consequent liability. The condescendence develops a case of loan. Thi rise to the plea against the pursuer that loan cannot be proved except or oath. Had it not been for mutual statements of facts by the part plea would have been decisive against the pursuer. But as the partie gone to issue on certain matters of fact we must look at the proof.

I take a different view of the import of the evidence from either of the S The pursuer cannot controvert the fact that the money was lodged in ba by him, but by the mother. He does not allege that he directed his mo lodge the money. She says that the money was her own, and gives anot a very plausible reason for the deposit-receipt not being in her name, vi she wished to protect the money from her husband's creditors. At the of his mother, or with her concurrence, the pursuer blank endorsed the d receipt. This seems to indicate that he had no objection to his mother the control of the money, whether it was hers or not. The receipt be endorsed, the money is drawn by the defender and the mother, wh together to the bank in order to do so. He was required by the bank his name on the back. This is solely for preserving a record of the pe whom the money is paid, and I question whether the bank have any r require the endorsation as a condition of paying the money.

The circumstances of this case are very different from that of any forme The money was not deposited by the pursuer himself, but by another and he is obliged to discredit that person's evidence. The whole strength

[1] Haldane v. Spiers, March 7, 1872, *ante*, vol. x. 537, and cases there

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pursuer's case appears to be his own evidence. It is said to be supported, but I do not see that it is supported in any material point. The case resolves itself into this: Is the pursuer to have credit given to his own statement, without corroboration, and against the evidence of several witnesses, including the mother, who is not a party to this case, and must know more about the circumstances than any one else?

Viewing this case as one of intromission I think that parole evidence was admissible, but that it is insufficient to support the pursuer's case.

LORD NEAVES.—I concur; and I do so in both aspects of the case. If we were to decide the case on the clauses of the record which contain the facts alleged in support of the very general conclusions of the summons, we should undoubtedly have before us a question of loan of money; and I hold that in such a case parole evidence is inadmissible, and that here the only document which could be used as writ being the endorsed deposit-receipt, is *inhabile* to indicate *quo animo* the money was transferred. In principle there is no difference between this case and that of the endorsed cheque in Speirs's[1] case. It is true that there are important distinctions between a deposit-receipt and a cheque; but there is no difference between the signatures endorsed on both in this respect, that neither can be any evidence of loan. Such signature is evidence to the bank in both cases, in order to identify the recipient of the money, and can be demanded by the bank for no other purpose. The endorsed receipt here is not a *chirographum* which should remain with the pursuer, and in his hands an acknowledgment of receipt of money by the defender, with an obligation to repay.

But, as your Lordship has pointed out, the generality of the conclusions of the summons may be held to let in the other and totally different ratio on which the Sheriff has given decree in favour of the pursuer, viz., intromission by the defender with the pursuer's funds, and liability to account therefor. Now, this is a pure question of fact—whose was the money—and may be competently proved by parole. A proof has been led, and it shews that the circumstances of this family were embarrassed to an extent which in the end led to a poinding of the household furniture. This state of matters lends an air of probability to the statement of the mother, that she lodged her own money in bank not in her own name but in that of her son, in order to put it beyond the reach of her husband's creditors. The receipt remains in her custody. Then after it is cashed the pursuer remains silent for years, in presence of an express denial by the defender that he owed the money to the pursuer. Though I may suspect that the pursuer believed the story told by his mother, of her having lodged the money in his name, and thought it to mean that the money was his, being the savings from wages, I yet must hold it to be the result of the proof that the money de-posited never was his, and that he has failed to maintain this action either on the ratio of loan or of intromission with his funds, with a liability to account.

LORD COWAN.—The summons concludes for payment of £34, "being the amount contained in a deposit-receipt, dated the 27th day of October 1862, granted by the agent of the Commercial Bank of Scotland at Linlithgow in favour of the pursuer, and which amount was, on or about the 27th day of August 1863, uplifted by the defender from said bank." The summons does not appear to be a demand for repayment of money advanced in loan, but is framed so as to bring out a case of legal liability against the defender, on the ground of his having received the contents of the deposit-receipt, and being bound to account. That general statement in the summons is explained in the record, particularly in article 4 of the pursuer's condescendence, by the averment that the money had been truly advanced as a loan, and if this had been the view we were compelled to take of the action I should have been clearly of opinion that the principle given effect to in the case of Speirs excluded parole evidence. Undoubtedly loan of money can only be proved by writ or oath. To admit parole if it is necessary that a document should have passed between the parties,

[1] March 7, 1872, *ante*, vol. x. 537.

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given by the recipient of the money to the other, so as to remain as a voucher in his hands, though not containing an obligation to repay.

It has been argued for the pursuer that the case of Speirs does not apply, because that case related to an endorsation on a cheque, and in this case we have the endorsation of the defender upon a deposit-receipt. I quite concur with your Lordship that there is no essential difference between the cases, in respect to the obligation undertaken by the defender in putting his name upon the document. He was naturally asked by the bank to put his name upon the deposit-receipt, but his doing so was not an acknowledgment of loan in favour of the pursuer. So that the principle of that class of cases, in which such an acknowledgment has been given as raises the presumption of obligation to repay, does not apply to the case of endorsation of a cheque or of a deposit-receipt.

If this action, then, had been based solely on loan, there would have been a question that parole proof was incompetent. But the generality of the summons led to an explanation by the pursuer how the deposit-receipt came to be in his name, although in the custody of his mother, and to a statement by the defender of the circumstances of this family transaction, to shew that he was not indebted to the pursuer in the amount claimed. The parole proof therefore was competent to explain the view set forth by the defender, as well as to support the claim of the pursuer for an accounting. In the peculiar circumstances of the case I think that the Sheriff was right in admitting parole evidence, and on the import of that evidence, which is certainly contradictory, the decision of the case depends.

Looking to the findings in the interlocutor, and to the explanatory note of the Sheriff-substitute, I observe that he has given effect to "the presumption arising from the terms of the receipt in the pursuer's favour," and it is very much on this ground that he takes a favourable view of the proof for the pursuer. The deposit-receipt no doubt bears to be in the pursuer's name, but the parole evidence, which was admitted to explain the whole circumstances, is entirely destructive of any presumption arising from the terms of the receipt. The money was not deposited by the pursuer, but by the mother. She says so, in so many words, that the money so deposited was not the pursuer's but her own. And she gives the reason, that her husband being in difficulties she deposited the money, which she had got from her own relations, in the name of another, to avoid the diligence of her husband's creditors. That is how the money came to be deposited in the name of the pursuer. The mother asks the pursuer, as she was entitled to demand, to put his name upon the back of the receipt. He leaves it endorsed in the hands of his mother. That is clearly proved not only by the evidence of the mother and of the defender, but of the pursuer himself. What follows? She gives the receipt to the defender, who takes it to the bank and gets the £34, and he immediately goes back and hands the money to his mother, as both of them distinctly state in their depositions. Some of it, about £12, seems to have been given over to the defender, but that he states that he afterwards repaid his mother, and this she confirms. How, then, can the presumption from the terms of the receipt he founded on, in the face of the clear evidence explaining why the pursuer's name had got upon the receipt? All the presumption is destroyed by the parole evidence.

The Sheriff-substitute thinks that the weight of the evidence supports the presumption to which he has given effect. I am very far from reaching that conclusion. I think that the pursuer's statements are unsupported in any essential respect, and that the weight of the evidence is in favour of the defence. If the pursuer has any claim for money deposited in the hands of his mother, which she denies in her deposition, her statement being that she had paid him as much as she ever got from him, he must constitute that claim against her. The defender has not been shewn to be his debtor.

The LORD JUSTICE-CLERK was absent.

THE COURT, on 4th February 1873, pronounced this interlocutor:—"Find that, in so far as the action is or may be rested on an allegation of loan of money by the pursuer to the defender, such ground of action cannot be proved by parole evidence, and that the

writing of the defender founded on in proof of it being the defender's name written on the back of the deposit-receipt in question is not legal proof of such a loan, nor sufficient to render parole proof admissible: Further, in so far as the action is rested on the defender's alleged intromissions with the pursuer's funds and the defender's consequent liability to account, find in point of fact that the deposit-receipt in question, on the 27th August 1863, when its contents were uplifted from the bank, was in the hands of the mother of the parties, who had herself deposited the money in bank on 27th October 1862, and who had remained in possession of the said receipt all along; that the said receipt had been taken by her in the name of the pursuer to preserve from her husband's creditors the fund paid in, which was not the pursuer's property, but money to which she had succeeded; that on 26th October 1862 the pursuer put his name on the back of the receipt with a view to its contents being uplifted, which was done by her going to the bank in company with the defender; that the defender thereafter got from the mother of the parties a part of the money thus obtained from the bank, but did so as an advance by his mother to him, and not as an advance to him by the pursuer; that the defender came under no obligation to pay or account for the same to the pursuer, and that accordingly the defender paid or accounted to his mother for all the money he had got as aforesaid: Find in point of law that in these circumstances the defender was under no obligation to pay or account to the pursuer for the contents of the said deposit-receipt, or any part thereof: Therefore sustain the appeal: Recall the interlocutors complained of, and assoilzie the defender from the conclusions of the action, and decern: Find the defender entitled to the expenses of process, both in the inferior Court and in this Court; and remit," &c.

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J. & A. PEDDIE, W.S.—BURN & GLOAG, W.S.—Agents.

No. 77.

The Rev. PETER SAWERS, Petitioner.—*Lord-Adv. Young—Scott.* JGH M'CONNELL and JOHN PETRIE (Monteith's Trustees), Respondents —*Trayner.*

Feb. 22, 1873.
Sawers' Executors v. Sawers' Trustees.

Process—Expenses—Appeal to House of Lords.—Where an interlocutor of the ner-House, recalling an interlocutor of the Lord Ordinary, was reversed by House of Lords, without any affirmance of the latter, and without any find- as to expenses, but with a remit to the Court "to do therein as shall be just consistent with this judgment," *held* (*diss.* Lord Benholme) that, the House Lords not having exhausted the case, the Court took it up, in applying the gment, as if the Lord Ordinary's interlocutor had never been recalled, and e entitled to deal with the question of expenses from the date thereof.

A PETITION having been presented on 23d June 1868 by James Monteith, of the two surviving trustees of the late Peter Sawers, praying the rt to sequestrate the trust-estate and appoint a judicial factor, it was osed by the other surviving trustee, the Rev. Peter Sawers, minister he Free Church at Gargunnock, Stirling. The Lord Ordinary (Manor), 5th Nov. 1868, refused the petition, and found the petitioner liable in enses, which he modified at two guineas. The Second Division, on h March 1869, recalled the Lord Ordinary's interlocutor, and granted petition, and found the petitioner, James Monteith, entitled to exses out of the trust-estate. Against this interlocutor the Rev. Peter ers appealed to the House of Lords.

2D DIVISION. Lord Manor. R.

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Pending this appeal, James Monteith applied for interim execution which was, on his death on 18th May 1869, insisted in by his trustees Hugh M'Connell and John Petrie. On 14th July 1869 the Court approved of the Auditor's report on the account of expenses incurred by the late James Monteith, and decerned for payment in favour of his trustees and granted warrant for interim execution pending appeal. Against the interlocutor the Rev. Peter Sawers presented a supplementary appeal.

On 23d Feb. 1872 the House of Lords, after hearing the cause *ex parte* no appearance being made for the trustees of the late James Monteith ordered and ordained that the said interlocutors of the Second Division appealed against should be reversed; and it was further ordered—"That the costs decerned under the said interlocutor of the 14th of July 1869 for payment to the said Hugh M'Connell and John Petrie, the respondents in the said supplementary appeal, out of the trust-estate of the late Peter Sawers, deceased, shall, if the same have been paid or retained, be repaid to the said trust-estate, with interest, conform to the last-mentioned interlocutor of the 14th of July 1869." And it was also further ordered —"That the said cause be, and is hereby, remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with the judgment."

The present petition was presented by the Rev. Peter Sawers to apply the judgment of the House of Lords, to alter the interlocutor appealed from in terms of said judgment, "to affirm the interlocutor of the Lord Ordinary of 5th November 1868, and to refuse the prayer of the petition for the appointment of a judicial factor; and also to ordain the respondents to repeat and pay back the costs, amounting to £93, 18s. 2d. decerned for under the said interlocutor of 14th July 1869, if the same have been paid or retained, with interest thereof at five per cent from the date thereof, to the said trust-estate, and to find the petitioner entitled to the expenses of process since the date of the Lord Ordinary's interlocutor of 5th November 1868, including the expenses of the present application; to remit the account thereof, when lodged, to the Auditor to tax and report, and to decern in the petitioner's favour for the taxed amount against the said Hugh M'Connell and John Petrie, as trustees of the late James Monteith."

The respondents argued;—The judgment of the House of Lords exhausted the case; the remit to the Court of Session "to do therein as shall be just" were mere words of style, and were strictly qualified by the words which followed, "and consistent with this judgment;" nothing therefore was remitted to this Court except to apply the judgment; and as that judgment did not contain a finding of expenses it was incompetent for this Court now to give them.[1]

At advising,—

Lord Justice-Clerk.—The cases cited create little difficulty as to our power to give expenses. In the case of Borrows and Colquhoun the House of Lords reversed the judgment of this Division, and affirmed that of the Lord Ordinary and remitted the case back to the Court of Session, to do therein as should be just and consistent with their judgment. Now, the whole of the Lord Ordinary's interlocutor in that case was before the House of Lords, and as they said nothing about costs that matter was held to be exhausted. It is not so here, however. The interlocutors of this Division have been reversed without affirming those of the Lord Ordinary. The case is remitted back to us to do therein as shall be

[1] Purves v. Landell, May 31, 1845, 7 D. 810; Colquhoun v. Borrows, Dec. 20, 1854, 17 D. 245; Stewart v. Scott, March 11, 1836, 14 Sh. 692; Dunnet, March 8, 1839, 1 D. 689.

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st, and it lies with us to take up the reclaiming note as it stood before we gave dgment upon it, and dispose of it in accordance with the judgment of the ouse of Lords. I apprehend we must follow the judgment of the House of rds in dealing with the reclaiming note, but I cannot see that it necessarily mits our powers in dealing with the case, as long as we do nothing that is in- nsistent with the House of Lords' judgment. I should require to hear more gent argument than that which has been addressed to us before I could hold at we are in any way restrained from doing substantial justice by a mere tech- nality such as that which has been pleaded. Though I have a great respect r the authorities, I do not think that they apply to the present case.

LORD COWAN.—When the case, of which the present petition is the sequel, me before the House of Lords on appeal, there was no affirmance of the Lord rdinary's interlocutor of 5th November 1868, but the judgment of the Inner- ouse recalling it having been reversed, the case is, in fact, sent back in pre- sely the same position as if the interlocutors of this Division had never been nounced. In these circumstances the petitioner, who has been successful in s appeal, asks for the expenses of the process from the date of the Lord Ordi- ry's interlocutor. I am of opinion that he is entitled to succeed in his appli- tion, if we have powers competently to give them. I think we clearly have. n examination of the cases which have been quoted by the respondents it ll appear that in all of them the House of Lords expressly affirmed the Lord rdinary's judgment, and, by omitting to give expenses, obviously did not in- nd to give them, seeing that their Lordships' minds had been directed to the bject. In Colquhoun's case, while the Lord Ordinary's interlocutor is affirmed, s application for expenses is not refused as incompetent, but simply refused. It was pressed for the respondents that they were *in bona fide* in the original pplication out of which this appeal arose. I do not doubt that they were *in ntima fide*, but in a matter of expenses we can only inquire whether the appli- tion was a proper one in the circumstances. The House of Lords has found at it was not, and I think it would be unjust to withhold expenses from the esent petitioner.

LORD BENHOLME.—I confess my mind is not so free from doubt as my brother rd Cowan's. I think that the distinction on which your Lordships go, namely, at there is not here an express affirmance of the Lord Ordinary's interlocutor, d that therefore we are entitled to dispose of the reclaiming note, and to go ther than we should have been entitled, had the Lord Ordinary's interlocutor en expressly affirmed, is too shadowy to be satisfactory. I think the House Lords tell us how far they reverse, and what the consequences are, and that are bound to obey. My impression is that the case may be different where y only reverse, without pointing out the results of their judgment, and leave er things to be done by us, about which they have said nothing. But when, here, they point out the consequences of their judgment, they do not intend y other consequences to follow, and do not give us power to do anything but ply their judgment in that form. The words used are words of style. It is, I nk, rather a thin distinction to say, that if they had affirmed the Lord Ordi- ry's interlocutor we could not have gone on to consider this matter of ex- nses; but as they have not done so, we have power to go on and decide the estion of expenses in this Court. I think such a course is infringing upon previous authorities, and, though I have not formed a decided opinion, I am clined to take a different view from your Lordships.

LORD NEAVES.—I agree in the judgment proposed by your Lordship, which is nsistent with justice and correct in form. We only know the views of the use of Lords in appeals from the judgment before us. The principle in plying such judgments is that we are to do nothing in any matter with which ir Lordships have themselves dealt. The matter of expenses ought to be posed of when an interlocutor of affirmance is pronounced; and if the House Lords say nothing more than that "we affirm the Lord Ordinary's interlocu-

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tor," it is not in our power to add expenses, since their Lordships ha their minds directed to the subject of expenses, and have been intenti silent. The same will be the case, if they remit to us to affirm the Lord nary's interlocutor, and dictate the terms of our affirmance, without sayin thing about expenses. But here we have neither of these cases. The comes back to us just in the same position as that which it occupied w first appeared before us, with this exception, that our judgment must not consistent with the interlocutor of the House of Lords. Therefore w affirm the Lord Ordinary's interlocutor, and as to expenses we are at lib decern according to the justice of the case.

THE COURT, on 6th February 1873, pronounced this interlocu "Apply the judgment of the House of Lords: Alter the int tors appealed from, in terms of said judgment; dismiss the re ing petition for the late James Monteith; affirm the interl of the Lord Ordinary of 5th November 1868, and refuse the of the petition for the appointment of a judicial factor: P the respondents from applying the trust-funds in payment costs decerned for in the said interlocutors: Find the pet entitled to the expenses of process since the date of the Lord nary's interlocutor of 5th November 1868, including the ex of the present application; and remit," &c.

A. BEVERIDGE, S.S.C.—M'EWEN & CARMENT, W.S.—Agents.

No. 78.

Feb. 22, 1873. Forbes v. Wilson.

WILLIAM FORBES, Pursuer.—*Watson—Mackay.*
JOHN WILSON, Defender.—*Sol.-Gen. Clark—Gloag.*

Lease—Constitution—Rei interventus—Homologation—Personal Bar—Removing—A. S. 14th December 1756.—*Held*, in an action of rem brought on the footing that the tenancy was yearly, that a valid and ing lease for years had been constituted by a written offer from the int tenant, stating rent and ish, combined with circumstances, both befo after its date, which inferred acceptance by the landlord or his agents, lowed by such outlay on the tenant's part as amounted to *rei interventus*.

Entail—Lease.—Question, Whether a lease granted by an heir of en a longer period than is allowed by the entail is good even for the allowed.

2D DIVISION. Sheriff of Stirlingshire. I.

THIS was an action of removing, in terms of the Act of Sede 14th December 1756, and of the Sheriff-court Act, 1853, brought Forbes of Callendar, for the purpose of having the defender, Mr Wil South Bantaskine, decerned to flit and remove from a piece of g less than half an acre in extent, situated on the south side of the burgh and Glasgow Union Canal and the Falkirk Fire-brick W bounded on the west by the defender's lands of South Bantaskin occupied by the defender under the pursuer at a yearly rent of 15s ling. The summons was dated 23d September 1870, and the date removing sued for was Martinmas following.

The following facts were either proved or not disputed:—The la Forbes of Callendar, M.P. (the father of the pursuer), who held the of Callendar under a strict entail, but with power to grant leases n ceeding nineteen years in duration, entered into negotiations in 185 the defender, whose lands adjoined those of Callendar, for an exch It was necessary to obtain judicial sanction therefor, and on applica the Sheriff a remit was made to referees for the purpose of deter what would be a suitable exchange in the circumstances. The

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ras dated the 7th of December 1854, and included in the parcels which were to be disjoined from the Callendar estate and given the defender the piece of ground which formed the subject of the action. It appeared, however, that the late Mr Forbes objected iclusion of the said piece of ground, as he had been advised that t might possibly be required for the formation of a road to his Standalane. It was a matter of equal importance to Mr Wilson hould be included, his sole, or at least, main object in agreeing to mbion, being to provide a commodious access to his mansion- f South Bantaskine, which access would necessarily cross the land referred to. This purpose was communicated shortly after e of the first report of the referees to the pursuer's father, in a ddressed by Mr Russel, the defender's agent, to Colonel Forbes, Mr Forbes's brother, who was acting for him, and dated 22d er 1854. A correspondence followed, which is sufficiently nar- the opinion of the Lord Justice-Clerk. It was ultimately agreed disputed piece of land should be struck out of the excambion. 23d of January 1855 Mr Wilson wrote as follows to Mr Forbes, ie pursuer's agent, who had a power of attorney to grant leases:— ground reserved for a road to Mr Forbes, Standalane farm, at t side of the feuars' ground, extending to 401 dec. parts of an ing now struck out of the excambion, I am anxious to become of it until it is required for the proposed road by Mr Forbes. I e now offer fifteen shillings annually for it, on a lease of say nine years; but if it shall be required during that period for the above mentioned I will at once abandon the lease thereof.

a are aware that through the ground I have got from Mr Forbes rming a road to Bantaskine. It was granted to me by Mr Forbes y for this purpose. This road requires to cross the ground reserved Forbes for his road, and my understanding is, that I am to be to form my road through it; but if in doing so I shall alter the the ground, so as in any way to interfere with Mr Forbes's road, er shall be formed, I understand that he or his successors are , in forming their road, to make such alterations on the level of l as they may find necessary.

s matter has been mentioned to Mr Hamilton (the pursuer's land-) by Mr John Russel, and he understood him to say that he would end the arrangement now proposed."

letter was received and retained by Mr Forbes, W.S., and there ne evidence that he and Mr Hamilton had expressly intimated nce to Mr Russel. A second or amended report, excluding the ce of ground, was drawn up by the referees before the death of Mr M.P., which occurred on 10th February 1855; and possession had ken by Mr Wilson of the lands disponed to him before the nego- above mentioned had come to an end, but the contract of excam- as not formally executed till May 1856. During this interval and o the date of the present action, the defender had regularly paid a of fifteen shillings annually in name of rent for the disputed f ground, and obtained receipts for the same. He had, moreover, before the late Mr Forbes's death, and completed after that event, mation of a road and bridge across the said ground, at a cost of £150, as access to his mansion house of South Bantaskine, and ther improvements on his adjoining lands, on the footing that his should pass in that direction. The pursuer denied having had rsonal knowledge of the existence of the said letter down to the 868, or of any payments of rent for the said ground; but he con-

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tinued to accept the rent for two years from the time that th lease came into his hands.

On 2d November 1870, at revisal, in addition to his other st the pursuer added the following:—(Cond. 8) "The pursuer d resume possession of the piece of ground which forms the su the present action, in order to form a road over it from the E and Glasgow Union Canal to the farm of Standalane, part of the Callendar."

The pursuer pleaded;—1. As the defender has no right or possess the ground in question after Martinmas next, decree s ought to be pronounced. 3. The only proof which is competer alleged lease for twenty-nine years is by writ or oath. 4. The f Forbes, W.S., having had no power or authority to grant lease part of the estate of Callendar beyond the duration allowed by lendar entail, his acceptance of, or acquiescence in, any proposa for a lease cannot constitute a valid lease. 5. The late Mr Forbe lendar having been proprietor of the ground in question, under t of a strict entail, a lease by him, or any person acting for hin period of twenty-nine years, is not valid in a question with the his successor in the entailed estate. 6. A lease invalid on the gr it was granted by an heir of entail for a period beyond his granting leases, both at common law and under the entail, is and cannot be sustained for any shorter period. 7. The alleged twenty-nine years not having been, in any view, constituted written instrument, it is not necessary for the pursuer to reduce bringing the present action. 8. In the event of its being held defender has proved the existence of a lease for twenty-nine y bound to remove from the subjects, as required by the pursuer to enable the pursuer to form the road to his farm of Standalane facts and circumstances founded on in the defences are irrelevar sufficient to constitute either acquiesence or homologation on t the pursuer, or *rei interventus* on the part of the defender, whi validate an improbative lease for twenty-nine years.

The defender pleaded;—1. A lease for twenty-nine years of of ground, from which the pursuer seeks to remove the defen constituted or instructed by the offer by the defender, set for defender's statement of facts, the acceptance thereof by the pur the payment and acceptance of the rent therein offered, and the being still current, the defender is entitled to absolvitor. 2. lease cannot be challenged by the pursuer, in respect of the a *interventus* libelled, and of the acquiescence of the pursuer and c decessors in the said lands, and in respect of the pursuer's hon of the lease by acceptance of the rent offered. 3. Even if the ri late Mr Forbes and of the pursuer to grant leases were limit entail of the estate of Callendar, as averred by the pursuer (wh admitted), the lease, at all events, falls to be sustained to the e for the duration sanctioned by said deed of entail. 4. The de virtue of the foresaid letter, the assent thereto of the late Mr F proprietor, and of the possession following thereon, the acts of *ventus*, and the acquiescence and homologation by the pursue has acquired a valid and unchallengeable right to use and enjoy across the said stripe of ground. 6. So long as the said lease right granted by the late Mr Forbes to use the said road, have reduced, the defender's right to the lease and to use the road mu tained, and he is therefore entitled to absolvitor from the conc the present summons. 10. The pursuer cannot in this action

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e averment introduced by him on revisal, and on 2d November 1870, at he requires the said piece of ground for the construction of a road to s farm of Standalane, in respect (1) no such intention was ever previously intimated; (2) such intention was not entertained when the tion was raised, and was not the true reason of the present endeavour remove the defender; (3) The road may be made without the removal the defender from the subject, and without interference with or removal the defender's road; (4) the pursuer cannot, at the same time, found and reprobate the letter of 23d January 1855. 11. Such intention ms no ground for a decree of removing against the defender, or for terference with or removal of his road.

After some procedure as to the relevancy in the Sheriff-court, and an peal to the Court of Session, the First Division, on 11th July 1871, mitted to the Sheriff to allow a proof before answer, with power to the eriff to dispose of all questions of expenses, including the expense of is appeal. Proof was led, and on 22d May 1872 the Sheriff-substitute ell) pronounced the following interlocutor:—"Finds in point of fact at the late Mr Forbes of Callendar (the pursuer's father), and the de-nder, in the year 1854, entered into an agreement for the excambion of rtain portions of their respective lands, including the piece of ground w in dispute, forming part of the entailed estate of Callendar: Finds at proceedings were instituted in the Sheriff-court of Stirlingshire by e petition, 34/1 of process, under the provisions of the statute 10 eorge III., c. 51: Finds that, throughout the excambion proceedings, e late Mr Forbes was represented by Mr William Forbes, W.S., his mmissioner and law agent, who had full authority to act for him in the hole arrangements, and by Mr Hamilton, his land-steward at Callendar, th of whom, as well as Mr Forbes himself, were aware that the de-nder's chief object in going into the excambion was to enable him to form new approach to his residence at Bantaskine, through the grounds pro-sed to be acquired: Finds that the valuator's report as originally lodged 7th December 1854, included the piece of ground in question, as form-g part of Mr Forbes's entailed lands proposed to be conveyed to the fender, but before the reporters had made oath to their report an jection was stated on behalf of Mr Forbes to the said piece of ground ng embraced in the excambion, as the idea had been suggested by Mr milton that it might possibly be required at some future period for the rmation of a road to the adjoining farm of Standalane: Finds that the cambion proceedings were, in consequence of said objection, delayed r a considerable time, as the defender was unwilling to relinquish said ce of ground, the possession of which was essential for the formation a proper approach to Bantaskine: Finds that protracted communings d correspondence in reference to this point took place between Mr rbes, W.S., and Mr Hamilton, on behalf of Mr Forbes, and the defen-r's agents, in which Mr Dickson, one of the valuators, also took part, d, by special arrangement with Mr Forbes, W.S., a meeting was held the office of Mr Black, surveyor, on 20th January 1855, at which essrs Dickson, Russel, and Hamilton were present: Finds that at this eeting it was arranged that the piece of ground in question should be ithdrawn from the excambion, on the understanding that a lease for a rm of years should be obtained from Mr Forbes of Callendar in favour the defender, so that he might have security for the formation of his oposed approach, but reserving right to Mr Forbes to make a road to andalane during the currency of the lease whenever he might choose to so: Finds that, in accordance with the spirit of the said arrangement, e defender addressed the offer, of date 23d January 1855, to Mr Forbes,

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W.S., as representing Mr Forbes of Callendar in the excambion: Finds that the said offer was considered and approved of by Mr Forbes, W.S. as acting for Mr Forbes of Callendar, after discussing the matter fully with Mr Dickson, one of the valuators: Finds that in the amended report 34/3 of process, the said piece of ground was left out of the excambion but without any diminution of the gross value put upon Mr Forbes's land given in exchange: Finds that said amended report was signed by the valuators on 31st January: Finds that on 1st February Mr John Russel the defender's agent, received from Mr Hamilton (who had been in Edinburgh with Mr Forbes, W.S., on the preceding day), a verbal intimation that the defender's offer had been accepted (by Mr Forbes, W.S., as Mr Russel understood), and that the defender might proceed with his operations: Finds that although there is no direct evidence to shew that the late Mr Forbes had personally accepted the defender's offer there are very strong presumptions that he was made fully aware of the whole course and details of the transaction: Finds that on the 1st February Mr Forbes, W.S., sent to Mr Russel the excambion proceedings in order that they might be carried through, and by the agency of Mr Russel, who believed that the defender's offer had been agreed to; the reporters' oaths were subsequently duly taken to the report, and the Sheriff's authority interponed to the excambion by interlocutor of 8th February 1855 thereby completing the proceedings in the Sheriff-court: Finds that on 10th February 1855 Mr Forbes, then of Callendar, died: Finds that on the faith of his offer having been accepted the defender, before Mr Forbes's death, took possession of the piece of ground in question, and carried on operations thereon in connection with the other portion of his approach which, on the faith of the excambion, had been previously commenced through the other portion of the lands embraced in the excambion: Finds that all these operations were carried on openly with the knowledge of the late Mr Forbes, or of those for whom he was responsible: Finds that subsequently the defender's approach and other improvements—including the road and several bridges—were completed at a large cost, a considerable portion of which was expended upon the piece of ground in question and these operations were carried on with the knowledge of the pursuer or of those acting for him: Finds that after Mr Forbes's death the excambion proceedings were brought to a close, through the agency of Mr Forbes, W.S., the pursuer's agent, by contract of excambion between the pursuer and defender, signed on 8th and 27th May, and recorded at Stirling on 11th July 1856: Finds that on 28th November 1856 the defender paid to Mr Forbes, W.S., the pursuer's commissioner, 30s. as the rent of the piece of ground in question, for the two years preceding Martinmas 1856, as per receipt number 8/1 of process, and the rents for subsequent years were paid from time to time to the said Mr Forbes, who granted receipts for the amounts: Finds that the defender's offer, of date 23d January 1855, has all along been in the possession of Mr Forbes, W.S. as agent and commissioner for the late Mr Forbes and the pursuer: Finds that matters remained on this footing until September 1868, when Mr Hamilton, the pursuer's land-steward, intimated to the defender that the pursuer wished to recover possession of the piece of ground in question and having received a copy of the offer of 23d January 1855, under which the defender maintained that he held the ground in lease, he communicated it to the pursuer: Finds that no farther communication on the subject was made to the defender until the present summons of removing was raised on 23d September 1870, and that in the interval the pursuer's commissioner, Mr Forbes, W.S., had received payment of the rents of said piece of ground for the years 1868 and 1869, and had granted receipts

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: without any protest or reservation being intimated: Finds that suer represents his father, Mr Forbes of Callendar, *titulo lucratio:* n point of law in reference to the whole circumstances narrated oregoing findings, that a valid lease for the period of twenty-nine rom Martinmas 1854 was constituted, during the lifetime of the : Forbes, by the defender's offer of date 23d January 1855, which rbally accepted by Mr Forbes, W.S., as acting for the late Mr in the transaction by which the Sheriff-court proceedings were ted, and which was followed by *rei interventus* on the part of the r, in so far as, on the faith of the said offer having been accepted, uiesced in and sanctioned the completion of the excambion pro- s in the Sheriff-court, and with the knowledge of the late Mr or of those acting for him, took possession of the said piece of and executed works, and incurred expenditure thereon of a kind could only be attributed to the assurance of a long occupancy: hat the defender's rights under the said lease have been homolo- y the pursuer, in respect that,—1st, By the agency of his commis- Mr Forbes, W.S., who was cognisant of the whole transaction, he ted the contract of excambion in accordance with the proceedings Sheriff-court, of which the lease in question was virtually part and 2d, Extensive operations by the defender on the ground in ques- id in connection therewith, were executed openly, and with the nce of the pursuer or those for whom he is responsible; 3d, The of the piece of ground were received by the pursuer through his sed agent, Mr Forbes, W.S., while the offer of the defender, his tle of possession, was retained by him; and payment of the rents 8 and 1869 were taken for the pursuer without any protest or tion, after the defender's claim to a lease had been specially t under his notice: Finds that the pursuer, from having thus per- homologated the lease, and also from his representation of his late is barred from objecting to the validity of the defender's right he lease: Finds that, even although there was no personal bar on t of the pursuer, there is no room in this action of removing for g that the lease is invalid as being for a longer period than is sanc- by the Callendar entail, for such a plea could not receive effect ie defender's right under the lease had been reduced: Finds, how- iat in terms of the defender's offer of 23d June 1855, the defender id, as has been admitted in the record, to cede possession of the f ground in question, in so far as may be necessary for the forma- f a road to Standalane, but otherwise, without prejudice to the er's possession, during the currency of the lease, of the road formed t, and of the remainder of the ground included in his lease not d for the pursuer's road: Therefore, to that extent, decerns in the ng, reserving as between the parties all questions as to the mode ch the pursuer's road may be formed; *quoad ultra* assoilzies the er from the conclusions of the libel: Finds him entitled to ex- ," &c.*

NOTE— . . . In the Sheriff-substitute's opinion it is proved beyond a that Mr Forbes, W.S., did make up his mind that the offer should be d; and in assenting, whether tacitly or expressly, to the defender's offer January 1855, he must be held as having acted as Mr Forbes' repre- re in the transaction of the excambion, which would have been suspended, ltogether interrupted, had the proposal by the defender for a long lease n agreed to. Notwithstanding the restrictions of the entail, Mr Forbes endar was entitled to grant the lease for twenty-nine years now founded

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On appeal, the Sheriff-principal (Blackburn) issued the followi terlocutor:—"Finds that the defender has failed to prove the l avers as the ground of his right to retain possession of the strip of l question: Therefore sustains the appeal; recalls the interlocutor a against; repels the defences, and decerns in terms of the conclus

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on, which would be effectual until competently challenged by a reducti it is thought that the acts of Mr Forbes, W.S., in assenting to the le material part of the transaction in the excambion, were equally effectu was not exercising the powers as to leases conferred by the factory and sion, No. 11 of process, but he was representing his constituent in a transaction; and it may here be remarked that, if the point of contrave the entail occurred to either Mr Forbes or Mr Forbes, W.S., it might re thrown aside, considering the trifling value of the ground and the advan nature of the agreement by which the proprietor of the estate of Callen during the lease, to receive a rent greatly exceeding the annual value of t of ground, without any hindrance in the way of forming an access to Sta and to receive credit in the excambion for its value, without giving any lent in return. . . . . Intimation of acceptance, although of impor shewing more clearly the intention of parties, is not absolutely necessar lessor to whom an offer has been addressed is barred from resiling by r the offer, while he allows the offerer to proceed upon his offer as if it h accepted, and to perform acts referable to the agreement, and which, refusal to execute the agreement, would prove detrimental to the person led or encouraged to proceed—See Bell's Commentaries, 1st vol., pp. 3 329, 5th edition. In the present case, the Sheriff-substitute thinks th was *rei interventus* following on the defender's offer, during the late Mr lifetime, sufficient to validate the agreement of lease. There was not possession of the ground in question, but expensive operations thereon— a nature as could only be attributed to a lengthened right of occupanc carried on openly, with the cognisance of the lessor or his representativ generally, matters were no longer entire when the defender had acqui the completion of the excambion after the exclusion of the piece of gr question, whereby, had he not been assured of possession under the question, great inconvenience and disappointment would have resulted. over, there have been acts of *rei interventus* since the pursuer's accession, excambion contract was executed, and expensive operations on the grou carried on and completed, under circumstances of which the pursuer held to have been legally cognisant. There have been also acts of homo and acquiescence on the part of the pursuer, and of Mr Forbes, W.S., fo he is responsible—as detailed in the foregoing interlocutor—which are Sheriff-substitute's opinion, sufficient to bar the pursuer from impugn defender's title to possess. . . . .

"In support of his views as to the effect of *rei interventus*, following defender's offer, having constituted a valid lease in favour of the defen Sheriff-substitute would refer to the following authorities:—Bell's Comm vol. 1st, pp. 328, 329; Hunter's Landlord and Tenant, last ed. pp. 41 and 433, 434; and the following decisions: Gordon v. Hall, 10th Augu Mor. p. 15,178; Countess of Moray v. Stewart, 1772, and House of 1773, Mor. p. 4392; Ross v. Ross, 9th February 1790, Hume's Deci 774; Campbell v. Campbell and M'Pherson, 6th March 1793, Hume's D p. 786; M'Pherson v. M'Pherson and Clark, 12th May 1815, Fac. Col Robertson's opinion); Keir and Others v. Duke of Athole, 17th Januar and House of Lords, 15th July 1815, 6 Paton's Appeals, p. 130.

"With regard to the validity of a lease by contravention of the limita an entail, until it has been set aside by an action of reduction the case of v. Gillespie, 23d June 1813, Fac. Coll., is a clear authority.

"The defender has been found entitled to expenses, seeing that he h successful in every branch of the case."

summons: Finds the pursuer entitled to expenses of the appeal to Court of Session, in terms of the interlocutor of 11th July 1871, pronced by the First Division of said Court, as well as to the expenses urred in this Court, but subject to modification to the extent of one-rd of the taxed amounts thereof."*

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* "NOTE.—The defender's case is, that he holds the land in dispute under informal lease of twenty-nine years from 23d January 1855, upon which *rei interventus* has followed, and therefore he refuses to remove.

"The parties have been allowed a proof of their averments on record before answer—the defender leading.

"The question therefore is, has the defender proved, by competent evidence, enough to support his defence? The foregoing interlocutor is founded on the ground that he has failed to do so.

"The lease, being one for a number of years, must be proved by writ or oath before any proof of *rei interventus* can be admitted.

"To render valid the contract of lease it is essential that the subject, the parties, the rent, and the term of the lease be clear, and proved by writ or oath of party—Stair, 2, 9, 5.

"The defender accordingly founds upon a letter written by himself to Mr William Forbes, W.S., as agent and commissioner for the late Mr Forbes of Callendar, and dated the 23d of January 1855. This letter is quoted at length in the 4th statement of the defences, and it is said to contain all that it is required to prove by writ to constitute the lease on which he relies.

"There is no dispute that the letter was written to and received by Mr Forbes, W.S., nor as to its terms; and although the Sheriff has doubts whether it fully comes up to what Lord Stair requires for a valid lease in one particular, namely, the duration of the lease, it has been dealt with by the parties on the footing that, by the terms of the letter, the offer was one for the term of twenty-nine years from its date—that is, from 23d January 1855. The words, 'say for twenty-nine years,' suggest that the letter contained a tentative rather than a definite offer of clear conditions of lease; but the Sheriff will deal with it as the parties have done.

"The Sheriff lays stress upon this, however, here, because he thinks that this discussion is probably the origin of the misapprehensions and cross purposes which have ended in the present lamentable dispute.

"Taking, then, this offer to be one for a lease of the subject in dispute by the late Mr Forbes to the defender, for a rent of 15s., and for twenty-nine years from the date of the offer, the next question is, was that offer accepted by the late Mr Forbes, M.P.?

"The defender's averment on this point is also in the 4th statement of his defences, and is pointed and clear. He says,—'Mr Forbes (then of Callendar) accepted of this offer, and acquiesced in and assented to the intentions of the defender as therein expressed. His assent and acquiescence were intimated to the defender by Mr Forbes's land-steward, Mr Hamilton, mentioned in the letter.'

"No written proof is adduced either that Mr Forbes, M.P., directly or indirectly accepted this offer. But there is produced a deed of commission and factory under the late Mr Forbes's hand to Mr William Forbes, W.S., to manage the estate of Callendar, as his commissioner and factor, and under that deed Mr Forbes has authority to grant leases, but not of longer endurance than is allowed by the deed of entail of the estate.

"An extract of the deed of entail of Callendar is also produced, from which it appears that leases of longer duration than nineteen years, or for the life of the entail, are strictly prohibited.

"It was not within Mr Forbes's power under that commission to bind his constituent to a lease of twenty-nine years, and thus even a written acceptance of the defender's offer under the hand of Mr Forbes, W.S., as commissioner for the late Mr Forbes, would not, constructively even, be evidence of acceptance of the offer by the late Mr Forbes.

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The defender appealed to the Court of Session.

Argued for him;—The letter of 23d January 1855, followed by

"Then arises the question, can the defender prove the acceptance of in any other way than by writ or oath? Without acceptance the contr complete, and the recent cases of Gowan's Trustees v. Carstairs, 18th J 24 D. 1382, and Walker v. Flint, 20th February 1863, 1 Macph. 417, there must be complete proof of the contract by writ or oath before the for parole proof of *rei interventus*.

"If this be sound law there is an end of the case, for there is no st here. But it is not necessary to rest the judgment on this ground alor

"Though it were competent to prove the landlord's acceptance of offer of lease by parole, to the effect of constituting the contract, the Sh not think there is such proof here.

"He agrees with the Sheriff-substitute that there is not proof that M M.P., accepted this offer. There is really no evidence that he was e of this offer having been made, or that any specific proposal had been n the defender should become tenant of the ground for a term of years, it is not unlikely he may have known that something of the kind suggested.

"It is said, however, that Mr Forbes, W.S., accepted the offer now fo

"There is a great improbability here to be overcome, arising from Mr W.S., want of power. It is not credible, without strong proof, that have accepted such an offer without express authority from Mr Forb nor that Mr Forbes, M.P., would have given any one else that authorit first consulting Mr Forbes, W.S. But it is clear from the evidence the 23d of January, when the offer was sent to Mr Forbes, W.S., until of February, when he died, Mr Forbes, M.P., of Callendar, was in n transact such business, and there is no evidence whatever that in tha he ever saw Mr Forbes, W.S.

. . . . .

"As regards *rei interventus* and homologation by the present pursuer, there can be none if the Sheriff is right.

"But the Sheriff would just make this remark on the receipts for they, one and all, are receipts for rent for the year beginning at Martin the first receipt is for rent for the year beginning at Martinmas 185 could hardly, therefore, be referred to a lease which commences at 23d 1855, while they do raise a presumption that the defender was occup land at and before the date of the offer, and did not enter upon pos consequence of its supposed acceptance.

"On the whole, the Sheriff has no doubt that the law of this case i with the pursuer, while he has as little doubt that the defender has *bona fide* belief that he had obtained the right which he claims.

"Perhaps it would not be easy to find a case which, more fully than sent, justifies the wisdom of the rule, which the Sheriff holds to be t law, that a contract of lease for years, including its acceptance, must b by writ or oath of party, and cannot be competently proved by parole.

"The Sheriff does not think that the pursuer really wants the land a road to his farm of Standalane. Whatever his real object was that the one which influenced him to institute these proceedings. But th doubt that the averment has caused a good deal of expense in the proo

"The Sheriff has therefore thought it right to grant some modificati expenses.

"It is, perhaps, too much to expect that this judgment will prove a to the parties; but the Sheriff may, without offence, he trusts, express t hope that they will find in it a solution of their rights which they ma and may see their way to make such arrangements for the future as m to the pursuer a full acknowledgment of his rights, and to the defe enjoyment of his present access, and of the expenditure he has mad and, if possible, a restoration of that good feeling between neighbo

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r tacit acceptance by those for whose acts Mr Forbes, M.P., was respon-
le, was a valid lease for years, containing all the particulars which are
uisite for such a contract. It was not necessary that the acceptance
uld be in writing or proved by the oath of the lessor, and the present
e did not fall under the rule of Gowan's Trustees, as cited by the pur-
r.[1] To the objection that the alleged lease for twenty-nine years was
d, as being in contravention of the entail, and therefore *ultra vires*
the late Mr Forbes to grant, it was replied—(1) This objection could
y be raised in a reduction, and not in the present process of removing
er the Act of Sederunt;[2] (2) the lease is at least good for the period
wed by the entail, *i.e.*, nineteen years, or the lifetime of the granter;[3]
the present Mr Forbes cannot raise the objection, being subject to
onal bar, by accepting rent, especially after the alleged lease had
e to his own knowledge. A contract of location being thus esta-
hed, however informal, Mr Wilson had shewn not only *rei interventus*
actings and outlay on his part, but also homologation by the landlord.
e present summons is not fitted to try any other question than whether
defender holds under any other title than a verbal contract, enduring
y for one year;[4] and in particular it is irrelevant to found on the con-
on adjected to the lease when granted.

Argued for the pursuer;—The present alleged lease for more than one
r must be proved by the writ or oath of the lessor before the lessee
get in any proof of *rei interventus*.[5] In the cases of Drummond and
a distinction was drawn between a completed though informal lease
one, such as we have here, which was incomplete. A factor has no
mmon law powers to grant leases, and in the present case, if Mr Forbes,
S., can be held to have tacitly or expressly accepted the defender's
r, he went beyond the express terms of his commission.[6] Even if a
lid contract of lease between the defender and the late Mr Forbes be
de out, it is not binding on the present heir of entail in possession, and
reduction is required, the circumstances in Agnew v. Gillespie being
ite different. If a lease contravenes an entail in respect of endurance,
annot be valid to any effect, or for any lesser term.[7] Mere acceptance
rents did not raise a personal bar by homologation, as the receipts
e equally applicable to a yearly tenancy, and the facts alleged in sup-
t of the plea of *rei interventus* do not come up to Bell's definition.[8]
e demand for enforcement of the condition as to the road to Standalane
bona fide made, and may be competently raised in the present action.

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ms, previous to these proceedings, to have uninterruptedly existed between
m."

[1] Hunter on Landlord and Tenant, i. 432; Drummond v. Gow, 1779, in Bell Leases, i. 314; Gordon v. Hall, Aug. 10, 1757, M. 15,178; Countess-Dowager Moray v. Stewart, 1772, M. 4392 and 15,179—rev. March 24, 1773, 2 Pat. 7; Ross v. Ross, Feb. 9, 1790, Hume's Dec. 774; M'Pherson v. M'Pherson, y 15, 1815, F.C.

[2] Agnew v. Gillespie, June 23, 1813, F.C.

[3] Bell's Com. i. 70—*contra* Bell's Prin. 1752; Hunter, i. 103; Agnew v. M'Niven, June 23, 1813, F.C.; Ivory's Erskine, iii. 8, 29, p. 808, note.

[4] Hislop v. Howden, Feb. 7, 1843, 5 D. 507; Keir v. Duke of Athole, July 1815, 6 Pat. 130.

[5] Gowan's Trustees v. Carstairs, July 13, 1862, 24 D. 1382; Walker v. Flint, 20, 1863, *ante*, vol. i. 417; Emslie v. Duff, June 2, 1865, *ante*, vol. iii. 854.

[6] Stair, ii. 9, 3.

[7] Hunter, i. 103; Mordaunt v. Innes, May 9, 1819, F.C.; Duke of Gordon v. Nov. 22, 1822, 2 Sh. 32; Malcolm v. Bardner, June 19, 1823, 2 Sh. 410.

[8] Bell's Prin. sec. 26.

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LORD JUSTICE-CLERK.—This is a summons of removing under the Act of Sederunt. The conclusions are that the defender should be decerned to remove from a piece of ground belonging to the pursuer, which the defender is said to have occupied as a yearly tenant, and that at the term of Martinmas 1870, the summons being dated 23d September 1870. The question is, whether the defender was a tenant from year to year. I am of opinion that he was not.

It appears to me that the history of the case has scarcely received the attention which it deserved. In 1854 negotiations for an excambion took place between the late Mr Forbes of Callendar and Mr Wilson, whose properties adjoined. Mr Forbes being an heir of entail it was necessary to have judicial authority for the excambion. The object which Mr Wilson mainly had in view is explained in a letter on 22d December 1854, by his agent, Mr Russel, to Colonel Forbes, brother of the late Mr Forbes, who was acting for him: "Mr Forbes is aware that the land acquired by Mr Wilson is purchased by him solely or chiefly for the purpose of enabling him to make a better entry to Bantaskine than he presently has." The only or chief object of Mr Wilson in carrying out the excambion was thus to make an access to his estate, and Mr Forbes was perfectly aware of this. It was originally intended to include the piece of ground in dispute in the excambion, and it was accordingly included in the first report of the referees to whom the Sheriff had remitted, which report was dated 7th December 1854. The letter from which I have quoted was written in consequence of a proposition to exclude the piece of ground from the excambion. It is explained by Mr Hamilton in his evidence that Mr Forbes had a great objection to it being included, because he did not wish to lose the power of making a road across it to his farm of Standalane, and the piece of ground was accordingly excluded from the excambion. When this proposition was made known to Mr Wilson he at first demurred. On 10th January 1855 Mr Russel writes to Mr William Forbes, W.S.:—"You are aware that Colonel Forbes mentioned that his brother was most anxious to have the excambion carried through; and as this small corner of ground is the sole cause of the delay, I trust that this matter may be immediately adjusted. Either Mr Wilson or myself will be glad to meet you in Edinburgh any day you may appoint if you wish further information upon the subject, as you are aware that Colonel Forbes wishes the matter adjusted without delay." Then on 15th January we have a long letter from Mr Russel to Mr Dickson, one of the referees, containing the following passage:—"In the plan, a large piece of ground, several times the breadth required to be left for the proposed road to Mr Forbes's farm, was left, and you may recollect that it was filled in, and a memorandum made by Mr Black that Mr Forbes was to have right to take at any time whatever breadth of ground was necessary to form his road, should he at any time think of doing so (which there is no chance of his ever doing.) Across this ground Mr Wilson's road is formed, and indeed without it Mr Wilson's whole object in getting the rest of the ground would have been useless, and indeed it was distinctly understood and known that it was to be formed." In this state of the correspondence, in which Mr Forbes understood that Mr Wilson's main object was to obtain an access to Bantaskine, and, on the other hand, Mr Wilson knew that Mr Forbes wished to retain the power of making a road to Standalane, the parties came to an arrangement at a meeting on the ground, at which Mr Hamilton, Mr Wilson, Mr Russel, and Mr Dickson were present, and which is described in a letter by Mr Hamilton to Mr Forbes, W.S., dated 23d January 1855. It was proposed that Mr Wilson should have a lease of the ground, and some discussion took place as to the rent. On the same day, 23d January 1855, the letter was written by Mr Wilson, which is the subject of the present action—(*Reads letter, quoted supra.*) That letter was sent to Mr Forbes's agent, Mr William Forbes, W.S., and the excambion was ultimately carried out. It would rather appear that the excambion had proceeded on the basis of this arrangement. It is plain that Mr Wilson would not have gone on with the excambion if he had failed to obtain an access. The letter was retained by Mr Forbes, W.S., who, it must be observed,

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a power of attorney from Mr Forbes of Callendar, which enabled him to at leases. Mr Forbes of Callendar unfortunately died the following month. e further correspondence took place between Mr Forbes, W.S., and Mr ilton, which is not very distinct, but with which Mr Wilson had nothing to From that date to the raising of the present action Mr Wilson has held piece of ground for fifteen shillings, the sum mentioned in the letter, which been accepted by the landlord, and on the ground Mr Wilson has built a ge and other works at a cost, as he says, of £150.

t is said that Mr Forbes did not know that there was a lease. I question ther the pursuer is entitled to maintain this. If those authorised to act for ndlord act under an informal writing on the footing that there is a lease, and ive rent and allow expenditure to be incurred in reliance thereon, the land- l cannot turn round and say that he knew nothing of the lease personally. in addition to that, in 1868, the pursuer ascertained how the facts stood, and he continued to accept the rent for two years.

n these circumstances, I am of opinion, in the first place, that the reading of letter of 23d January 1855, and its retention by the landlord, followed as it by *rei interventus*, are sufficient to constitute a binding lease, and, in the se- d place, that the pursuer cannot maintain that the heir of entail who granted lease had no power to grant it, because by his own actings the pursuer has pted the transaction.

t is not necessary to express any opinion as to whether a lease granted for a ger period than is allowed by an entail would be good for the period allowed the entail. That is a difficult question.

n the circumstances it is plain that the summons is unfounded. We have hing to do with the meaning of the condition supposed to be inherent in the e. This is not an action for the termination of the lease in respect of the tingency having arrived, but a summons of removing on the ground of the de- der being a yearly tenant. Whatever questions may remain behind this is nly not a lease for one year, but for a term of years, and the defender is en- d to have the action dismissed.

LORD COWAN.—This is a simple action of removing, on the footing that the nder held the piece of land in question only on a verbal lease for a single r. I am of opinion with your Lordship that such is not the true state of the , and that the action has been wrongly raised, and cannot be maintained.

The defence is that a lease for a term of years was granted under very peculiar mstances, that is to say, under an agreement collateral to an arrangement an excambion betwixt the pursuer's father and the defender, in consequence which and on the faith of which the excambion was in fact carried through. regard to this matter I entirely adopt the views of the Sheriff-substitute. It s contemplated at first that the piece of ground referred to should be included the excambion, and on this footing the first report of the valuators proceeded. rwards the parties agreed that the ground should be struck out of the ex- bion, and remain the property of Mr Forbes, so as to enable him to form a dway on the ground if he at any time required such access to his farm of ndalane. Accordingly it was arranged that the strip of land should be let to Wilson, under a condition framed to meet this contemplated necessity, and roffer by Mr Wilson, which is the foundation of the present action, was adjusted, d to Mr Forbes's agent, and by him retained for his client's behoof. In con- quence of this change in the arrangement of parties a new report was obtained m the valuators, in which this strip is left out of view, and the excambion s carried through on the understanding that the proposed lease was part of whole arrangement. Thereafter followed *rei interventus* of the most plain l obvious description. Mr Wilson entered into possession even before the Mr Forbes's death, which occurred soon after the date of the offer referred nd laid out a large sum of money in forming an avenue to his house of Ban- tine through the strip of ground the formation of which was the very object he excambion, the excambed ground being used for that purpose. There was s fixed on the late Mr Forbes an obligation to give effect to this lease. No-

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thing is better established than that such a conjunction of circumstances is quite sufficient to constitute a valid and binding contract of lease. Many cases that import were referred to by the defender's counsel, and I may mention the case of Neill v. E. of Cassillis, 22d November 1810, F.C., as bearing out the same doctrine. Nor is there any room for the contention that the lease so established is not binding on the present pursuer. There can be no doubt that he adopted the arrangement come to by his predecessors. The excambion still went on after his accession to the property; the alterations made by the defender also went on, and might have been seen by the pursuer; and he is not only the heir of entail, but the general representative of his father, and bound by all his personal obligations. Moreover, the stipulated rent was paid to and accepted by the pursuer or by those acting for him, and entered in his rental books, for upwards of fifteen years. Above all, though he may himself have had no personal knowledge of what was going on, he, like most landed proprietors, has to trust much to his servants, and to be responsible for their acts. They, in the present case, were quite cognisant of the state of affairs, and one of them held the very deed which has caused so much controversy. But the proof of adoption is more distinct still, for we find that in 1868 a copy of the lease at length reached Mr Forbes, and that for two years after that period he accepted the rent which was originally stipulated for the strip of ground.

The form of the action, being a removing on the footing of the lease being merely verbal, excludes consideration of the question what would be the effect of the restriction of leases to a period of nineteen years, contained in Mr Forbes's entail; and though it is not necessary for the decision of the case, I cannot conclude without adverting to the character and terms of the offer of lease. I doubt very much whether any removing which could have been ordered in the circumstances of this case could have applied to the right of way which the defender has acquired across the strip of ground in question. The two things, if we carefully consider the correspondence and the terms of the defender's letter, are quite distinct, and this consideration may come to be of importance at the ish of the present lease whenever that may turn out to be.

Lord Benholme.—I concur with your Lordships. The present action is not calculated to try the second question raised, viz., whether, assuming the existence of a good lease for twenty-nine years, the subject is not liable to be resumed on certain contingencies. The action is one of removing, on the ground of there being no lease, and the only question before us is, whether there was a lease. I am also clearly of opinion that the pursuer is barred by *rei interventus* and homologation from challenging this as a lease for twenty-nine years. I think that we should decide the removing on its own merits, and dismiss the action.

Lord Neaves.—I concur in the opinion expressed by your Lordships. It is impossible to mistake the nature of the action, which is plainly stated in the record to be laid on the Act of Sederunt of 1756, and on the Sheriff-court Act of 1853, and which proceeds on an admission that a lease did actually subsist between the parties, with, however, the qualification that the contract was only verbal and the endurance of the tack only from year to year; and such being the case the conclusion is that the tenant is bound to remove at the Martinmas next following the date of the action. Now, if the defender turns out not to be merely a yearly tenant, but on the contrary to have a lease of longer duration, the ground of action entirely fails. I think this is just what appears from the case as submitted to us. The defence is founded on an alleged lease for twenty-nine years; and then on revisal, the pursuer somewhat inconsistently traverses the defence by means of a very special stipulation in the offer, referred to by your Lordships, in virtue of which, as he alleged, he might at any moment bring the lease to an end, by occupying the ground himself for another purpose. Now this is quite a different case from that with which the summons sets out, and I am of opinion, if the defender can make out a valid lease in his favour for a term of years, he is entitled to prevail in this action as laid, and that we cannot wander into inquiries about the qualifications or conditions contained in the lease

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Now, I think it quite plain that the defender has succeeded in making valid contract of lease, and that on much the same grounds of *rei inter-* or homologation as your Lordships have adverted to. It may be that Mr is quite correct in stating that he had no personal knowledge of what been arranged, and of what operations were going on in respect to the strip of d in dispute; but I must hold that every proprietor, whether he mismanages tate or not, is presumed to know all about what goes on in connection with d especially what passes with the full knowledge of his own servants. He not be allowed by the law to indulge the dignified repose of the gods of rus, especially in a business-like country and age such as this; and if it m that valuable rights are thereby imperilled, and expense incurred, he just take his chance. But I think Mr Forbes must have obtained some cognisance of what was occurring even before 1868; for we find the rent strip of ground duly entered in the rental-book of the estate. After 1868 doubtedly knew of Mr Wilson's alleged right, and allowed it full effect for two years thereafter without challenge.

THE following interlocutor was pronounced:—"Find that in the year 1854 the defender and the late Mr Forbes of Callendar entered into a contract of excambion of certain lands near their respective properties: Find it proved that the defender intimated to Mr Forbes that his object in including the excambion was to obtain an access to his lands of Bantaskine: Find that the strip of ground in question was struck out of the excambion, and that the parties agreed that the defender should have a lease of it: Find that the letter, No. of process, was transmitted to Mr Forbes's agents and retained by them, and that it has been acted on by payment and receipt of the stipulated rent ever since: Find that, in these circumstances, the said writings, followed by the actings of parties, constituted a binding lease for a term of years, and cannot be repudiated by the pursuer: Therefore recall the judgment appealed from; dismiss the action, and find the appellant entitled to expenses in this and the inferior Court, including the expenses of the appeal formerly taken to this Court, and decern: Further, remit to the Auditor," &c.

BURN & GLOAG, W.S.—J. K. CRAWFORD, S.S.C.—Agents.

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Feb. 26, 1873.
Stewart v. Padwick and Another.

ARCHIBALD DOUGLAS STEWART, Pursuer.—*Shand—Balfour—Mackay.*
HENRY PADWICK and FRANC NICHOLLS STEUART, Defenders.—*Sol.-Gen. Clark—Watson—Keir.*

penses—Counsels' Fees.—In a question of expenses between party and r in a case in which the evidence was voluminous, and involved diffi- questions of medical science—(1) fees to counsel for consultation before debate in the Inner-House allowed; (2) the fees of medical men ex- ed as experts upon the effect of the whole evidence fixed at ten guineas a- ; (3) fees of medical men called as witnesses to matters of fact, but who also examined upon questions of medical opinion, also fixed at ten guineas r.

1ST DIVISION.
Ld. Mackenzie.
B.

HIS was an action of reduction on the ground of deathbed of a ute or agreement of sale in favour of the defender Padwick of the te of Grandtully and others, executed by Sir William Drummond rt on 30th March and 3d April 1871. Sir W. D. Stewart died on April 1871.

record was made up and closed, and proof was led in the action be- the Lord Ordinary, who, on 30th May 1872, found that it was not

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proved that on the date on which Sir W. D. Stewart executed the said minute he was labouring under the disease of which he died, and assoilzied the defenders, with expenses.

To this judgment the First Division adhered on 17th January 1873.

The main question in the case was whether Sir William D. Stewart died of active congestion of the lungs, the result of inflammatory action, or passive congestion of the lungs, the result of pre-existing structural disease of the semi-lunar valves operating mechanically to produce congestion; and, accordingly, great part of the proof, which extended to 2[illegible] pages of print, consisted of medical evidence.

The case now came before the Court on objections to the Auditor's report on the defenders' account of expenses. The defenders objected that the Auditor had disallowed fees paid to counsel for consultation before the hearing in the Inner-House; and argued that this charge ought to be allowed, (1) on account of the length of time (more than six months) between the hearing in the Outer-House and that in the Inner House; (2) on account of the great delicacy and difficulty of the evidence.

At advising,—

LORD PRESIDENT.—I think that we should allow the fee for consultation before hearing in the Inner-House. Sometimes we have inconsistent arguments by counsel on the same side, which would have been avoided had there been consultation. Of course there are many cases in which a consultation before hearing in the Inner-House is not necessary; but in a case like this it is of the greatest consequence that counsel should arrange in what way they are to present the case to the Court, and for that purpose a consultation is necessary.

The other Judges concurred.

The fees charged in the account as paid to each of Dr Grainger Stewart and Dr P. H. Watson, who were examined for the defenders as experts and gave evidence upon the whole evidence led, amounted to £[illegible]. This charge the Auditor disallowed, and allowed £10, 10s. a-day for the days during which the proof lasted to each.

Professor Spence and Dr Gillespie were also examined for the defenders with regard to their observations in a *post mortem* examination of Sir William D. Stewart's body; but the questions put to them extended also to matters of scientific opinion. The Auditor allowed only the usual fee of £2, 2s. per day to these gentleman, regarding them as merely witnesses to matters of fact.

The defenders objected to these findings by the Auditor, and argued that such remuneration was altogether inadequate for medical men of the position of the witnesses.

At advising,—

LORD PRESIDENT.—Mr Grainger Stewart and Mr Watson were called merely as experts, and I do not think it safe to exceed the allowance fixed by the Auditor. There is no doubt that the highest class of evidence cannot be got at this rate, and in a case of such importance as this is parties will have the best evidence; and it is desirable that it should be so. But is the winning party entitled to charge the whole of his expenses against the loser? It is against the spirit and practice of the Court that he should. If we exceed the sum paid by the Auditor I do not see where we are to find a limit to such charges. The only safe course is to adhere to the rule of the Auditor.

As to Drs Spence and Gillespie, theirs is a very exceptional case. I do not remember a similar case. For they were called to speak to a matter of fact, but a matter entirely of medical fact, observed by themselves, and valuable

y on account of their skill as observers of such facts. They were also ex- No. 79.
d as experts. Now, it is difficult to see any good ground for making a
ence between the remuneration of these gentlemen and that allowed to Drs Feb. 26, 1873.
ger Stewart and Watson. No doubt they might have been compelled to Stewart v.
l as witnesses to fact; but the facts to which they were called to speak Padwick and Another.
their observations in the *post mortem* examination; and they went volun-
to conduct this examination, and were sent to conduct it as being highly
d men. So I am of opinion that they should be allowed the same re-
ation as Drs Grainger Stewart and Watson—that is, ten guineas a-day.

e other Judges concurred.

Interlocutor accordingly.

DUNDAS & WILSON, C.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

THE EARL OF ZETLAND, Pursuer.—*Fraser—Lancaster.* No. 80.
LEXANDER ALLAN LAIRD and OTHERS (Hugh Tennent's Trustees),
Defenders.—*Sol.-Gen. Clark—Gloag.*

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Earl of Zetland v. Tennent's Trustees.

lmon-Fishings—Prescription—Possession—River—Medium Filum.—Held the right which may be acquired by possession for forty years on a grant lmon-fishings pertaining to lands situated on one side of a river (1) t limited to the fishings in that part of the river which is *ex adverso* of nds; and (2) may extend to fishings beyond the *medium filum* of the

operty—Possession—Bounding Charter—Medium Filum—Where a proprie- d a right of salmon-fishings pertaining to lands described as lying within nty bounded by a river, which separated that from another county, *held* he description applied to the lands and not to an incorporeal right attached m, and that the possession following upon the title was not limited by the *m filum* of the river.

served that, even if the title were ambiguous, possession, which was the r interpreter of its meaning, had made it clear.

served that the *medium filum* is only of importance in determining rights of rty in the *solum*, or making arrangements for the exercise of the right of g where opposite proprietors have each rights of fishings, but neither has xclusive possession.

shings—River—Possession—Prescription.—Where the right of salmon-fish- d been exercised from banks on the bed of a river for more than forty years, from changes in the river, new banks had been formed, one of which had d for less than that period, *held* that the possession of the fishings from new bank was only an exercise of the right of fishing previously exercised the former banks,—the substantial right of fishing being the matter to be ded, and not the particular stations from which the right was exercised.

HE Earl of Zetland was proprietor of and infeft in the lands and 2D DIVISION.
e of Balinbreich, in the county of Fife, and lying on the south side Lord Jerviswoode.
e firth or estuary of the river Tay, with the fishings attached thereto R.
he river Tay, "*prout medium flumen dictæ aquæ currit.*" The de-
ers, the trustees of the deceased Hugh Tennent, Esquire of Errol, were ch heritable proprietors, and duly infeft in the lands of Easter Errol, he north side of the river Tay, including therein "All and whole the s of Dallalie, Easter and Wester Randerstone," &c., "together with almon-fishings and other fishings pertaining to the said lands of Ran- one and Dallalie, all lying within the parish of Errol and sheriffdom rth."

this action of declarator and interdict the pursuer sought to have it d and declared "that the pursuer had good and undoubted right to

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the salmon-fishings in the river Tay, between Corbieden on the east and the Pow of Lindores on the west, and that from the south shore as far as the middle line of the said river, and including the exclusive right to fish for salmon, and other fish of the salmon kind, in the South Deep or south channel of the said river, so far as opposite to the said estate of Easter Errol, belonging to the defenders, and particularly from and upon the banks or fishing stations called Lower Peesweep, Haggis, and south side of Hobby Horse; and that the defenders and their successors in the said lands and estate of Easter Errol had no right or title to fish for salmon, or other fish of the salmon kind, to the south of the middle line of the said river, and, in particular, from the said banks or fishing stations, or in any other part of the South Deep or south channel of the river Tay *ex adverso* of the said estate of Easter Errol."

The pursuer stated in his condescendence that under their titles to the said estate the pursuer and his predecessors had for greatly more than forty years been in the uninterrupted possession of the right of fishing for salmon by net and coble and otherwise in the river Tay from Corbieden on the east to the Pow of Lindores, the westmost point of his estate. His estate of Balinbreich and the defenders' estate of Easter Errol were separated from each other by the firth or estuary of the Tay,—Errol being on the north side, and Balinbreich on the south side. The firth or estuary, where it stretched between these lands, varied from a mile to a mile and a half in breadth at high water. The channel of the stream of the river Tay at low water occupied only about a third of this space, and as the tide receded extensive banks of sand and mud were left bare along the north and south shores and in the channel of the river. Among these banks was a large bank lying nearly in the middle of the river, opposite to his estate, and also partly opposite to the defenders' lands. The southern side of that portion of the bank which lay opposite to the defenders' lands was divided into two fishing stations, called Lower Peesweep on the west, and Haggis on the east. To the east of the large bank above mentioned, and separated therefrom by a channel about thirty yards in breadth, there was another bank, called the Hobby Horse, also lying nearly in the middle of the river, and opposite to his estate. The said banks, which were constantly changing their form and position, owing to the action of the river and the tide, were parts of the *alveus* or bed of the river, and were entirely submerged by the tide, which at high water covered them to a depth of about two feet. The Hobby Horse bank had only existed for ten years. At low water the river Tay flowed eastward in two channels of nearly equal breadth, one on the north side and the other on the south side of the above-mentioned banks. The former channel was called the North Deep, the latter the South Deep. A considerable part of the volume of the river Tay flowed in the channel called the North Deep, between the said banks and the estate of Errol. Throughout the whole course of the said north channel salmon-fishing was extensively carried on from the time of low water till the banks were covered by the tide. The north channel was quite as much a part of the river Tay as the south channel, and the *medium filum* of the river, according to which the rights of the opposite proprietors to the salmon-fishings therein fell to be regulated, consisted of a line drawn down the river equidistant from the north and south shores at low water. This line intersected the two banks in question, dividing them longitudinally into nearly equal halves. The south sides of the said banks, consisting of the fishing stations called Lower Peesweep, Haggis, and south side of Hobby Horse, were considerably to the south of the *medium filum*, and the defenders could not rest

out crossing that line and encroaching on the portion of the
ishings in which belonged to the pursuer. The defenders, not-
ing, claimed the right not only to the salmon-fishings in the
ep opposite to their lands, but to cross the middle line of the
to fish in the South Deep at the before-mentioned stations,
ver Peesweep, Haggis, and south side of Hobby Horse.

fenders stated,—The salmon-fishings pertaining to their said
prehended the fishings from the said bank or banks *ex adverso*
nds, and, *inter alia*, the fishing stations and fishings on these
wn by the name of the fishing stations of Peesweep, south side
ggis Bank, and the south side of the Higham or Hobby Horse
ese fishing stations were on the south side of the foresaid bank
and were the fishing stations claimed by the pursuer in this
a virtue of their title to the salmon-fishings above set forth they
predecessors in the said lands had from time immemorial, and
more than forty years prior to July 1870, possessed the salmon-
the river Tay from the said bank or banks *ex adverso* of the said
d, in particular, they had possessed for the period foresaid the
hings called the Lower Peesweep, South Haggis Bank, and South
r Hobby Horse Bank fishings. This they had done by fishing
a with net and coble from the said fishing stations and bank or
adverso of their said lands, southwards into the stream of the
by hauling their nets on the said bank or banks, and that with-
nge or interruption. Neither the pursuer nor any of his prede-
er, by themselves or their tenants, fished at the said fishing
r from any part of the said banks, nor until July 1870 did they
e any right to do so, or state any objection whatever to the de-
xclusive possession thereof.

rsuer pleaded ;—(2) In virtue of his title founded on, and of the
a which had followed thereon, he had the exclusive right to fish
a and other fish of the salmon kind in the river Tay between
a and the Pow of Lindores to the south of the middle line of the
) The banks or fishing stations called Lower Peesweep, Haggis,
a side of Hobby Horse, being situated between Corbieden and
of Lindores, and to the south of the middle of the river, he had
sive right to fish for salmon at the said stations. (6) The titles
on by the defenders having reference to lands and fishings in the
Perth only, can confer no right to the fishing stations in dis-
ch are situate within the county of Fife.

fenders pleaded ;—(2) The right of the pursuer to salmon-fishings
extended beyond his previous possession thereof, and neither
s predecessors having ever possessed the said fishings his claim
annot be maintained. (4) In respect of their title to the said
shings, and of the immemorial and exclusive possession thereof
and of their predecessors, they were entitled to absolvitor, with

of of the averments of parties having been allowed and taken
Ordinary, on 31st July 1872, pronounced this interlocutor :—
s matter of fact that the defenders and their predecessors in the
Easter Errol, described in the statement of facts on their behalf,
essed, as set forth in the sixth article of the said statement of
hout challenge or interruption on the part of the pursuer or
his right, the salmon-fishings in the river Tay from the bank or
erred to in the said article *ex adverso* of the said lands ; and, in
, that they have so possessed the salmon-fishings called the
eesweep, South Haggis Bank, and South Higham or Hobby

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Horse Bank fishings: Therefore sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns," &c.

The pursuer reclaimed.

Argued for pursuer;—The defenders had no title on which to found prescriptive possession to the fishings in question, in respect (1) that the *medium filum* of the river formed the legal boundary line between opposite riparian proprietors having each a grant of fishings; (2) that the defenders' charter was a bounding charter, the lands to which the right of fishing was attached being described as lying within the parish of Errol and county of Perth, while the fishings in dispute were beyond the *medium filum* of the river which bounded both the parish and the county. Further, that there could be no prescriptive possession of the fishings from the Hobby Horse station, that bank not having been forty years in existence.[1]

At advising,—

Lord Justice-Clerk.—The pursuer seeks to have it found and declared that he has right to the salmon-fishings in the South Deep or channel of the river Tay opposite to the defenders' estate of Easter Errol, and particularly from the banks or fishing stations called Lower Peesweep, Haggis, and south side of Hobby Horse; and that the defenders have no right to fish there. This is the claim of exclusive right to the fishings in these particular localities. The Lord Ordinary has found that the defenders have possessed these fishings for forty years; and in regard to the stations, Lower Peesweep and Haggis, that is admitted by the pursuer, but it is not admitted as regards the Hobby Horse station, which is said to have come into existence within the prescriptive period. These conclusions depend, in the first instance, on the title of the defenders. The defenders have shewn a sufficient title to support possession of fishings. The title is not disputed to be a title to salmon-fishings. But it is said (1) that the fishings in dispute are not *ex adverso* of the defenders' lands, while the grant was only of fishings attached or pertaining to the lands; and (2) that as the defenders' charter is a bounding charter, the estate being described as lying within the parish of Errol and county of Perth, it cannot be a title to possess fishings in these stations, which, being to the south of the middle line of the river, are within the county of Fife. Neither of these contentions can be maintained consistently with the uniform decisions of this Court. In the first place, where there is a title to salmon-fishings followed by possession on the part of the proprietor on one side of a salmon-fishing river, it is not necessary that he should limit his right of possession to that part of the river which is directly *ex adverso* of his lands, or that it should not extend beyond the *medium filum* of the river. In the case of the Duke of Richmond I was of opinion (though Lord Benholme gave another construction to the expressions used in the grant) that the fishings in the grant were only those *ex adverso* of the lands, but as the Duke had possessed on both sides he had converted that grant into a complete right to the river. Now, the present is a stronger case for the application of this doctrine for the possession of these stations is substantially *ex adverso* of the lands in question. Possession for forty years on a mere title *cum piscationibus* is enough. Here there is an express title of salmon-fishings, and the right cannot be affected by the fact that the possession has been a little above or below the lands contained in the title.

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[1] Young v. Carmichael, 1671, M. 9636; Hepburn v. D. of Gordon, Nov. 25, 1823, 2 S. 459 (N. E.); Milne v. Smith, Nov. 22, 1850, 13 D. 112; Wedderburn v. Paterson, March 22, 1864, *ante*, vol. ii. 902; Fraser v. Grant, Feb. 21, 1866, *ante*, vol. iv. 596; Lord Zetland v. Glover Incorporation of Perth, Jan. 31, 1868, *ante*, vol. vi. 292; Duke of Richmond v. Earl of Seafield, Feb. 16, 1870, *ante*, vol. viii. 530; Macbraire v. Mather, June 29, 1871, *ante*, vol ix. 913.

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to the *medium filum*, I do not think that a matter of any importance. sage and practice has been that the proprietor on one bank uses his right ing across the stream, and the proprietor on the other bank does the same. is here quite a sufficient title to prescribe, and I do not give any weight idea that the circumstance of the lands being described as lying within a ılar parish and county will limit the right of salmon-fishing to the *medium* of a bounding river. But prescription has construed this clause "lying ı the parish of Errol and county of Fife," and construed it conclusively. th regard to the fishings from the Hobby Horse station it is said that there possession for forty years, for that sand-bank has not existed for that . The answer to this is, that although these names are given to the par- : sand-banks where the right of salmon-fishing is exercised, the substantial to which possession applies is the right of fishing itself. There have been es in the river; but is it to be said that there has not been possession of hings for forty years, because it has not, and by reason of these changes it not have been, exercised in the same spot during all that time? I look : fishing from the Hobby Horse station as but a portion of the same right ing from the sand-banks in the south channel.
ı defenders have had sufficient possession on a sufficient title, and I am, ore, for adhering to the Lord Ordinary's interlocutor, but I think we must me finding as to the title.

ND COWAN.—This is a case involving questions of feudal title and of of salmon-fishing under such title. This matter has been the subject of consideration in many cases, and the principles on which the law is ed have not been left in much doubt. The pursuer's title, as set forth in ı 2 of his condescendence, is a title to salmon-fishings attached to his lands e south bank of the South Deep or channel of the river Tay. The only sion which the pursuer has had under that title has been of fishing from ns on this south bank of the south pool of the river. The title of the de- rs, on the other hand, is in these general terms:—"All and whole the of Dallalie, Easter and Wester Randerstone, &c., together with the salmon- gs and other fishings pertaining to the said lands of Randerstone and Dal- all lying within the parish of Errol and sheriffdom of Perth." Now, what ı right of salmon-fishing pertaining to these lands? I do not see any way certaining this except by inquiring into the facts of possession. And what ı possession that has been enjoyed by the defenders? It is not disputed he interlocutor of the Lord Ordinary is correct in its findings, so far as are confined to the question of possession. He finds that the defenders and predecessors in the lands of Errol have possessed without challenge and uption the fishings *ex adverso* of their property extending to and including shing stations on the north bank of the south pool, and especially from tations mentioned in the summons, and that the pursuer has had no pos- n whatever on that side of the south pool. The practical result of that ng is that all the stations on the sand-banks forming the north side of the ı pool which can be fished have been possessed by the defenders exclusively time immemorial. Now, that possession has been enjoyed under their ; and possession affording the only interpretation of the title, it seems to hat the title is amply explained, and that the salmon-fishings held by the ıders under their titles are those extending from their own lands on the ı bank of the river to the north bank of what is called the South Deep or nel. And this cannot be of the shifting character alleged, as the evidence s that the fishings from it have been exercised beyond the memory of man. was in the argument which we have heard urgently pressed that the title e defenders is a limiting title, and confines the defenders to the parish of and county of Perth, and cannot extend beyond the *medium filum* of the I do not so read the defenders' titles. I rather think that the descrip- n regards the parish applies to the lands only. But admitting the terms is respect to be ambiguous, how is the ambiguity to be cleared up except roof of possession? And as the proof shews the possession has extended

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beyond what is said to be the *medium filum* of the stream I do not think that that would be excluded by the terms of the title. As an incorporeal right attached to the lands its extent is to be ascertained by possession, and that from what the salmon-fishings are which the title describes as "pertaining" to the defenders' estate. As to the authorities, it was admitted that the case of Gr which related to fishings on a loch, would be conclusive against the pursuer, the same principle could be applied to river fishings. I do not see any sufficient ground for the distinction, and it so happens that the decision in the case of the Duke of Richmond and Lord Seafield had reference to river fishing There was this peculiarity, no doubt, that Lord Seafield's title had not been followed up by possession at all, but the decision is a clear authority as regards the sufficiency of the title to support prescriptive right. We must take it settled by that case that the Duke's title was sufficient to enable him to prescribe the whole fishings all the way across the river. The decision went so far as this, that he could draw his nets on Lord Seafield's lands. My opinion in that case has been fully reported, and quite agrees with that of your Lordships and I need not, therefore, refer to it further.

Now, the clear law of the case being as I have stated it, and being as found by the Lord Ordinary, I cannot give any effect to the distinction attempted to be drawn as to the Hobby Horse station. That is a station which has only been fished for the last twenty or thirty years, for the good reason that it has only existed for that time. But there are other stations in the same locality which have been worked by the defenders for more than the prescriptive period, and because these stations may vary from time to time, according to the shifting of the banks in the river's bed, is that to affect the exercise of the substantive right of fishing exercised from time immemorial? Can it be said that a change in the position of a fishing station, owing to a change in the bed of the stream, is to alter the question of right acquired through immemorial possession? I think such a proposition is untenable.

But, lastly, a good deal has been said about the *medium filum* of the stream. If there had been no possession at all, and we came to consider how the different competing rights of heritors on the banks of the river, having each a right of salmon-fishing *ex adverso* of their lands, were to be regulated, then indeed I think the Court have recognised clear principles upon which the fishing must be carried on. If the stream is broad enough to allow of a clear sweep of the nets, without crossing the *medium filum*, each riparian proprietor must exercise his right as to keep within the *medium filum* of the stream. But then again, a different state of matters arises where the stream is not sufficiently broad to admit of this. The Court in such cases has found that some arrangement must be made for an alternate sweep of the nets from the different sides. In the case, however, where immemorial possession has been enjoyed, I cannot think that the ascertainment of the *medium filum* is of any avail in determining such rights of fishing. The title being sufficient and the proof of possession clear, there is conclusive ground for judgment in the defenders' favour; and in this case, and on the whole matter, I think the defenders' title amply sufficient to support the possession they have had, and to establish their rights. Consequently, they are entitled to absolvitor.

Lord Benholme.—I quite concur with your Lordships. The argument for the pursuer, though able, appeared to me to proceed entirely on assumptions in point of law, for which, plausible as they seemed, no authority could be produced. On the other hand, there is strong evidence of possession, founded on undoubted title, which can hardly be impeached by theoretical argument alone unsupported by decision or authority; and in these circumstances I concur in thinking that we should find the title sufficient to support the possession which has been had.

Lord Neaves.—The first point in salmon-fishing cases is the question of title, the second the fact of possession. These two things are quite separate. You must have a habile title. Possession alone is of no use. Next, having a habile title

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ust have had possession to explain that title. Here you have a title, but aid to be habile to support the right of salmon-fishing only on the north of the river, and limited by the *medium filum* of the stream for the being. I am not aware of any authority for that proposition. The ques- s whether the title is habile or not to support the possession which has had. I know of no authority for saying that, in a question of this kind, ight of fishing can only be exercised *ex adverso* of the property to which shing is attached. The right of salmon-fishing is an incorporeal right at- g to certain lands founded on a grant, and interpreted and supported by sion; and it appears to me that the fishings in a river belonging to a pro- r under his titles are those fishings which he from time immemorial has nued to possess in virtue of those titles.

e point most pressed by the pursuer was that the fishings cannot go beyond *edium filum* of the stream. Does that view come to this, that the owner hings must follow the *medium filum* of the stream for the time being, as ream itself shifts its course? Or is the *medium filum* to be taken as when rant of fishings was made, and the proprietor to lose his fishings if the n shifts away from him? This would be quite at variance with the cases cted with the river Nairn, where the tendency of our law was shewn as ing the proprietor to follow his fishings. The matter of the *medium filum* be of importance in questions of property rights, but it can have nothing to ith rights of fishing, except in those cases in which the Court have availed selves of it for the purpose of making workable arrangements between com- g proprietors.

THIS interlocutor was pronounced:—"Find that the defenders have produced a sufficient feudal title to support the prescriptive right claimed by them to the fishings libelled; and with this finding adhere to the Lord Ordinary's interlocutor," &c.

H. G. & S. DICKSON, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

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THOMAS JACKSON, Complainer.—*Mair.*
e Rev. Dr COCHRANE, Respondent.—*Sol.-Gen. Clark—J. C. Smith.*

oof—Oath on Reference.—In an oath on reference, a party having deponed a statement in an article of his condescendence was true, *held* that the nent was thereby imported into the oath.

served, that in order to make documents part of the oath on reference the nent must be examined specifically on the matters therein contained; but that is done it is not necessary to engross the whole documents, a reference em being sufficient.

inds—Minister's Stipend.—*Held* that a proprietor who has a bare supe- y over lands, or one who has a security right over lands on which no ssion has followed, and who has not intromitted with the fruits, is not for minister's stipend.

inion, that it is not necessary to enable a minister to use his decree of ity against a possessor of lands localled on that the possessor's name should ar in the locality.

inion, that a proprietor whose name appears in the decree of locality ceases liable for stipend when he ceases to be proprietor.

2D DIVISION. Ld. Ormidale. I.

IIS was a suspension at the instance of Thomas Jackson, writer in caldy, of a charge on an interim decreet of augmentation, modifica- and locality, obtained on 9th February 1853 and 2d February 1855, e minister of the parish of Cupar-Fife, against the titulars and tacks- heritors, possessors of the lands and others, intromitters with the and teinds of the parish. The charge was for arrears of stipend for

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fifteen years from 1853, amounting to £20, 17s. 6d., alleged to be due to the respondent from lands called St Michael's Acres. The complainer's name did not appear in the decree of locality. The person whose name appeared therein in connection with those lands was an Andrew Thallon. The complainer stated that in 1853 a disposition was granted by the National Bank of Scotland, with consent of Thallon, and by Thallon for his own right and interest, in favour of the complainer and David Pearson, which disposition, though *ex facie* absolute, was qualified by a back bond in favour of Thallon; that the whole subjects conveyed by this deed having been previously feued out, only the *dominium directum* of the subjects was thereby conveyed; that by a series of transmissions the *dominium directum* was now vested in the complainer under the qualification contained in the foresaid back-letter; that he was not aware what lands were referred to under the name of St Michael's Acres, but that this name might apply to the lands conveyed by Thallon.

In article 10 of the statement of facts for the complainer it was stated, that "in the interim locality in said process, on which said interim decreet and warrant proceed, the said Andrew Thallon, and the said lands of St Michael's Acres, were localled on for part of the stipend due to the respondent. After David Pearson and the complainer became disponees of the National Bank and Andrew Thallon, as aforesaid, they lodged objections, on 10th June 1856, to said interim locality, on the ground that they only possessed the *dominium directum* of the property so disponed to them, and they specified the names and designations of those who possessed the *dominium utile*. These objections were allowed to be received and seen. They are undisposed of."

Pleaded for the complainer;—(1) The charge complained of being illegal and incompetent, in respect that it charged the complainer to make payment of the said alleged arrears of augmentation and stipend, and that to the respondent and his successors in office, it ought to be suspended. (2) The complainer never having intromitted with the rents and teinds of any lands in said parish, and never having had any right, heritable or personal, to do so, he was not liable in payment of stipend to the respondent. (3) Having only the *dominium directum* of any lands possessed by him in said parish, he was not liable in such payment. (4) *Separatim*. Being only an heritable creditor as regarded the said subjects disponed by the National Bank of Scotland and the said Andrew Thallon as aforesaid he was not liable in payment of stipend to the respondent in respect of said subjects. (5) The sums charged for, in so far as alleged to have been due upwards of five years, were prescribed. (7) The complainer not being mentioned *nominatim* in the pretended interim decreet and warrant, and the precise sums alleged to be due by him not being specified therein, and no such sum being due and resting owing to the respondent, the said charge ought to be suspended.

Pleaded for the respondent;—(2) It was incompetent to rectify or quash an interim decree of locality by process of suspension. (3) The complainer having failed to insist in his objections in the locality process and to obtain a judgment therein, was precluded from challenging the interim decree of locality by any separate process.

The Lord Ordinary (Ormidale), on 10th February 1870, pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties on the complainer's first and seventh pleas in law, to the effect that the charge brought under suspension is illegal and incompetent, and having considered the argument and proceeding, repels said pleas in law except in so far as the seventh plea assumes that the sums charged for are not due by the complainer; and, under a reservation, in the meantime

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l questions of expenses, appoints the case to be enrolled, to be further eeded with." *

e complainer withdrew his objections so far as referring to the last years' stipend, and the Lord Ordinary, on 18th May 1872, held that laim for stipend for the previous years was prescribed, and could be d only by the writ or oath of the complainer. A proof *scripto* of omplainer having failed, the whole cause was referred to his oath. he course of his deposition the following statement was made,—) Is the first sentence in statement 10 true? (A.) I have not the im locality, but I have no doubt it is true. (Q.) Is that first sentence ? (A.) I have no doubt there is not a statement made for me on the d that is not true. (Q.) Are all your statements on record true. I think so."

e Lord Ordinary, on 14th January 1873, pronounced the following locutor:—"The Lord Ordinary having heard counsel for the parties he import and effect of the complainer's oath, finds the same to be tive of the reference: Therefore, *quoad* the sums charged for other those found due to the respondent by interlocutor of 18th May 1870, nds the letters and charge complained of, and decerns," &c. †

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* NOTE.—If the complainer's pleas, now repelled, had been well founded, onsideration of his other pleas, which relate to what may be called the s of the claim made against him, would have been unnecessary. Both s therefore concurred in asking judgment on the pleas now disposed of e the case was further proceeded with.

The Lord Ordinary, being very clearly of opinion that the complainer's now repelled are ill founded, has had no hesitation in repelling them.

The ground on which the complainer endeavoured to support his first and ith pleas was, that, as he was not named in the decree of locality charged nd is only proceeded against as having come into the place of one Thallon, is said to have been an heritor when the decree was pronounced, it was ssary to have constituted his liability by action. But the Lord Ordinary not think so. A general decree against heritors and others, such as that in question, was undoubtedly competent, and is in accordance with the ary form and practice. And it is equally undoubted that the respondent, inister, was entitled in virtue of such a decree to charge the complainer as g an heritor now liable, although all the heritors be dead that were alive at ate—(Erskine, 4, 3, 11; and Connell on Tithes, vol. i. pp. 97-8). And the ndent was also clearly entitled to charge the complainer on and in virtue of decree of locality without the necessity of raising and expeding letters of ing—1 and 2 Vict. c. 114, secs. 1 and 3.

Whether the complainer can shew that he is not liable to the respondent in sums charged for on the ground that he is not an heritor, or any other nd, is a question which will now fall to be determined under his pleas other i those which have been repelled."

"NOTE.—It is unfortunate that so much litigation should have taken place, consequently so much expense incurred—about £20; but the Lord Ordi- r had of course no alternative but to deal with the case as it was presented im.

Since the 18th of May 1870 the litigation has related to the respondent's avours to establish his claims so far as not found due to him by the Lord inary's interlocutor of that date, first, by the writ of the complainer, and ndly, by his oath. It has been found by interlocutor of 5th November 3 that the respondent had failed in the first of these endeavours, and he has , by the present interlocutor, been found to have failed in the second.

In regard to the complainer's oath, the question is not *quid verum est* but *juratum est.* So dealing with the oath, the Lord Ordinary has found it ssible to arrive at any other conclusion than that it is negative of the ence.

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The respondent reclaimed.[1]

At advising,—

LORD JUSTICE-CLERK.—This question arises in a suspension of a charge at the

"It cannot be, and was not contended, that the complainer has directly acknowledged either the constitution or the resting owing of the stipend in question. The contention of the respondent has been merely to the effect that must be inferred, from the complainer's oath, taken in connection with the writings alluded to in it, and particularly the proceedings in the augmentation and locality, that he is liable to the respondent in the stipend charged for. But the Lord Ordinary has felt himself unable to adopt this view. The respondent had formerly an opportunity of instructing his claims by the writs founded on to him for that purpose; but they were held to be insufficient. He then referred the matter to the complainer's oath, and now he says the allusions therein made to the writs, which had been previously found to be insufficient, are to be held as sufficient to establish his case. This was, in effect, the nature of respondent's argument, as the Lord Ordinary understood it, and so understanding it he had had little hesitation in holding it to be untenable. The process of augmentation and locality is not produced in the present process at all. There has only been produced of, or connected with that process, the locality (No. 61 of the process) of 9th February 1853, commencing with crop and year 1852, and the interim decree (No. 14 of process) of dates 9th February 1853 and 2d February 1855, but in neither of these writs is the name of the complainer mentioned. These writs, therefore, cannot in any view that can be taken of them, either by themselves or in connection with the complainer's oath, be held to get over the prescription established by the statute 1669, cap. 9, which enacts that ministers' stipends 'not pursued within five years after the same are due shall prescribe in all time coming,' except the same 'shall be offered to be proved by the defenders their oaths, or by a special writ under their hands acknowledging what is resting owing.'

"Having regard to the terms of the statute it would rather appear that although the whole augmentation process had been imported into and made part of the complainer's oath, the respondent could not be held to have prevailed. But the augmentation process in its entirety cannot, in any view that can be taken of the complainer's oath, be held to have been made a part of it. As the oath stands, it may well be doubted whether any of the writs spoken to by the complainer can be held to have been made parts of his oath in such a manner as to entitle the Court to consider them in determining its true import and effect. In the case of Boyd v. Kerr, 17th June 1843, 5 D. 1213, although it was held to be competent, in the examination of a party under a reference to his oath, to place documents before him with the view of assisting his memory, and to question him on the subject, or even to shew him a document irrelevant to the cause the Court could not consider such document with the view of contradicting the oath; and in the case of Gordon v. Pratt, 24th February 1860, 22 D. 902, it was held that although a party produced documents on the opposite party's call and deponed that they all had relation to the matter referred to and were genuine, that they were not imported into the oath so as to form part of it, the Lord Justice-Clerk, now the Lord President, remarking that 'proof by writ or oath does not mean proof by writ *and* oath; if the defender fail to prove his case by writ, he can have recourse to reference to oath, but he is then confined to the oath as his only evidence—the reference to oath being a judicial contract that the case is to be determined by what his adversary shall depone.'"

[1] Authorities cited (*as to the reference to oath*).—Cooper v. Hamilton, Feb. 20, 1824, 2 S. 728—aff. March 14, 1826, 2 W. and S. 59; Boyd v. Kerr, June 17, 1843, 5 D. 1213; Hunter v. Geddes, Jan. 29, 1835, 13 S. 369; Hamilton v. Struthers, Dec. 2, 1858, 21 D. 51; Gordon v. Pratt, Feb. 24, 1860, 22 D. 902. (*As to the liability to stipend*).—Dundas v. Nicolson, 1778, M. 8511; M'Donald v. Heriot's Hospital, Feb. 12, 1828, Shaw's Teind Cases, 156; Duncan's Par. and Eccles. Law, 167, 333.

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ance of Dr Cochrane, the minister of Cupar, against Mr Jackson, for the portion of stipend said to be in arrear for a number of years prior to the date he charge. The ground of action is that Mr Jackson is in possession of certlands which appear in the locality of this parish to have been localled on. person therein localled upon is one Andrew Thallon, and the charge pros on the footing that Jackson became the proprietor of these lands, and was uring the years for which stipend is claimed. Jackson suspends, and in the se of discussion the plea of prescription under the Act 1669, cap. 9, is stated gard to all but five years of the stipend said to be due. As regards the claim tipend for these last five years Jackson has satisfied it, putting in a minute ertaking that the money shall be paid. But as regards the rest of the claim plea of prescription is manifestly good in itself, and the Lord Ordinary has ained it, leaving the minister to prove the constitution and the resting owing the oath of the suspender. The whole case now depends on the oath on rence. The reference is of the whole cause. Whether that was altogether ntial in the circumstances of the case may be questioned. But be that as it y, the question now is, *Quid juratum est*—has the minister proved by the h of Jackson that this claim was originally due, and is now resting owing. e questions which are submitted to the deponent, and in the answers to which minister must find his grounds of success, are in reality these: First, Was drew Thallon localled on in respect of these lands in the locality? and, Second, Jackson acquire these lands from Thallon, and was he proprietor or possessor them or intromitter with their profits during the years in question? On the t question I am clearly of opinion that it is proved that Thallon was localled in respect of these lands for the amount of stipend claimed. Something has n said about the competency of referring to the documentary evidence in the n. There is no doubt as to the law on that subject. When a case is referred oath the proof must be derived from that which is sworn; but it is perfectly mpetent to put to a deponent documents relative to the subject-matter of the rence, and to interrogate him thereon, taking the answers as part of the deition. The case of Hunter v. Geddes affords a very apt illustration of the w on this subject. But it is quite a different question whether you can, *per ersionem*, import documentary matter in regard to which no detailed questions ve been put. That was the case in Gordon v. Pratt; and I refer to the opening tences in Lord Cowan's opinion in that case as giving a perfectly concise and nd view of the law on that subject. The rule is simply this, that you may make ruments part of the oath on reference, but in order to do this you must examine e party specifically on these matters; yet when that is done it is not necessary engross the whole documents, a reference to them being sufficient. Keeping se principles in view, we return to the question, whether it is proved that allon was localled on. It is stated in the tenth article of the condescendence t he was, and the question was put to Jackson, "Is that statement true?" and e answer is affirmative. I therefore hold it to be proved that Thallon was alled on. The next question is, did Pearson and Jackson acquire these lands? is distinctly proved by the statement in the tenth article, as also by the ole tenor of the oath. What question, then, there can be as to the identity of e lands I am at a loss to see. For Jackson, who was agent for the original prietor, who held a security over the subjects, and who has been connected rewith for the last fifteen years, to say that he does not know what lands were alled on does not reflect much credit on him. He certainly knew in 1854, Pearson and Jackson moved then to have the locality altered. We do not, wever, need to travel beyond the oath in order to find an answer to this ques-n.

The next question is, did Jackson take the place of Thallon? Now, I do not nsider what the minister's remedy is against singular successors. My impresn is that a singular successor just stands in relation to the minister in the me position as his predecessor, and that it is not necessary, at any rate, in order use the general decree against a possessor of lands, that his name should appear the locality. How far a former proprietor remains liable is a question which is not necessary to determine, although my impression is that he ceases to be

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liable when he sells. The question here is, what is the minister's right; and would greatly restrict that right if he could not use his summary remedy u the interim locality was rectified or the final one reduced. But it is sugge that Pearson and Jackson were never more than bare superiors. That is st in the condescendence and also in the oath. Now, in order to sustain charge it must be proved that the new proprietor takes the place of the old that respect. In my opinion it does not appear in the oath that Jackson du the years in question held the place of Thallon as intromitter with the fr There was a *pro indiviso* right *ex facie* of the conveyance to Pearson and Jack although it was really only a security that they used. But it does not ap that there was any possession on that title, in the proper sense of the word, the company or by either partner. After a year or two the company was divo by a conveyance to Welch, but on what footing he held the subjects is not pro by the oath, and it was essential to the success of the minister that this sh be cleared up. Thereafter there was a conveyance to Mackenzie, to which same remark applies. Consequently, since I am obliged to find within this grounds for this charge, and since I do not find there any evidence that du the years in question Jackson came into the place of Thallon as intromitter v the fruits, I come to the conclusion that there is a flaw in the essential pa the case, and that the oath must be held as negative.

The other Judges concurred.

THE COURT pronounced the following interlocutor:—"Adhere to interlocutor complained against, and refuse the prayer of the claiming note," &c.

JAMES BARTON, S.S.C.—BOYD, MACDONALD, & LOWSON, S.S.C.—Agents.

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Feb. 28, 1873. Stirling & Sons v. Holm and Others.

WILLIAM STIRLING AND SONS, AND OTHERS, Pursuers.—*Watson—Balf*
JOHN HOLM, Assessor for the County of Dumbarton, Defender.—*Fraser—Robertson.*
THE COMMISSIONERS OF INLAND REVENUE.—*Sol.-Gen. Clark—Rutherf*

Jurisdiction—Administration of Justice—Corruption—Irregularity—Va tion Act.—Allegations of private communications between the Judges of Valuation Appeal Court and the assistant Solicitor of Inland Revenue w *held* irrelevant to support a conclusion for the reduction of judgments follo thereon, it being the duty of the Solicitor of Inland Revenue to lay the sp case for appeal before the Judges and get their opinion thereon.

Valuation of Land (Scotland) Acts—Valuation Appeal Court.—The Valu Appeal Court is a Supreme Court, and its proceedings cannot be set aside the Court of Session on the ground that they are *ultra vires* and incompet

1st DIVISION. Lord Gifford. M.

THE circumstances out of which this action arose are thus stated in Lord Ordinary's note:—

"The pursuers are owners and occupiers of certain dye and printw in the Vale of Leven, Dumbartonshire, and they appealed to the Comm sioners of Supply of Dumbartonshire against the valuation of their w made by the assessor for the county for the year 1870-1.

"On 13th September 1870 the Commissioners of Supply sustained appeal, and restricted the proposed valuations to the sums at which works stood in the valuation-roll of the preceding year.

"The assessor, being dissatisfied with this decision of the Commissio craved a case for the opinion of the Judges—that is of Lord Ormi and Lord Mure—who had been appointed to decide in such mat under 30 and 31 Vict., cap. 80, sec. 8. A case was accordingly state the Commissioners, which was duly laid before Lord Ormidale Lord Mure.

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ı 5th July 1871 Lord Ormidale and Lord Mure, after hearing l, pronounced an interlocutor requesting the Commissioners of to give the appellants (that is, the present pursuers) an opportu- proving certain facts, and requesting the Commissioners 'to report stance of what may be proved.' A proof was accordingly led by pellants (pursuers) before the Commissioners, the substance of was reported by the Commissioners. No proof was led by the r, the Commissioners observing 'the remit authorises only a proof appellants.'

e case again came before Lords Ormidale and Mure, when their ips, on 5th December 1871, 'before disposing of this case,' again d to the Commissioners to give the assessor access to certain valu- to allow the assessor to lead evidence, and 'to report the substance t is proved.'

. 37 of process contains a report by the Commissioners under this remit, but it has no date, although it appears that the proof d on was not led till 20th May 1872.

the meantime, and before this second proof was led, the present of reduction and interdict was brought on 16th May 1872, con- ; for reduction,—(1st), of the interlocutor of Lords Ormidale and lated 5th December 1871; (2d), a deliverance by the Commis- of Supply, 23d April 1872, fixing a diet of proof; and (3d), an- leliverance of the Commissioners, dated 30th April 1872, post- the proof and fixing a new diet. The original remit by Lords le and Mure, dated 5th July 1871, and under which the pursuers lves had led proof before the Commissioners, is not brought under on. The summons also concludes for interdict against the Com- ers proceeding with the proof, but as no interim interdict was d the proof was proceeded with on 20th May 1872."

pursuers averred, *inter alia*, that the report of the Commissioners ly, under the remit of 5th July 1871, was transmitted to the Com- ers of Inland Revenue, who laid it with the case before Lords le and Mure, the Judges under the Valuation Act, who, on 25th ber 1871, heard parties on the whole case,—"The present pur- eing represented at the debate by counsel, and the assessor and mmissioners of Inland Revenue by Mr David Crole, assistant r of Inland Revenue, Edinburgh; and after the debate was con- the Judges made avizandum." (Cond. 11.) "The pursuers heard ; more of the case until 1st December 1871, when a paragraph d in the Glasgow 'Evening Citizen' newspaper intimating that a ad been allowed to the assessor in the case, and similar announce- were made in the Glasgow daily papers of the following day. inquiries were consequently made for an interlocutor by Messrs on, Kinnear, and Beatson, W.S., the pursuers' agents in Edinburgh, December, but they were told that no judgment had, down to that een pronounced."

; day the Judges issued the interlocutor of 5th December above- ned. On 7th December the pursuers requested Mr Crole to state ad taken place between him and the Judges between 25th Novem- l the issuing of the notes. "Mr Crole at first displayed an gness to give information, but ultimately he admitted, and the s believe and aver, that he, as acting for said assessor and Com- ers of Inland Revenue, had two meetings with the said Judges e debate mentioned in article 10, and before the said interlocutor ı were written out and signed, at which the questions before said for opinion as aforesaid, or some of them, and the terms of the

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interlocutor, notes, or opinion to be issued or given by said Judg
said case were made the subject of consideration and remarks,
thereafter either Lord Mure drafted the interlocutor, notes, or
which said Judges were to issue or pronounce on said case, and
draft for revisal to Mr Crole, who revised it, or that the draf
interlocutor or notes was prepared by Mr Crole and submitted t
Judges for approval, and that the notes as revised by Mr Cr
prepared by him and approved by said Judges, were issued
Judges on 5th December 1871 as aforesaid. Mr Crole, however
though asked, to exhibit said draft, or to state the extent or nat
alterations which he had made upon it."

They further averred that they (the pursuers) had received no
such private or *ex parte* meetings between the Judges and Mr C
understood and believed that in accordance with the invariabl
judicial proceedings no private or *ex parte* "communications w
place with or be made to the Judges, but that the judgment,
opinion to be pronounced by the Judges would proceed upon
stated and argument openly submitted, and the statements op
when both parties were present in Court, and upon the informat
larly and competently before the Judges. Further, they re
notice that any draft interlocutor or notes had been prepared
mitted to Mr Crole for revisal. No such draft interlocutor or n
submitted for revisal to the pursuers, or any one on their be
they had no opportunity of submitting their views thereupo
Judges, or of objecting to the alterations made or suggested by
just as they had no opportunity of hearing and meeting the s
made by that gentleman to the Judges at the private and *ex pa*
ings above mentioned."

The Valuation of Lands (Scotland) Act (17 and 18 Vict. c. 91)
the valuation-rolls of counties to be made up annually by
appointed by the Commissioners of Supply, subject to appeal (1
8) against the assessor's valuations to the Court of the Commis
Supply. The Act 20 and 21 Vict. c. 58, sec. 1, makes it lawf
Commissioners of Supply, if they think fit, to appoint the officer
of Inland Revenue having the survey of the income and asses
within any county to be assessor or assessors for the purpos
Valuation of Lands Act, "and in such case the expense atte
making up of valuation-rolls by such officer or officers shall be
by the Commissioners of Inland Revenue, or as the Commis
Her Majesty's Treasury shall direct in that behalf." By th
section of the same statute it is enacted that "all persons e
appeal against valuations made by the assessors appointed unde
Act, shall also be entitled to appeal under and subject to the
and regulations against the valuations to be made by such
officers of Inland Revenue appointed as aforesaid under this Ac
upon any such appeal, any officer of Inland Revenue or the p
pealing shall apprehend the determination of the said Commis
Magistrates hearing such appeal to be contrary to the true inte
said Act, and shall then declare himself dissatisfied with such d
tion, it shall be lawful for such officer or appellant respectively
the said Commissioners or Magistrates to state specially and to
case upon which the question arose, together with the dete
thereupon, and to transmit such case to the Commissioners
Revenue, to the end that the same may be submitted to the Se
Ordinary and the Lord Ordinary officiating in Exchequer cau
Court of Session, for their opinion thereon; and such Judges

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...ch case may be submitted shall, with all convenient speed, give and ...scribe their opinion thereon, and according to such opinion the valua... or assessment which shall have been the cause of the appeal shall ...altered or confirmed." By statute 30th and 31st Vict., cap. 80, "The ...uation of Lands (Scotland) Amendment Act, 1867," the second section ...he 20th and 21st Vict., cap. 58, is amended, and it is "provided always ... any valuation which shall have been confirmed or altered in con...ity with the opinion of said Judges shall hereafter be final, and not ...ject to review in any manner of way."

...he Lord Ordinary (14th January 1873) pronounced an interlocutor ...ing that "the averments made by the pursuers are not relevant or ...cient to support the conclusions of the action, or any of them: There... dismisses the action, and decerns: Finds the pursuers liable in ...nses, and remits," &c.*

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* NOTE.—(After the narrative above quoted)—It will be observed that Lords ...idale and Mure have as yet decided nothing upon the original case as laid ...e them under the statute, the remits made to the Commissioners, and the ...s directed to be allowed, being necessarily before answer. Under the ...tes, Lord Ormidale and Lord Mure will yet fall to give their opinion upon ...riginal case of 13th September 1870.

In these circumstances, the very peculiar nature of the present action ...es apparent. It seeks to set aside certain intermediate procedure adopted ...ords Ormidale and Mure, who admittedly are the only competent Judges to ... the statutory opinion upon the statutory case. Farther, that intermediate ...dure is only partially brought under reduction. The pursuers propose to ... the proof led by themselves under the first remit to stand, but they pro... to interdict as incompetent any counter proof to be led by the assessor. ... farther, they seek to interdict the Commissioners of Supply from obeying ...emit or order made to them by Lords Ormidale and Mure, although the ...ers themselves have taken advantage of and acted upon a precisely similar ... or remit, under which a report has already been made to the Lords ...inary.

Notwithstanding the able and ingenious argument submitted on the part ... pursuers the Lord Ordinary is of opinion that the present action is wholly ...vant and incompetent, and he has accordingly dismissed the same.

It is necessary, however, to keep in view that the action embraces several ...ct and separate grounds of reduction, and as the Lord Ordinary thinks ... these fall to be differently dealt with, he will explain shortly the view ...kes of each.

I. There are apparently allegations of corruption, if not against Lords ...idale and Mure, against Mr Crole, Assistant-Solicitor of Inland Revenue, ...burgh, who, it is said, had *ex parte* and private meetings or communications ... the Judges, and suggested the terms of their interlocutors.

The counsel for the pursuers, while declining to abandon any part of the ... certainly did not insist very strongly in the pursuers' first plea in law, ... he declined to ask an issue in support of the allegations on which the ... rests.

The Lord Ordinary, however, is very clearly of opinion that the pursuers ... made no relevant averment, not to say of corruption, for they shrink from ... that word, but even of such partial counsel or irregularity as has even the ...test semblance of what might be held to be legal corruption or irregularity ... arbiter or judge.

Supposing it to be true that Mr Crole did draft the interlocutor, or suggest ...rms, or alterations upon its terms, the Lord Ordinary thinks this is wholly ...aterial. Mr Crole was in no sense a litigant in the cause, and had no ...est whatever therein. Mr Crole represents the Commissioners of Inland ...nue, to whom the case is to be transmitted, and who are to lay it before ... Judges. Mr Crole's position was really that of Clerk of Court, or at least

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The pursuers reclaimed, and argued;—(1) The interlocutor had l nounced after private communications with Mr Crole, who had a

it was more analogous to that position than to any other. Quite r the Judges might have requested him either to draft the interlocu suggest its form, and quite rightly the Judges might receive from suggestions calculated to carry out their views. The adjustment of t terms of an interlocutor of remit, while undoubtedly the act of the Ju practice every day made with the Clerk of Court after the parties hav bar. The pursuers' allegations, when carefully examined, really co more than this.

" The Lord Ordinary cannot help regretting that the pursuers sho thought it necessary to make the allegations now in question, which appearance at least of being imputations against the impartiality and ing of the parties concerned. For such imputations there is not the foundation.

" II. The more serious question, however, in the case, is that rais pursuers' pleas, that the proceedings of Lords Ormidale and Mure w *vires* and incompetent under the statutes, and that the Court of Sess Supreme Court of the country had right to set aside such proceedings, it has no right to review the ultimate judgments.

" It was urged, with great force, that under the statutes a special ca opinion of the Judges was really of the nature of a special verdict, and be dealt with as such. The Judges, it was said, have no right to deal special case as if it were an issue in fact, and to send it to proof eithe mission or otherwise. Still farther, the anomalies were dwelt on whi result from proofs taken, it may be, on many separate days before meetings of the Commissioners of Supply, each meeting possibly att different members, and the last meeting being required, not simply evidence or the mere depositions of witnesses, but to report the sul what had been proved. Indeed, the very purpose of a special case is sede proof, and the Legislature cannot have intended that the Lords who are to be the final Judges, should either lead proof themselve commission for leading proof, and, least of all, that they should gran sion for proof to such a body as the Commissioners of Supply.

" The Lord Ordinary feels the full force of the pursuers' argumen branch of their case, but he is of opinion that he cannot give effect t in the present process, or in any process like the present.

" (1) Lords Ormidale and Mure form a statutory Court, whose j are in no way subject to review. They derive their authority merel clusively from the Valuation Acts, 17 and 18 Vict. 91, 20, and 21 Vic 30 and 31 Vict. 80. It is expressly declared that the valuations ' wh have been confirmed or altered in conformity with the opinion of sa shall thereafter be final, and not subject to review in any manner of w judgment of Lords Ormidale and Mure is to be given by way of opini special case, but when it is so given it was not pretended that it wou way be subject to review.

" (2) Now, if the final judgment could not be touched or reviewed way of reduction or otherwise, the Lord Ordinary does not think that mediate step which the supreme and final Judges may think it necessa to enable them to give final judgment can be interfered with. Th which make the judgment of Lords Ormidale and Mure final do not any form of process. The statutes do not prohibit the Judges from m inquiry, or from informing their minds in any way they may think r Plainly, they might receive explanations from the assessor, or from th and it is thought they might call for any leases or documents bearin question at issue. How far they may go with such inquiries is real tion of expediency, which must be left to the discretion of the Jud selves, and with the exercise of this discretion the Court of Session wi slow to interfere.

as a party, and ought to be reduced in consequence of this grossly ular and incompetent procedure. Mr Crole being a party, or having himself a party, could not act as an official of Court, as appeared to ld.[1] There was, at all events, a grave irregularity in the interview

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) The Lord Ordinary, as at present advised, cannot hold that under the ion Acts, or under similar statutes providing for special cases being laid the Judges, the special cases once transmitted cannot be amended or added e rather thinks that it is inherent in the Judges who are finally to decide ct that obvious errors in the special case may be corrected, and obvious ons supplied, it being always a question of discretion how far such power endment shall be exercised. Probably in most cases the Judges will be ing to send back special cases for amendment, especially where there is ver to convene the same individuals by whom the special case was origi- ent up. All this, however, is matter for the Judges themselves, and not Court of Session, which has no power of review.

) The argument of the pursuers as to the illegality of the remit under ion is equally applicable to the previous remit, of which the pursuers lves took advantage. The pursuers' counsel scarcely ventured to main- at Lords Ormidale and Mure were bound to look at evidence on one side nd to exclude all evidence on the other side; and yet this would be the of the pursuers prevailing in the present action; for the Lord Ordinary ly set aside the interlocutor brought under reduction, and not another utor of which no one complains. It is vain to suggest that a judgment our of the pursuers would virtually set aside the remit of 5th July 1871 l as that of 5th December 1871. It would need a new action to do this, y mere expression of opinion either of the Lord Ordinary or of the Court not be enough. Decree in terms of the libel would leave the remit of 5th 871, and the proof taken under it, quite untouched.

) The whole remits made by Lords Ormidale and Mure are necessarily, deed expressly, before answer. The remit complained of expressly bears made 'before disposing of this case.' Now, in their final judgment, Ormidale and Mure may possibly lay aside the remits altogether, and exclusively on the special case as originally returned. The present Lord ry cannot anticipate the future proceedings in the cause, and he declines cribe, to the slightest extent, the course which the sole statutory Judges dopt.

stly, it appears to the Lord Ordinary that the remit of which the pur- omplain was really a remit made in favour of the pursuers themselves, that the remit of 5th July 1871 and 5th December 1871, taking both to s they really do, one remit, was a remit to give the pursuers an oppor- of justifying the decision of the Commissioners of Supply. The Lord ry may be wrong, but the perusal of the proceedings has produced a impression on his mind that Lords Ormidale and Mure were not satis- th the decision of the Commissioners, but were inclined to return to the n of the assessor. Accordingly, it is not to the assessor that a proof is l in the first instance, but to the pursuers, although they held the judg- f the Commissioners. This seems to infer that unless the appellants something, the assessor's judgment must stand. If this view is well l, the plea of personal bar against the present pursuers would be very for what they are now doing is to seek to take advantage of the proof hey themselves have been allowed, and yet to exclude the assessor from junct probation, and from all probation whatever.

ile the Lord Ordinary, however, has thought it right to notice shortly re considerations, he rests his judgment chiefly on the ground that this s no power to interfere with or review the proceedings of the supreme r Court created by the Valuation Acts."

pbell v. M'Cowan, July 10, 1824, 3 S. 245; Manson v. Smith, Feb. 8, *ite*, vol. ix. 492, 496 (per Lord Neaves).

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between the Judges and the party. (2) The Court has inherent po set right the Valuation Appeal Court when it goes beyond its jurisd The Judges of the Valuation Court are part of the Court of S and however their judgments may be invested with finality, so regards the merits of any case, they were subject to review whe clearly exceeded the powers conferred by the statute. If the could not be controlled, at all events this Court could prevent th missioners of Supply from proceeding with an incompetent proc special case was the only thing that could be laid before the Judges.

Counsel for the respondents (defenders) were not called on.

At advising,—

LORD PRESIDENT.—There are two grounds of action here, and t Ordinary has found a great many reasons against entertaining either. I do not think it necessary to find so many reasons, because there is or applicable to each ground of action, which, to my mind, is perfectly con

There is an allegation that something took place between the A Solicitor of Inland Revenue and the two Judges to whom the case Commissioners of Supply of Dumbartonshire was presented which ough have taken place between the Judges and him, because he had argued to the Judges on behalf of the assessor of the county of Dumbarton, t opposed to the present pursuers. Now, whether any such argument place is a matter of fact not ascertained. We must assume that it did t in disposing of this question of relevancy, and I am free to confess th Assistant-Solicitor of Inland Revenue did argue the case of one of the p stepped out of his proper province; but then I think the fault was i taking that duty of arguing the case of one of the parties, and not in else that he did as alleged upon this record. The statute 20 and 21 ' vides for the mode in which the case is to be laid before the Judges. It that "all persons entitled to appeal against valuations made by the appointed under the said Act shall also be entitled to appeal under an to the like rules and regulations against the valuations to be made by su or officers of Inland Revenue, appointed as aforesaid, under this Act; an any such appeal, any officer of Inland Revenue, or the person appeal apprehend the determination of the said Commissioners or Magistrate such appeal to be contrary to the true intent of the said Act, and s declare himself dissatisfied with such determination, it shall be lawfu officer or appellant respectively to require the said Commissioners or M to state specially and to sign the case upon which the question arose with the determination thereupon, and to transmit such case to the sioners of Inland Revenue, to the end that the same may be submitt Senior Lord Ordinary and the Lord Ordinary officiating in Exchequ in the Court of Session for their opinion thereon; and such Judges such case may be submitted shall, with all convenient speed, give and their opinion thereon, and according to such opinion the valuation or a which shall have been the cause of the appeal shall be altered or co Now, it is quite clear that when a case is prepared by the Commis Supply, and subscribed by their chairman, their business is, in the fi to send it to the Commissioners of Inland Revenue,—there is no direct cation between them and the Judges; and the Commissioners of Inland are directed then to submit it to the two Judges. Of course, by the sioners of Inland Revenue is meant any officer of the Commissioners Reveuue, and in Scotland that must mean either the Solicitor of Inland or his assistant. Therefore, the Assistant-Solicitor here was perfor statutory duty in submitting this case for the opinion of the two Judg was his business to see that they gave their opinion thereon and subs so that he might retransmit it, with the opinion of the Judges there Commissioners of Supply to regulate the Commissioners of Supply i

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confirming the valuation in question. It is quite plain, therefore, upon this ...se of the statute, that the Solicitor of Inland Revenue or his assistant is the ...per custodier of the case, and it is his business to see the opinion of the ...dges written upon that case, and subscribed by them, and then to have the ...e returned to the Commissioners of Supply. As I said before, if there was ...y fault upon the part of the Assistant-Solicitor here it seems to me to have ...en entirely that which is alleged against him of having argued the case of one ...the parties, and not that he came into communication with the Judges when ...y were making up their minds upon their opinion, and writing it upon the ...e. I think the 13th article of the condescendence, in which the only aver...nts upon this subject are contained, is irrelevant. Indeed, I do not see how ...could have even the appearance of relevancy, unless something like a charge ...corruption were insinuated either against the Assistant-Solicitor or against the ...dges. Whether that would be a charge which we should have sustained in ...s Court is another and a very different question indeed, on which I offer no ...nion; but upon this I am quite clear that the allegations in the 13th article ...the condescendence are irrelevant.

The other ground of action is that in the proceedings complained of the two ...dges who were acting under this 11th section of the statute to which I have ...rred went out of the statute in the mode of conducting their procedure. It ...gued, and argued with much force, that a case such as is here contemplated ...s a case stating the facts, and raising a question of law for the Judges to ...wer; and that if the Judges find that the facts stated in the case are not ...cient to enable them to form an opinion, the proper course is to send back ...case to be amended, which of course must be done through the intervention ...the Commissioners of Inland Revenue just as before. That may be a perfectly ...nd argument: upon that I give no opinion either. What the Judges did ...not to order the case to be amended, but in point of fact to order it to be ...plemented. They desired the Commissioners of Supply to satisfy themselves ...certain other facts by leading additional evidence, or allowing the parties to ...l additional evidence, and to report, as a supplement to their case, the result ...that evidence. Now, whether I should have been disposed to take that course ...not, if I had been sitting as one of the Judges under this statute, I am not ...pared to say; but I am quite clear of one thing,—that we have nothing to do ...h the matter any more than if this were a complaint that the Court of Justi...y had pronounced a wrong judgment, or had gone out of their way and ...lated their own form of process, or their act of adjournal. I think these two ...dges sitting under this statute are just as much a Supreme Court as we are ...ing here, that their jurisdiction is absolutely privative, and that no other ...ge or Court in the realm can interfere with questions arising under the ...sation Act, or rather, I should more properly say, with questions relating to ...sations. It is to these two Judges, and to nobody else, that the whole juris...tion in this matter is committed; and I think we have no jurisdiction to ...rfere with the way in which they conduct their business.

LORD DEAS.—I am of the same opinion. There are just two grounds of action ...e:—in other words, two reasons of reduction. The pleas in law are now ...derstood to come in place of the reasons that were formerly embodied in the ...al summons; and the first plea in law is substantially the one that raises the ...t question to which your Lordship has referred, taken perhaps in connection ...h some parts of the second; but it just comes to this, that there were certain ...munications between Mr Crole and the Judges in the preparation of the ...erlocutor, which are said to make that interlocutor of no effect. Now, I am ...opinion that in order to give relevancy to that plea and to these averments, ...posing we had jurisdiction to entertain the matter, they must come up to a ...e of malfeasance on the part of the Judges, as well as of Mr Crole; and it is ...ite plain that unless it is definitely stated that Mr Crole influenced the Judges, ...d unless the Judges were equally to blame with him, there is no case against ...her the one or the other. The answer to that upon relevancy is that, although ...re is some insinuation of that kind, there is no distinct and substantive

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statement of fact to found such a plea; and that I understand to be w Lord Ordinary has found. I would only say further upon that point in place of insinuation, there were distinct statements amounting to mali on the part of the Judges and of Mr Crole, I should think twice before hold that we had any jurisdiction whatever to interfere in such a matter. Judges form a Supreme Court. The jurisdiction, be it what it may, is to them, with no appeal to us,—with no right to us to interfere at all would be a most extraordinary assumption for the Judges in one Supren to sit in judgment upon what really amounted to a charge of corruption the Judges of another Supreme Court. I can quite understand that, in of an arbiter, inquiry may be made as to whether there was corruption; a very different thing when the question comes to be with regard to a Judge in another Court over which we have no jurisdiction whatevc not necessary, however, to go upon that, because I hold with your I that there is really no averment of corruption. If there were, I should much inclined to think that it was by impeachment in Parliament and an action of reduction in this Court that the question should be tri a Judge lent himself to such things as are insinuated, although not sa I think it would be in vain for him to say, "I meant nothing wrong." that would raise a question not to be decided in the particular case, but tion of the removal of the Judge, and if it did not come up to that, I doubt if it would amount to anything at all. It is not necessary, how go into all that, if we are right in holding that there is no allegation of tion here.

The only other reason of reduction resolves, as your Lordship has s a question as to the mode of procedure,—whether in construing this the Judges were wrong in thinking that it does not prevent some inquiry to be made by them, and whether they are not entitled, eithe particular case they are dealing with, or by a general rule, to make would call in this Court an Act of Sederunt with reference to the form a of procedure, a thing that is implied in the constitution of every Suprem The constitution of every Supreme Court implies a power to make and the forms of procedure in that Court; and it is very difficult to say t power does not extend to such matters as were dealt with here. At all they might construe the statute in one way in that respect, and we might construe it in another way, but it would not be for us to say who was r who was wrong in that respect. It belongs to that Supreme Court to w jurisdiction is confided to construe the statute, and to construe their own for the regulation of the mode of procedure. I think with your Lords we have nothing to do with that at all. I see no reason, for my own think that the Judges went wrong; but although that were more doubt it seems to me to be, I do not think that our construction of the statu by possibility, be put in place of theirs.

Lord Ardmillan.—I should content myself by saying that I concur w Lordships, but as I had considerable experience in this Court, having Judge on valuations for several years, I think it right to make a few tions.

In the first place, I have a very distinct recollection,—and your L view of the statute is entirely in support of mine,—that the Solicitor of Revenue, or Mr Crole, the Assistant-Solicitor, does not represent the who is the party to the case. He is not there as counsel for the assess is there as custodier of the proceedings, and he is there, on the part of the of the Inland Revenue, in the discharge of a public and statutory duty. understand that Mr Crole appears in any sense for the assessor; and I that I have very often seen Mr Crole, when he did appear, give expl (for that was a duty of his) favourable to the subject, and unfavourab assessor. It is quite a mistake to say that Mr Crole is a mere counsel assessor. I have often myself, when sitting judicially, asked Mr Crole q and received answers from him unfavourable to the procedure of the as

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y, and favourable to the party appealing; and, therefore, I think the f Mr Crole has been somewhat misapprehended. I have nothing more that part of the case.

I believe, the uniform practice is that the word "right" or "wrong" a either by one of the Judges or by the Judge's clerk; and I see o vitiate the proceedings when it happened to be written by Mr

nything of the nature of corruption or malversation nothing of the kind relevantly alleged.

her part of the case appears to me to be equally clear; and there also d an explanation from my personal knowledge of the matter. It has y been felt necessary to get a little more information than the case of oners supplied, and in order to get that information, sometimes one form and sometimes another form was used; but the thing done is to ask the oners to correct, or admit, or add to the statement of facts upon which es are to proceed. In this case the form is rather different from what enerally seen; but I do not see much objection to it. The formal xpression, "allow a proof," are not the words used. The first judgment ows is that of 5th July 1871, where "the Judges request the Commis- give the appellants an opportunity of proving by witnesses or other- d so forth, and "the Judges request the Commissioners to report the of what may be proved." Now, under that remit, these gentlemen, tell us that anything like ordering a proof is absolutely incompetent, hemselves of the opportunity which was given to them, and used the ty to lead evidence before the Commissioners, but now they say, when d judgment comes for further inquiry,—a proof being allowed on the ,—the words being again exactly the same,—it is incompetent to do so. e right to allow these gentlemen to lead evidence, and they use their ; it it quite wrong to allow the opposite party to lead it, and that is to rned, as if the Judges were to proceed to decide the case when only a e evidence had been led, and to shut out the other. I cannot see that ither justice or law in that contention. It does not appear to me that ase in which the Court ought to interfere, and I agree with your Lord- he chair that Judges acting and having a final jurisdiction cannot be l by us.

ERVISWOODE.—I am entirely of the same opinion as has been expressed. o hesitation in saying that, even if it were within our power to touch ment, we should not interfere with it.

IE COURT adhered to the interlocutor of the Lord Ordinary.

, KINNEAR & BEATSON, W.S.—ANGUS FLETCHER, Solicitor of Inland Revenue—CHARLES TAYLOR, S.S.C.—Agents.

No. 83.

Mar. 3. 1873.

Donaldson, &c.

DONALDSON, AND REV. WILLIAM SMITH, Minister of the Parish of North Leith, Petitioners.—*Lee.*

—Erection—Endowment—Lease—Feu—Act 7 and 8 Vict. c. 44, sec. on of Parishes Act, 1844).—The above Act sanctions the erection of *cra* parishes only in cases when the title to the site of the proposed s such that it shall be inalienably secured as the church of the new *Held (diss.* Lord Justice-Clerk and Lord Ardmillan) that a 999 years' church site did not satisfy this condition.

was a petition for the disjunction and erection of the church and *oad sacra* of Dalreoch, in the parish of Cardross and presbytery barton.

ite of the proposed church was held on a 999 years' lease only, on a feu-right, and the question was raised whether this was

TEIND COURT. Teind Clerk.

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sufficient compliance with the Act 7 and 8 Vict. c. 44, sec. enacts,—"And provided also that the titles to the said chur taken and conceived so as that the said church shall be i secured as the church of the said new parish in connection Church of Scotland."

At advising,—

LORD JUSTICE-CLERK.—My opinion is that there is here sufficient with the Act of Parliament, because the right, although in form equivalent to a perpetual grant.

LORD NEAVES.—I do not think we have here a sufficient complian statute. I have great doubt if we should sanction the erection o which is only to last for a limited period.

LORD ARDMILLAN.—I am inclined to think that there have been sions and legislation tending to recognise very long leases as equivale to a right of ownership. Undoubtedly a lease for 999 years is as nea ency as possible, and I am of opinion that in the matter here inv quite sufficient to meet the requirements of the statute.

LORD JERVISWOODE.—The question is one of considerable diffi view is rather that a lease, however long, cannot be looked on here as title. A lease is quite a different title from one of property, and ques arise under it with singular successors of the granter and otherwise w be subversive of the purposes of the Act.

LORD MACKENZIE.—I do not think that a lease fulfils the requiren statute. If Mr Donaldson was to convey his estate without takin obligation from his disponee the lease might not be binding upo singular successor, and the objects of the Act might thus be defeated.

LORD DEAS.—It seems to me that a feudal title is necessary here with the provisions of the statute. It is true that in certain classes such as qualifications of parliamentery voters,—a lease for 999 year held equivalent to a right of property; but that does not in the lea question we have here to dispose of.

The LORD PRESIDENT concurred with Lord Neaves.

THIS interlocutor was pronounced:—"Find that the leas years in favour of the trustees of the ground on which t has been built is not a sufficient title under the mean 8th section of the statute 7 and 8 Vict. c. 44, and with ing continue the cause until next calling."

J. B. M'INTOSH, S.S.C.—Agent.

No. 84.

Mar. 6, 1873. Bathie v. Lord Wharncliffe.

MARGARET BATHIE, Pursuer.—*Millar—Scott.*
The Right Hon. LORD WHARNCLIFFE, Defender.—*Sol-Gen. Cl Robertson.*

Landlord and Tenant—Draft Lease—Rei Interventus.—Circum which *held* that a draft lease of a farm had been validated *rei interv* to constitute a valid lease for nineteen years.

1ST DIVISION. Ld. Ormidale. B.

MISS MARGARET BATHIE raised this action against Lord Wl concluding for declarator that the defender had let to her th Gateside of Newtyle at the rent of £83 for the period of ninet from Martinmas 1868, and that he should be ordained to execu

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her favour in terms of the draft of a lease thereof prepared by the late Christopher Kerr, as his factor and commissioner, and revised and justed by Mr Gray Bissett, solicitor, Dundee, on her behalf, or in such ms as should be fixed by the Court.

The pursuer, and her father, who died in 1854, had possessed the farm Gateside of Newtyle from 1849. It was disputed whether their possion had been from year to year or on a verbal lease. The pursuer erred that in 1867 and 1868 she had certain meetings with Mr Kerr commissioner for Lord Wharncliffe, and with his son, Mr C. W. Kerr, o assisted his father in his business of a law-agent and factor; t at the first of these meetings Mr Kerr agreed, on behalf of the dlord, to accept the pursuer's offer to take a renewed lease of the farm the old rent of £83 for another period of nineteen years, "and stated e might consider the farm as again let to her at the rent of £83, and the condition that the improvements after-mentioned should be ecuted. The agreement being thus concluded it was also arranged tween Mr Kerr and the pursuer that no time should be lost in carrying t the stipulated improvements upon the farm, and the pursuer undertook that Mr Kerr's wishes in this respect should also be fulfilled. The suer accordingly now made purchases of lime, laid the same on the d, and proceeded to make the other improvements, in so far as these re to be executed by her."

Mr C. W. Kerr died in October 1868, and Mr Kerr, his father, in June 69, and the factor who was appointed in his place declined to acknowdge the existence of the alleged lease.

The pursuer pleaded;—(2) The pursuer having entered to possession of e farm at Martinmas 1868 under the new lease, or agreement for a ase, to her, and possessed the same since that term, and executed expenve improvements on the land and otherwise, before and since her entry, the faith of the new agreement, an effectual contract has been conluded between the parties for a renewed lease of the subjects, which both e bound to implement and give effect to, whether the new lease has en formally executed or not. (3) A draft of the new lease having been epared by the defender's agent and factor, communicated to the pursuer, d revised by her agent, and the terms of the lease adjusted, both landrd and tenant are bound by this draft of the lease and their actings with ference to the subjects let, and the pursuer is entitled to have the deder compelled to enter into a formal lease to her of the subjects, in rms of said draft, or otherwise in such terms as may be adjusted at the ght of the Court. (4) The lease, or agreement for a lease, having been ted upon by both parties in essential particulars, the defender is barred om challenging it or refusing to give effect thereto by *rei interventus* and homologation.

The defender pleaded;—(1) The pursuer's statements are not relevant sufficient in law to support the conclusions of the summons. (2) The efender ought to be assoilzied, in respect that no lease for nineteen years as ever entered into with the pursuer by the defender, or any one acting n his behalf. (3) The pursuer's whole material statements being unounded in fact, the defender is entitled to absolvitor, with expenses.

A proof was allowed and led before the Lord Ordinary. The import f the proof is stated in the Lord Ordinary's note and the opinions of he Judges.

The Lord Ordinary pronounced this interlocutor:—"Finds it proved hat the farm of Gateside, and the other subjects libelled, have been let to he pursuer for the period, for the rents, and on the conditions set out in he summons: Therefore finds, decerns, and declares in terms of the first

evidence that Miss Bathie and her brother had got right, from the lan
the farm for a period of nineteen years. Miss Bathie says that this
understanding, and in the rental account, kept for the landlord, 'for cr
and other rents payable in 1868,' (Appendix of Documents, p. 20), the
entry applicable to the farm of Gateside in these terms:—'Conditions
pancy.—Holds for nineteen years from Marts. 1849. Rent, £83, pa
Candlemas and Lammas after reaping.' And there is added—'N
arrangement is in progress for giving a new lease from Martinmas 1868.'

"That there were negotiations for a new lease in 1868, and that t
(No 69 of process) of such new lease was then prepared by Mr Christoph
or under his directions, for the landlord, and revised by Mr Gray Bi
behalf of the pursuer, are undoubted facts in the case. But the partie
issue on the question whether that draft lease, although not extended a
scribed by the parties, and formally completed, must not now be held
circumstances which have been established by the proof, to be valid and
as a lease.

"As preliminary to an examination of the proof, the Lord Ordin
remark that he cannot help thinking that the difficulties in the way
parties, which gave rise to the present dispute, might not improbably ha
obviated, or have never occurred, had it not been for the death not onl
Christopher Kerr himself, in June 1869, but also of the death of his son
W. Kerr, who, it will be found from the evidence, had a good deal to
the adjustment of the new lease, on the 10th of October 1868. Not
but it also appears from a correspondence which took place in 1869 an
after the death of Mr Christopher Kerr, between Mr Bissett as acting
pursuer, and Mr William Kerr and Mr Whitton as acting for the landl
the draft lease itself had gone amissing, although it was ultimately found
Mr C. Kerr's papers. The Lord Ordinary may further remark, in refe
this correspondence, that the fairness and accuracy of Mr Bissett's repres
of the nature and terms of the draft lease, made at a time when it was s
to be lost, are calculated, in his opinion, to add weight to the testimo
gentleman has given as a witness in the present case.

"In considering the proof, the two material questions to be kept in v
1st, Has it been established that the parties had agreed that the pursue
have a tack or lease of the farm and subjects in dispute, in conformity w
draft, No. 69 of process. And 2d, Has this draft, although imperf

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The defender reclaimed, and argued;—The parole evidence could not be looked at in proof of the lease or agreement, but only with regard to the *rei*

latter stated that 'the matter was all right,' that he had instructed his son, Webster Kerr, 'to prepare a lease of the farm of Gateside, and he referred to him;' that having, accordingly got the draft as prepared in Mr Kerr's se, he, after going over it with the pursuer, revised and completed it by filling various blanks, and that, on the 27th of August, he went over and adjusted t a meeting with Mr Webster Kerr, who, it was then arranged, was to get it nded and sent to him, Mr Bissett, for execution by the pursuer. Mr Bissett ther states that in consequence of some delay having occurred in obtaining extended lease he saw Mr Webster Kerr on the subject about the beginning September, who then told him, 'it was all right,' only that the draft had to before his father as a mere matter of form. Mr Bissett, having in about ten s thereafter called for Mr Christopher Kerr, was told by him that the lease uld require to be gone over by Mr John Davidson, 'to see that it was all t with regard to the rotation of cropping,' and that it 'would be well to the rent of William Robertson's holding,' but 'he assured me at the same e that everything was all right;' and Mr Bissett also says that having reafter met Mr C. Kerr, and reminded him that he had never got the extended e for signature, 'he told me that he had it in his bag, and that he would orders for its being sent me ere long.' 'He said he was very busy, but that had given John Davidson instructions to carry out the improvements pro- d for by the tack;' and he also said—'Margaret Bathie need not trouble head about it, that it was all right.' In addition to all this there is the roborative evidence, to a large extent, of Mr Macfarlane, formerly the managing k of Mr C. Kerr, now one of the defender's agents, a witness adduced for , besides a large body of evidence, written as well as parole, presently to be iced, which, although it bears especially on the matter of *rei interventus*, is o pregnant with important matter, shewing that the terms and conditions of ase had been agreed to; and if a lease had been agreed to it must have been t contained in the draft, No. 69 of process, for there is no evidence of there ing been any other.

"The Lord Ordinary, however, is quite aware that a lease for a term of years not be established by parole evidence, but that the verbal agreement must be ved by writing or oath of party—Walker v. Flint, 20th February 1863, 1 cph. 417, and Emslie v. Duff and Husband, 2d June 1863, 3 Macph. 854. The d Ordinary does not therefore rest his judgment in the present case on the le evidence, except in so far as that evidence may be competent and necessary identify and render intelligible the writings and the actings forming the *rei rventus*, whereby these writings, although defective and invalid as a lease in nselves, were perfected and made obligatory; and that parole evidence may admissible in a case such as the present for other purposes besides proving *rei interventus*, is well illustrated by the case of the Earl of Mansfield, and reshie v. Henderson, 5th June 1856, 18 D. 989.

"The principal writing upon which the pursuer relies is the draft lease, No. of process. This writing is quite complete as a draft lease. It contains not ly all the essentials of such a contract,—that is to say, a description of the bjects of the lease, the term of entry, the period of endurance, and the rent to paid, but also all the usual and necessary details. It could not indeed well otherwise, for the draft was prepared, in the first instance, by the defender, the landlord, or by his agent, who held ample powers for that purpose; it s then considered and revised by the pursuer and her agent, and by the latter was returned to the landlord's agents, in whose possession it thereafter remained til recovered and produced in the present process. Nor can it be doubted at in law such a draft if acted upon,—that is to say, if followed by the requisite *interventus*,—must bind the parties. This principle has been given effect to numerous cases, occurring in every variety of circumstances, as referred to Mr Hunter's Treatise on Landlord and Tenant, vol. i. 415, and following ges. But here there are other writings besides the draft lease, of a very

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intervenlus. The draft was the only writing founded on, and that did not prove an agreement, but only that at one time there was a proposal or suggestion for an agreement. Even if this informal writing were sufficient, no sufficient *rei intervenlus* to shew that there was intended to be a nineteen years' lease had taken place. These ordinary improvements and preparations for better culture by the tenant were not sufficient.[1]

The pursuer argued;—The draft, which was a writ of the character sufficient, along with *rei intervenlus*, to establish a lease,[2] contained the conditions of lease agreed upon, which included all the *essentialia* of a lease for a term of years, and it had been followed by sufficient *rei intervenlus*.[3]

At advising,—

Lord President.—This is an action at the instance of Miss Bathie against

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pregnant character, in support of the pursuer's allegations that an agreement for a lease had been come to. Thus, in the rental accounts kept by or for the landlord for the years 1868 and 1869 (Appendix of Documents, pp. 22 and 30) there occurs an entry to the effect that 'lease expired at Martinmas 1868; new lease in course of adjustment for nineteen years from Martinmas 1868.' And the new lease must have been held by the landlord or his agents as ultimately adjusted the Lord Ordinary thinks may be reasonably inferred from others of the writings which have been produced, and especially from entries in the account at bottom of p. 23, and the accounts at pp. 23, 25, 26, 27, and 28 of the Appendix of Documents.

"As to the *rei intervenlus*, or actings of the parties, it appears to the Lord Ordinary that the proof—and there is a great deal of it—leaves no room for doubt on the subject. That the improvements or meliorations stipulated for in the new lease were nearly all carried into effect in the course of the autumn and winter of 1868 is proved beyond all question. Not only do various witnesses speak to this, but the written evidence, consisting of receipts and other documents supported as it is by the parole evidence, is quite conclusive on the point. And that the improvements and meliorations were carried into effect on the faith of the lease as drafted seems also abundantly clear. The Lord Ordinary thinks it impossible to read the evidence of the pursuer herself, supported as it is more or less by that of all the other witnesses, without being satisfied of this. It is proved that the improvements were authorised and paid for—except the carriages which, in terms of the new lease, were undertaken by the pursuer herself—by the defender, or those acting for and in charge of his interests. It is also proved that these operations were of a character and extent to render it improbable that they should have been thought of, or executed at all, unless a new lease of some permanence had been agreed upon. All this indeed is placed beyond any question by the written receipts, accounts, and other documents recovered from the parties who acted, and still continue to act, for the defender. Many of these writings bear express reference to a lease under and in virtue of which the operations to which they relate were performed.

"These are the grounds upon which the Lord Ordinary has proceeded in pronouncing the prefixed interlocutor. But the Lord Ordinary has gone no further for the present than to sustain the first conclusion of the summons, as it is possible some of the subordinate details of the lease may still require adjustment. This, however, can be no reason for holding that the essentials of a lease were not agreed upon in terms of the first conclusion of the summons—Erskine v. Glendinning, 7th March 1871, 9 Macph. 656."

[1] Walker v. Flint, Feb. 20, 1863, *ante*, vol. i. p. 467; Emslie v. Duff, June 2, 1863, *ante*, vol. iii. p. 854; Macrorie v. M'Whirter, Dec. 18, 1810, F.C.

[2] Grieve v. Pringle, 1797, M. 5951.

[3] D. of Gordon v. Carmichael, May 30, 1800, Hume, 805; E. of Aboyne v. Ogg, Dec. 8, 1810, Hume, 847; Macpherson v. Macpherson, May 12, 1815, F.C.; Grieve v. Pringle, *cit.*

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Wharncliffe, to have it declared that his Lordship let to her the farm of ide of Newtyle for nineteen years from Martinmas 1868, and for decree st his Lordship to execute a lease in favour of the pursuer, in terms of a prepared by the late Mr Kerr, town-clerk of Dundee, as factor and agent e defender, or by his directions, communicated to the pursuer, and revised adjusted by Mr Gray Bissett, solicitor, Dundee, on her behalf. Now, the in which this nineteen years' tack is said to be proved is by a draft ease adjusted between the parties. The constitution of the agreement is to have been verbal, but the proof of it is a draft which was adjusted in of the verbal agreement; and that draft—which, not being signed or in way properly completed, is not a lease in itself—is said to be validated and complete by *rei interventus*. Every case of this kind requires very care- onsideration, for it is indispensable to the constitution of a lease in this for a term of years not only that the writing which proves the lease should rfectly distinct and clear, and be the writing of the party against whom it ed, but also that what is called the *rei interventus* has a sufficiently clear listinct relation to the terms of the alleged contract. In the present case I the draft is shewn to have been to all important effects, and as regards all ssentials of the lease, adjusted between the parties. It may be that there are details about which slight alterations might be proposed and assented to, but is not material. If in the draft of the lease we find the whole essentials e contract, and if that draft has been as regards these essentials adjusted e satisfaction of the whole parties, and followed by *rei interventus*, that I shend, is quite sufficient. Now, here, there can be no doubt, reading the s of the draft, in the first place, as to the term of endurance. That is for teen years. In the second place, as to the rent, I do not see any reason for t as to what was the rent agreed to between the parties. There is an omission ter the rent and a slight mistake at first in entering the amount of it on the in; but it is not contended on either side that the rent was not fixed, or is ompletely stated in the draft that now exists. Thirdly, it appears to me the subject of the contract is also precisely and definitely ascertained. To re, a difficulty was suggested here in regard to a piece of land adjoining the , which was in the possession of a person named William Robertson, and it certainly in the contemplation of the parties that if this William Robertson, was only a yearly tenant, gave up this piece of land it should be added liss Bathie's farm; and in the draft as originally proposed by the landlord's t there was a declaration inserted that it was in the contemplation of the ies that that should be so, and that Miss Bathie was to have that addition s to her farm when Robertson went out of possession, provided an agree- t were come to as to the rent and conditions of lease between her and the nistor. In the draft as originally proposed on behalf of the landlord was no lease of Robertson's pendicle of land at all, and no concluded agree- ; of any kind contemplated or proposed to be entered into at the same time e agreement for the lease of the farm of Gateside. It was merely a pro- ive arrangement, the terms of which fell to be adjusted afterwards when pportunity arose. A proposal was made on the part of the agent for Miss ie, that the terms of that arrangement as to the addition of Robertson's land d be inserted in the lease, and a question is now raised whether that mat- s finally adjusted between the parties. It appears to me to be of very little quence whether that matter was finally adjusted between the parties or not. vas not finally adjusted between the parties, then the lease stands exactly as it riginally proposed by the landlord's agent. It is left for future arrangment. s adjusted between the parties then it forms a part of the lease and must be led in the lease; and, therefore if this shall be found hereafter to be the proper ng of this draft, that proper reading will be given effect to in extending the leted and formal contract. But, in the meantime, whether the parties have r arranged the terms upon which Miss Bathie is to hold Robertson's land, re not, that does not interfere with the question whether they have finally ged the terms upon which she is to hold the farm of Gateside for a period neteen years. I think, therefore, looking to the whole evidence in the

Now, it is proved that Miss Bathie did take down these cottages, and the materials thereby acquired, and other materials, the landlord pro build a dyke along the side of the road, in terms of the obligation in t and in consequence of that proceeding Miss Bathie stands bound, if t lease, to maintain the whole houses and fences for the period of her le the footing of her having received the whole in a tenantable cond appears to me that this is an act of *rei interventus* of the greates importance. Miss Bathie could have no interest whatever in pulling d ruinous cottages unless in contemplation of a continuous possession fo this farm. Her act, therefore, is to be ascribed to this obligation or arr in the lease. She performed her part of the arrangement contained clauses; and although the act of the landlord following upon that i *interventus* in this question, in which the claim is made by the tenan the landlord, yet the circumstance of his proceeding to follow up tenant had done in terms of the contract of lease, makes it demonstr that he saw and recognised what had been done by the tenant as an ac her in pursuance of this contract of lease, and an act done by her and up by him with most serious consequences as regards the whole end the lease; for the effect of the one act following upon the other—the of the fence following upon the taking down of the cottages—was to obligation against the tenant to keep up the whole buildings and a period of nineteen years. I must say I cannot conceive any *interventus* more significant than that. It is an act done precisely in this clause of the lease; and there is no possibility of ascribing it to motive than the object of carrying out this particular clause of the leas again, we have an obligation upon the part of the landlord to drain formerly occupied by William Simpson, and now attached to this f with this obligation is coupled, as is very common in leases, an obliga the part of the tenant to drive the material—that is, in particular, in c with this drainage, to drive the tiles. Well that is done. The land is dr the tiles are driven by the tenant. And does anybody imagine for a mo the tenant would drive tiles to be buried in land of which she was not to session for a term? or is it possible to ascribe that act of driving the til thing else than the obligation imposed upon her under this clause of t That is another unequivocal act, as it appears to me, constituting *rei in*

But not to dwell upon less important matters, there is, finally, the tion of manure and lime to a very considerable extent, which is prob

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a yearly tenant. A more insane proceeding for a yearly tenant it is difficult to gine. This, I apprehend, can only be ascribed to the obligation which she undertaken and the right which she had acquired to a possession of nineteen . No other period can be suggested. There was no other period in the mplation of the parties. Nineteen years confessedly was in the contempla- of the parties, whether they completed the bargain or not, and these acts ch as nobody could possibly perform except in the contemplation of pos- n for a term of years, which therefore leads to our ascribing these acts to lease for nineteen years, and to the right thereby acquired. The dung, would be put in either upon the lea or with turnips, would unquestion- remain an unexhausted improvement for a period of four or five years. The which was put in in these two years would remain an unexhausted im- ment certainly for a period of ten years, and, as some people think, for ntire endurance of the nineteen years' lease. Now, these are acts totally istent with the notion that the tenant at least did not believe this to be a luded agreement, and acted upon it as such. I am therefore of opinion the Lord Ordinary has come to a perfectly sound conclusion in this case. has done well, I think, in the meantime to limit himself to a judgment in of the first conclusion, because if that is well founded the next step to be is to adjust the terms of the completed contract—that is to say, to extend draft, with any such verbal alterations as may be thought requisite by the .

D DEAS.—I am entirely and very clearly of your Lordship's opinion. It fectly settled in our law and practice that if there are writings between a ord and a tenant—no matter in the possession of which of them,—if posses- has followed upon them—writings which fix the subject, the rent, and the ance,—a lease must be carried out, and any further conditions of that lease, though important, will fall to be fixed, if the parties do not agree about , by a remit to a professional man to adjust the lease, subject to the approval e Court. There are two different classes of cases of that kind. One class here there is a verbal agreement proved by writing. That is more rare. was the case of Emslie. The only difficulty there was as to the kind of ing by which the lease was said to have been proved; but it was held the writing was sufficient to prove a verbal lease. Another and a more on class of cases is where the essential terms of the lease—by which I mean ent, the endurance, and the subject—are proved by writings which, however, informal, and consequently require *rei interventus* to validate them. That is more ordinary case; and I am disposed to think that that is the nature of case. It does not, however, matter whether this case be regarded as falling the class of cases in which a verbal bargain is held to be proved by writing, der that class of cases where the writings themselves prove the terms of the , and want only to be made probative by *rei interventus*. Here the draft of ease unquestionably shews all the essentials of the bargain—viz., the endur- , the subject, and the rent. As to that part of the draft which refers to the ct possessed by Robertson, I agree with your Lordship that it may be with in either of two ways. When the parties come to adjust the formal , if they are agreed that it shall stand as it does on the face of the draft, it may be so inserted in the formal lease. On the other hand, if it turns that they differ upon that point, the result will simply be to bring it back to position in which the landlord at first proposed to have it—viz., that it should ft to future arrangement. Either view does not effect the present question. thing that was not fixed in the case of Emslie was not less important this about Robertson's possession. The lease was for nineteen years, but it a question between the parties whether there was a break at the end of seven or not; and it was held that the fact of that being an unsettled question not prevent the lease from being a binding lease in whatever way that might be settled. Now, the question here being whether there is a lease the farm called Gateside, I think we have the essentials of the bargain quite r and precise.

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The next point, on which I likewise agree with your Lordship, is that is here such *rei interventus* or such adoption of this draft as to make it bi between the parties. The various things your Lordship has noticed an clearly things which were done in implement of stipulations in the draft The landlord undertook to do a variety of things with reference to the dw house, the hedges, the stone fences, and the drains, and all of these are a ingly done by the landlord. They were done at the sight of Mr Davidso seems to have acted in a twofold character, either of which entitled h bind the landlord. He was clerk to the landlord's agent, Mr Kerr, a became a farmer on the estate; but whether in one or both of these char he was acting for and representing the landlord beyond all doubt. Mr K son, as representing the landlord, authorises all these things in succession done at the landlord's expense. He authorises the operations on the dw house, the cementing the walls, and the cutting round the walls to mak dry, at an expense to the landlord of £11, 15s. 8d.; he authorises the ope upon the hedges, at the landlords expense, which cost £30; he authoris operations on the stone walls at the landlord's expense, which cost £9, a cutting of the drains, which cost £18, 11s. 8d. Now, so far as the la makes that expenditure, it perhaps cannot be called very great, but co every one of these things, and more particularly all of them taken to are the clearest acknowledgment by the landlord that that draft was th —the lease which was to be carried out and acted on. I do not kno in a question of this kind it makes much difference whether all that is d at the expense of the landlord, or, as here, partly at the expense of the la and partly at the expense of the tenant. This is a mutual contract, bind both parties or neither; and the objection as to its not being binding mi well arise on the part of the tenant as on the part of the landlord. If th party is bound the other cannot be free. Most unquestionably if the had been objecting the landlord would have been entitled to say—"I these things at my own expense." The tenant, on the other hand, is enti say—"You did all these things at your expense, in terms of this very h the draft—which you are now objecting to." But when all that is c with this, that the tenant does all the carriages, which, though not ex amount to the cost to the landlord, are unquestionably a substantial expe by the tenant—there is very clearly *rei interventus* on that lease. Furth tenant's expenditure for lime and manure, which is large, considering the the farm and the rent, is an expenditure that no tenant would have made on the faith that there was a lease for a term of years. I suppose the l the first year rather does harm than good; at any rate, it is mainly inten have effect over a considerable period of years, and the manure purchas and above the manure made on the farm, at considerable cost, is likew questionably applied on the footing of a lease for a term of years. It that the tenant made expenditure of the same kind previously. I s little evidence of that. I certainly see no evidence at all that she ev viously made expenditure on lime and manure to the same extent. said she had done it before on a lease from year to year. I do no that would very much affect her, even if it were so. The question w she had a lease from year to year before is of no moment at all in th except as being attempted to be made a ground for depreciating the imp of the subsequent expenditure for lime and manure which she made the present lease. It is only in that way that it becomes of any mon all. But if it were of any moment, I think it rather appears that the p lease was a lease for nineteen years. That is the way in which it is ent the landord's rental for crop 1867—"Conditions of occupancy—holds fo teen years from Martinmas 1849." Now, that might not be sufficient to tute a lease for nineteen years, having been made up by Mr Kerr's exa and not in his lifetime; but I cannot hold that it is not evidence in the q whether Miss Bathie may fairly be held to have understood that she pre had a lease for nineteen years, and therefore in the comparison betwee she expended for lime and manure before and what she did after, I do n

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it could be held that she did it as a tenant from year to year, and I am not fied that if that were so it would make any difference. If she had a lease year to year before, it rather tells the other way if she immediately increases antities of manure and lime beyond what she had previously laid on. view, I think, is rather against the landlord. All the sums of expenditure I have mentioned, made in terms of the lease, are proved, under the hand of avidson, to have been made according to his instructions. There are sums of 15s. expended on the house; £30 for hedges, with the words in Davidson's riting "all in terms of lease;" £12 for walls, "in terms of lease," and £18, d. for drainage "in terms of proposed lease." All these are authenticated by avidson at the time as made in conformity with instructions given by him, his understanding of the provisions of the lease; and although Mr David- rather disposed in his evidence to be in favour of the landlord as far as he he is obliged in his cross-examination to confess that he cannot account for he has written in any other way. Taking it altogether, I think this is one clearest cases of the kind I have met with.

D ARDMILLAN.—I entirely agree in what your Lordships have stated, and only make one remark in addition. I think it very important always to the rule that, in our law, we recognise *rei interventus* as a clear equitable upon any man resiling from an informal transaction. Though there is no nt written lease, nothing can be better settled than that, if there is an al writing such as this, the parties to that writing cannot resile from it if has been *rei interventus*. I think there has been here *rei interventus* very strongest kind. The farm is small, the rent is small, and the s are considerable. The only question is whether these outlays stand to the lease, so as to be clearly done on the faith of it. If done on the of it no man can doubt that the *rei interventus* was enough; and the only ion is, were they done on the faith of it? Now, it is in that view I think that what the landlord did is very important. Both landlord and have done something. The tenant performs certain operations which are unterpart of what the landlord has done, and therefore every step which ndlord took in fulfilment of the provisions of this draft lease is relative to the tenant did, and is a link which binds what the tenant did under the lease as done on the faith of that draft lease. Taking it in that view I not the least doubt that if Miss Bathie, the tenant, wanted to get out of ase, what the landlord did would have been *rei interventus*, and would prevented her from resiling. Now, what the tenant did, as the counter- of what the landlord did, is by the landord's actings so brought into connec- with the draft lease as to be clearly done on the faith of it. I have no t that under these circumstances we must hold this to be a good lease, as ded for.

D JERVISWOODE concurred.

THE COURT adhered to the interlocutor of the Lord Ordinary.

ADAM & SANG, W.S.—G. & J. BINNY, W.S.—Agents.

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Union Bank v. Makin.

R BANK OF SCOTLAND, Pursuers and Respondents.—*Sol.-Gen. Clark—Marshall.*

MAKIN & SONS, Defenders and Appellants.—*Watson—Balfour.*

nt and Principal—Mandate—Bill—Forgery.—A firm of merchants, by a addressed to a bank, granted authority to their manager "to sign, per pro- ion of their firm, all bills, cheques, cash-orders, and other documents neces- to the conducting of our business, and all vouchers so subscribed will be y binding as if signed by any member of our firm." They also delivered r manager a letter of procuration binding themselves to meet all cheques, , drafts, bills, &c., endorsed by the manager, and "to keep the parties

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dealing with you free and skaithless; and we bind ourselves to ratify, l gate, and confirm the actings and doings of you, the manager, in respect cheques," &c. This document was delivered by the manager to th The manager, after forging the names of certain real and fictitious firms tors of bills to bills drawn by himself as procurator of his principals' f counted the bills at the bank, and endorsed them per procuratory, and app the money thus obtained to his own use.

Held that, as it was not proved that the bank had failed to exe caution in discounting any of the bills, or that the signatures thereto w fest forgeries, or presented a suspicious appearance which should have bank on their guard, the firm were liable to the bank for the amount of

1st Division. Sheriff of Lanarkshire. M.

THIS action was raised in the Sheriff-court of Lanarkshire Union Bank of Scotland against Makin & Sons, steel and file whose principal place of business was at Sheffield, and who had or agency at Glasgow under the management of Samuel Watson ster. The conclusions of the action were for payment of £7 4d., contained in seven bills of exchange which had been dis with the bank and endorsed by Dempster per procuratory for fenders. The facts of the case, as brought out in a proof, wer lows :—

On 26th January 1870 the defenders addressed to the pu letter, which was shortly afterwards delivered to the pursuers by ster, in which they said,—"Samuel Watson Dempster, our ma Scotland, has authority to sign, per procuration of our firm, cheques, cash-orders, and other documents necessary to the cond our business, and all vouchers so subscribed will be equally bind signed by any member of our firm."

About the same date the pursuers, at Dempster's request, after inquiries to be made in Sheffield as to the defenders' credit, ope the defenders a discount account and an account current at thei in Canning Street, Calton, Glasgow.

The pursuers, wishing to obtain from the defenders a mor authority to Dempster, prepared through their law-agents a pr or power of attorney on stamped paper, and which, having bee by the pursuers to Dempster for the defenders' signature, was, on 1870, signed by the defenders before witnesses, and was shortly a returned by Dempster to the pursuers, and duly completed in th clause, which bore,—"We, William Makin & Sons, Shef James Marchinton and Benjamin Makin, sole partners of t hereby authorise you, Samuel Watson Dempster, 34 Saint Enoc Glasgow, our general representative and agent in Scotland, to our whole business and affairs in Scotland, to sign for us all d relating to or in connection with our business in Scotland, and we authorise you to sign, per procuration, for us and on our b cheques, orders, and drafts, and to draw, grant, accept, or endor and on our behalf, all bills, promissory-notes, and negotiable do and to discount the same on our credit and responsibility; an gage to meet and honour all such cheques, orders, drafts, bills, sory-notes, and negotiable documents drawn, granted, accepted, or or bearing to be drawn, granted, accepted, or endorsed by you, Samuel Watson Dempster, and to keep the parties dealing with and skaithless: And we bind ourselves to ratify, homologate, firm the actings and doings of you, the said Samuel Watson Dem respect of all such cheques, orders, drafts, bills, promissory-n negotiable documents; for all which powers these presents held full and ample authority: And we declare that the auth

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r hereby granted shall subsist notwithstanding any change in our and until the same be expressly recalled in writing.—In witness eof," &c.

tween the months of January and June 1870 inclusive Dempster ted upon the said accounts, and discounted a number of bills in the ers' branch, which discounts the pursuers allowed on the credit of efenders, and relying on the said letter and procuration. *Inter alia*, pster so discounted the said seven bills purporting to be drawn by efenders upon, and to be accepted by, the parties following, viz.:— for £96, 14s. 7d., by Brigham and Bickerton, machine makers, Ber-, dated 28th March 1870, payable four months after date; (2) for l, by Howie and Young, engineers, Kirkcaldy, dated 19th April 1870, ble four months after date; (3) for £41, by Nevin and Rintoul, hbuilders, Greenock, dated 27th April, 1870, payable three months date; (4) for £44, 10s. 9d., by Robert Russell and Sons, engineers, ake, dated 2d May 1870, payable four months after date; (5) for 5, 10s. 9d., by Caird and Company, shipbuilders, Greenock, dated 16th 1870, and payable four months after date; (6) for £39, 5s. 6d., by s Hatley and Company, contractors, Carstairs, dated 23d May 1870, ble three months after date; (7) for £138, 14s. 9d., by Laing and rin, coachbuilders, Aberdeen, dated dated 1st June 1870, and payable months after date.

mpster signed the said seven bills as drawer and endorser, "p. p." t is, per procuration) of William Makin and Sons, except the one dly above described, which was signed "for Wm. Makin and Sons, f'Pherson" as drawer, and was endorsed by Dempster as above. The atures, purporting to be those of the acceptors of all the said seven , were forged, and the defenders had not at the dates thereof any n against any of these parties.

he pursuers paid to Dempster the proceeds of all the said bills (de-ing bank charges), and the whole or part of the proceeds of the first ere paid into the said current account, and mixed up with the de-rs' other moneys therein. The proceeds of the seventh bill (deduct-harges) having been £137, 2s. 2d., Dempster drew a cheque at the ers' said bank, and purchased therewith, and with £20 drawn from the nt account, a draft on Messrs Glyn and Co., bankers, London, for £150 ng in favour of the defenders, the balance (£6, 19s. 1d.), after deduc-of bank charges, having been paid to him in cash. The said draft for was not transmitted to the defenders, and they did not receive any of the proceeds thereof.

the parties appearing as acceptors of the said bills, Messrs Brigham Bickerton, Howie and Young, Nevin and Rintoul, and Caird and pany, were existing firms, and the three first mentioned had had ess dealings with the defenders; but Messrs Robert Russell and and Messrs James Hatley and Company were non-existent and fic-us.

ll of the said pretended acceptors appeared to be in lines of busi-in which dealings with the defenders might have taken place. pster, when applying for discounts of said bills, gave explanations h satisfied the pursuers' officers that they were genuine and *bona fide* duly accepted by parties indebted to the defenders in the ordinary of their business, and the pursuers discounted all the said bills, ng on Dempster's explanations and on the apparent genuineness of locuments. It was not proved that the pursuers failed to exercise aution in discounting any of the said bills, or that the signatures

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thereto were manifest forgeries, or presented a suspicious ap which should have put the pursuers on their guard.

The pursuers pleaded;—(1) The said Samuel Watson Demps the general and accredited manager, agent, and representative o fenders, and the seven bills or documents above mentioned hav drawn and endorsed by him while acting within the line and sc employment and of the defenders' business, the defenders are lia pursuers in payment of the same. (2) *Separatim*, the said bills ments having been drawn, endorsed, and discounted by the sai Watson Dempster, as acting within the power of procuration upon him by the defenders, the defenders are liable to the pu payment of the same. (3) The said seven bills or document been discounted by the pursuers on the understanding and repr that the same were genuine acceptances of the parties on wh respectively purport to be drawn, and the proceeds thereof hav paid by them to the said Samuel Watson Dempster, as manage presentative foresaid, and the signatures of the drawees on having been discovered not to be genuine, the pursuers are e instant repayment of the sums contained therein, with interest, duction as concluded for in the summons."

The defenders pleaded;—(2) Dempster's authority to bind the in the drawing and endorsing bills cannot be extended beyond of the letter of procuration. (3) The documents in question not b granted in the ordinary course of the defenders' business, or ne the conduct thereof, or for their behoof, Dempster had no au draw or endorse them in the defenders' name, or to discount t they are not bound thereby. (4) The documents in question genuine, Dempster had no authority to put the defenders' nam as drawees or endorsers, nor to discount them on their account a and they are not bound by such his acts. (5) The pursuers ha guilty of negligence in their dealing with said documents, must loss caused by the fraud of Dempster.

A proof was led in the Sheriff-court, which established the fa narrated; and thereafter the Sheriff-substitute (Dickson) pronc interlocutor, which, after detailed findings in fact, "finds that said pretended acceptors appeared to be in lines of business dealings with the defenders might have taken place; that] when applying for discounts of said bills, gave explanations wh fied the pursuers' officers that they were genuine and *bona* duly accepted by parties indebted to the defenders in the ordina their business; and that the pursuers discounted all the said bil on Dempster's explanations, and on the apparent genuinene documents: Finds it not proved that the pursuers failed to ex caution in discounting any of the said bills, or that the signatur were manifest forgeries, or presented a suspicious appearanc should have put the pursuers on their guard: Therefore repel fences: Finds the defenders liable to the pursuers in the amoun said bills, being £736, 16s. 4d. (but under deduction of £4, 4s the proportion of discount libelled on), with interest as libelled:] defenders liable in expenses."

On appeal, the Sheriff (Bell) adhered. The defenders appeale

They argued;—(1) They were not liable, as they had not author agent to commit a fraud, and had not profited by it. They were o for acts done by the agent within the scope of their employment, t was no allegation that they had authorised their agent to com gery. (2) The bank were negligent, and did not make proper in

ıs on whom the bills were drawn. They ought at all events that the parties existed. Where one of two innocent per- iffer the one who has most directly caused the wrong ought

ers argued;—Makin and Sons had given a very wide autho- ns rendered themselves liable for the genuineness of every esented by their agent. There was no negligence on their ey were bound to look at was the endorsation, and that was he transactions were within the apparent scope of Dempster's ıd the defenders represented to the bank that he had autho- them. The question was, to what extent the party dealing ınt was entitled to believe in his authority to bind his prin- object of a general procuration was to avoid the necessity of plying to the principals every time the agent presented a bill

ıg,—

IDENT.—In this case the Union Bank of Scotland sues William ons, steel and file-makers, Sheffield, for payment of the amount of f exchange alleged to have been discounted by the defenders' agent Samuel Dempster, with the Union Bank, at various times between f March and June 1870. The defence set forth is not that Demp- the agent for the defenders, but that he exceeded the powers en- n in the circumstances disclosed on record. The most important to is the nature and extent of the authority given to Dempster. on two different writings, each giving him authority. It is im- ep both of these writings in view in considering the position of One of these is dated in January and the other in May, and some ere in question were discounted before May, so they fall under the nly. This first writing is addressed directly to the Union Bank, much an authority to Dempster as a letter of guarantee to that ns as follows:—"Attercliffe and Clifton Steel Works, Sheffield, , 1870. To the Union Banking Company, Glasgow. Gentlemen, Watson Dempster, our manager in Scotland, whose signature is s authority to sign, per procuration of our firm, all bills, cheques, nd other documents necessary to the conducting of our business, ers so subscribed will be equally binding as if signed by any mem- n. We are, Gentn., yours very respecty. (Signed) Wm. Makin archinton, p.p. Wm. Makin & Sons, S. W. Dempster."

r as the matter of discounting bills of exchange is concerned, that s a very large and important authority. It puts the Union Bank in safe as if they were dealing with a member of the defenders' firm ember authorised to draw and endorse bills of exchange. The is somewhat different, and is a proper procuratory or mandate ad- mpster. By it the defenders authorised him to act (1) as their sentative and agent in Scotland, to manage their whole business and

Dickson, March 15, 1867, *ante*, vol. v. p. 603; M'Lean and Hope ne 14, 1867, *ante*, vol. v. p. 893; M'Lean and Hope v. Fleming, 71, *ante*, vol. ix., House of Lords, p. 38; Grant v. Norway, Feb. Scott, C. B. p. 665; Coleman v. Riches, May 2, 1855, 16 C. B. r. Atherton, April 23, 1861, 30 L. J. (Exch.) 387; Hubbersty v. 6, 1853, 22 L. J. (Exch.) 113; Parsons on Contracts, i. (5th ed.) rstein v. Barber, 2 L. R. (Com. Pleas) 38; Fuller v. Smith, April Carrington and Payne, 197; Lindley on Partnership (2d ed.), ii. oway v. Grant, June 20, 1859, 19 D. 865; Galloway v. Grant, Dec. D. 230.

mm. ii. 611, 5th ed.; Smith's Mercantile Law, 7th ed. p. 124, 8th Willet v. Taylor, 2 Cowper, 817; Addison's Wrongs and their Re- 6, 3d ed.; Story on Agency, sec. 73.

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affairs in Scotland ; then follows the particular power chiefly under cons here, viz. :—to sign per procuration for them and on their behalf all orders, and drafts, and to draw, grant, accept or endorse for them all b missory-notes, and negotiable documents ; and they bind themselves homologate, and confirm all his actings and doings. It is then decl this authority is to subsist notwithstanding any changes in their firm, expressly recalled in writing. It appears to me that this later documen as wide as regards the obligations of the defenders with respect to dra endorsing bills as the earlier one. No partner could have greater pow by this, as by the former writing, the bank is informed that all bills d dorsed, and discounted by Dempster were to be in the same position a drawn, endorsed, and discounted by the firm. But further, in the sec ing there is a peculiar addition, which has been a little lost sight of. do the defenders authorise Dempster to sign such negotiable docum have alluded to, and engage to meet and honour all such documents a but they bind themselves "to ratify, homologate, and confirm" his ac doings in respect of all such negotiable documents. That must me thing more than a mere general authority, because if Dempster wa tended to act under the direction of the defenders' firm, there would b for their undertaking to ratify all his actings and doings. It appears t what is meant by that addition is to make it clear to any one that Makin were bound not to object to any paper signed by Dempster per proc their firm. In this respect it seems to me that it is a peculiarly larg tory and authority.

It is necessary for us now to see what Dempster did. The pursue payment of seven bills in all, signed by him per procuration of the firm, but all of these not quite in the same position. The first is for £96 and is drawn upon Brigham and Bickerton, machine-makers, Berwick cond for £100, on Howie and Young, engineers, Kirkcaldy ; and the thir on Niven and Rintoul, coachbuilders, Greenock ; and the seventh an £138, 14s. 9d. is drawn on Laing and Melvin, coachbuilders, Aberdee these firms were customers of the defenders, and therefore it was na bills should be drawn on them by the defenders' agent.

The fourth bill in the summons for £44, 10s. 9d. bears to be drawn sell and Son, engineers, Carluke, and the sixth for £39, 5s. 6d. be drawn on James Hatley and Company, contractors, Carstairs. No s as these last two are or were in existence. The only remaining bill—t for £276, 10s. 9d., is drawn on Caird and Co., shipbuilders, Greenock. a real firm, but they were not customers of the defenders. Such is t of the drafts which are now before us—four upon customers of the two on fictitious firms, and one on a real firm, who were not customers gards the bills drawn upon real firms—*i.e.*, the four customers and the were not customers—the acceptance on each of these bills was forged b ster ; and with regard to those drawn on the two fictitious firms, the ac in these cases also were in a manner forged—that is, the signatures of tious firms were written by Dempster. All these bills were discounted l ster with the Union Bank, and there was nothing remarkable in what t Some inquiries seem to have been made as to the acceptors and drawe were satisfactorily answered by Dempster, and no suspicions seem to h entertained by the bank officials. One of the bills was in a peculiar because the drawer of it was not Dempster, but a clerk in his office Dempster endorsed and discounted it himself, that kept it from seeming to the bank agent.

The money realised by discounting six of these bills was paid into th account in Dempster's name for the defenders ; and as regards the seventh, it was converted into a draft on London for £150,—the amou bill being £138 odds, and the balance being paid by Dempster out of £ by cheque at the time of getting the draft. In reality no part of the obtained ever came into the hands of the defenders. Dempster ap whole sums to his own uses. Having committed the crime of forgery,

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mbezzlement. The question now arises who is to suffer for the loss -the Union Bank or the defenders?

ıl of authority has been quoted to us, but nothing seems to be law by the recent cases. They do not seem to vary the great general he law of mandate in the civil law. There is and can be no diffi- e principle; the only difficulty is its application in such circum- this case there is no real difficulty in applying it. I inquire merely Dempster did here was done under the authority granted to him by . No doubt, as between mandant and mandatary there was a great gularity and breach of duty, and without doubt the defenders could ing beyond the scope of his authority if the question were between tomers of theirs. It is easy to conceive how Dempster could have the scope of even such wide authority as he had. For example, if the mandate of Makin and Sons, steel and file-makers, Sheffield, he en to deal with parties in cotton, that would be clearly outwith the nted to him, and so he could not have bound his principals. Though, rould be of great importance in a question between the defenders tomers whether Dempster went outside his authority or not, it is ferent in a question with the bank. The question with the bank her he was engaged in carrying through transactions with a view defenders' goods: that was not it. It was what was his authority— rity to sell goods, but his authority to make negotiable documents. of negotiable documents was all the bank was concerned in, and ial department of business; and in conducting that special depart- er was authorised to bind the defenders. It appears to me therefore ıces here are quite irrelevant, and that the bank had nothing on earth ıe question whether the money raised from them was intended to) the defenders' business or not. The only question is, whether l not deal with the bank in that department of business in which lly authorised to deal. I am clearly of opinion he did.

ı concurred.

MILLAN.—I have given to this case the attentive consideration which ortance deserves. We have had an able argument and an ample thorities. Both parties have been deceived and both are innocent, ontending *de damno vitando*. The question therefore in regard to of the loss caused by the dishonesty and forgery of Dempster, the lefenders, is very serious. Such cases must, I fear, be viewed as asionally, and the decision in this case may have a somewhat wide

ned a clear opinion in accordance with the judgment of the Sheriffs, in the exposition of the law given by your Lordship. I shall not ex- il the grounds of my opinion. The agency of Dempster was of the ıost comprehensive character. He was manager in Scotland for the He acted for them, and represented them, and they bound them- ſy and confirm his acts. This very wide power and authority, by fenders accredited Dempster as acting for them and binding them, ıd apart from the special and particular authority to sign per pro- , cheques, cash orders, and other documents in conducting their 'e have here two distinct and ample letters of authority—one ad- ıe bank, the other addressed to Dempster, and handed or communi- bank. These letters could scarcely be more clear or more compre- ıntertain no doubt that the bank, acting in their banking business er as the defenders' manager—discounting the bills and notes, and e drafts of Dempster for the defenders,—were in entire good faith, ıual and natural course of their business. Holding these letters, suspect, and had no reason to suspect, Dempster; and they were ɔinion, under any obligation to make special inquiry in regard to e names were on bills drawn by Dempster. The bank failed in no

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duty, and neglected no precaution incumbent on them. The bills were c by Dempster for Makin and Sons, and the acceptances were forged by They were discounted by the bank. Dempster has been convicted of forg

We have no case here of implied authority. We have very clear and authority expressly conferred. On that authority, given by the defenders t manager, their "general representative and agent in Scotland," the bank entitled to rely.

So far as the bank did know, or could know, the business in the cou which these bills were discounted was the business of the defenders. The nothing here to awaken even a suspicion on the part of the bank. The to deceive and defraud the bank was given to Dempster by the defenders used that power, and deceived and defrauded the bank. Some one must loser by the deceit. He who armed the deceiver with the power of dec ought to suffer rather than he who was deceived. Makin and Sons were c by Dempster, but they of their own accord trusted and authorised Dem The bank only trusted Dempster because Makin and Sons authorised t credited him to the bank. No authority has been produced to shake the principle of equity in respect of which liability for the loss attaches defenders, who gave to Dempster the power and authority under whi acting for the defenders, defrauded the bank.

LORD JERVISWOODE concurred.

THE COURT pronounced this interlocutor:—(After finding ting forth the import of the proof as above given)—"Fin all of the said pretended acceptors appeared to be in li business in which dealings with the defenders might have place; that Dempster, when applying for discounts of said gave explanations which satisfied the pursuers' officers that were genuine and *bona fide* bills duly accepted by parties in to the defenders in the ordinary way of their business, an the pursuers discounted all the said bills, relying on Dem explanations and on the apparent genuineness of the docu Find it not proved that the pursuers failed to exercise due c in discounting any of the said bills, or that the signatures t were manifest forgeries, or presented a suspicious appearance, should have put the pursuers on their guard: Therefore refu appeal, and decern: Find the appellants liable in expenses; an account," &c.

J. & F. ANDERSON, W.S.—J. & R. D. ROSS, W.S.—Agents.

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Mar. 8, 1873.
Macvean v.
Maclean.

DONALD MACVEAN, Pursuer.—*Sol.-Gen. Clark—Fraser.*
ALEXANDER MACLEAN, Defender.—*Millar—Adam.*

Proof—Bill of Exchange—Discharge—Parole.—A proof before allowed to explain documents alleged to instruct discharge of a debt con in two promissory-notes in possession of the creditor in the obligation.

Process—Interlocutor—Proof before Answer.—Observations as to the of the words "before answer."

2D DIVISION.
Ld. Mackenzie.
B.

THIS was an action at the instance of Donald Macvean, ten Sallachan, Ardgour, against his landlord, Mr Alexander Maclean o gour, for payment of £1000, being the sum contained in two promi notes for £500 each, and payable one day after date, granted t defender to the pursuer, and dated 28th March 1868.

The pursuer had been tenant of the farm of Sallachan since Whits 1853, under a lease the natural termination of which was Whits 1872. At the date of this action he held the farm under a lease

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uary 1870, for twenty-one years, at the same rent as under the ease, being £361, 6s. 10d. In 1868 the pursuer lent £1000 to ader, who granted the promissory-notes mentioned above. The admitted the loan, but averred that he had granted to the pur- lease of 20th January 1870 on the same easy terms as the former ly on consideration that this debt should be cancelled. He alleged that the debt was discharged, and explained the pur- ssession of the promissory-notes by producing the following h letter, which he said the pursuer had written to him in answer quest that the promissory-notes should be given up on delivery ase:—

Sallachan, Saturday evening.

Ardgour,—In looking through my papers to-day I find that all ts I have of any consequence are lying in the bank safe, amongst our promissory-notes for £1000; and if you have any doubts of grity, had better keep the lease until I give you a sufficient e that I'll never claim the above. I called up this evening, but t find you.—I have the honour to be your obedient servant,

Maclean, Esq., Ardgour. DOND. MACVEAN."

efender pleaded;—(1) The defender not being indebted in the l for, is entitled to be assoilzied, with expenses. (2) The debt is not due, in respect that the pursuer has received a new lease rm as the consideration for his discharging or cancelling the 3) The sums contained in the notes libelled on having been paid, ier is bound to deliver the same to the defender.

e other hand, the pursuer averred that, although a lease at a it on condition of the debt being cancelled had been proposed, it er been concluded. In April 1869 the defender offered to the a lease at a rent of £300 a-year, provided he would discharge the tained in the promissory-notes. In consequence of this the pur- te to the defender making a formal offer to take the farm on the terms. To this letter the defender replied accepting the offer, as in answer to this last letter that the pursuer wrote the letter Saturday evening," founded on by the defender. No lease, how- s executed upon this offer and acceptance, as the pursuer refused into the transaction further, upon being advised by his law-agents a a lease would not be binding upon the defender's heirs of entail. ary 1870 the defender offered to grant the pursuer a lease of the the old rent of £361, 6s. 10d. for twenty-one years. The pursuer these terms. The lease was extended and executed, and the continued his possession of the farm under this new lease. The paid interest on the £1000 until March 1869, and, as the pur- ged, he excused himself after that date on the ground of pecuniary sment, but admitted the debt after the lease of 1870 was entered n 14th June 1872, however, he wrote to the pursuer stating that gnorant of any claim which the pursuer had against him. In nce of this letter the pursuer raised this action.

efender having died during the dependence of this action, the linary (Mackenzie), on 14th January 1873, pronounced an inter- sisting Alexander Maclean and John Dalrymple Maclean, the 's sons, as accepting trustees in room of the defender. The Lord then pronounced this interlocutor:—"The Lord Ordinary having unsel, before answer allows the parties a proof of their respective ts, and appoints the defenders to take the lead in the proof."

ursuer reclaimed, and argued;—That the interlocutor reclaimed allowed parole proof of the discharge of two promissory-notes,

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granted for value, and in possession of the creditor. That was incompetent, the discharge of the debt being only provable by writ or oath of the pursuer.[1] The words in the letter, "Saturday evening," founded on by the defenders, were ambiguous, and might be explained by parole evidence, but beyond this parole proof was inadmissible.

The defenders argued;—That although parole proof of the discharge of the debt was inadmissible it was quite competent to bring parole evidence to shew what was the bearing of the letters upon the lease, what lease the letter dated "Saturday evening" referred to, and generally to explain the circumstances of the case.[2]

At advising,—

Lord Cowan.—There is considerable delicacy in the question as to the extent and mode of proof to be allowed in this case; but on the whole, I think, the Lord Ordinary's interlocutor should be adhered to. Generally speaking, questions regarding the discharge of a loan which is constituted by writ can only be determined by writ or oath. But there have been a great variety of cases, most of them referred to in Haldane v. Speirs, all to the effect that where there is writing left with the alleged creditor shewing that money has been paid by him to the alleged debtor, then, in order to explain the circumstances under which it was paid, and the effect of the payment, as implying an obligation to repay, parole proof is admissible. The peculiarity of Haldane's case, where parole proof was disallowed, lay in this, that the writing founded on was the mere endorsation of a bank cheque, which the majority of the Court viewed as quite insufficient for the purpose. I do not know any good reason why the same principle may not apply as much to the extinction as to the constitution of loan of money. Here we have a letter which recognises, under the pursuer's hand that in certain circumstances the lease was not to be delivered until the promissory-notes sued on were given up. But its terms do not shew that the lease referred to is that on which the pursuer did obtain delivery, and under which he is in possession of the farm. Further, there are undoubtedly circumstances and statements in the other letters, even on the pursuer's own shewing, which, in one view of the case, draw very nigh a case of fraud. For instance, the pursuer's statement in his letter as to the documents being in the custody of the bank has an awkward appearance, and requires to be cleared up. And, on the whole matter, I think the surrounding circumstances must be inquired into, in order to explain the transactions between these parties in their relation to the promissory-notes sued on. It has been said that we must confine the parole proof to the date of this letter, but I think the proof should not be so limited. Much that may be valuable and necessary for the justice of the case, even as regards the pursuer's position, might be excluded if we did not allow a parole proof referring to the whole circumstances, and particularly the whole correspondence. Having regard to the very special case before us, we are not departing from any legal principle as to evidence in questions of loan by thus admitting parole proof to clear up the uncertainty in which the documents here leave us. The words "before answer" are sufficient to protect the pursuer from any danger on the score of irrelevancy.

Lord Benholme.—It occurs to me that the date of the letter which Lord Cowan has read, and which is only dated "Saturday evening," may be all that is necessary for the elucidation of this matter. For if the date of that letter is proved, then we may be able to conclude with certainty whether it refers to a proposed lease which was never completed, or to the lease under which the pursuer now holds his farm. I doubt whether there should be any parole proof except what is necessary to shew the effect of the written documents; and if it appears from the date of this letter that its contents refer to the one or to the

[1] Haldane v. Speirs, May 1872, *ante*, vol. x. 557.
[2] Fraser v. Fraser, Feb. 9, 1871, *ante*, vol. ix. 497.

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of these leases I do not think that parole proof beyond that need be ed.

hile I throw out these doubts as to the course proposed I am not prepared sent.

RD NEAVES.—I concur in the opinion delivered by your Lordships, but I s I should prefer to see the interlocutor pronounced without the intro- on of the words "before answer," which mean, in my understanding, re answer as to the relevancy." I cannot see any justification for the prac- f allowing a proof "before answer as to the competency." If it is incom- t, the incompetency should be decided now. I am of opinion that the proof ed is competent, and should be allowed, but I would rather that these s were left out of the interlocutor, as the facts alleged seem clearly to be ant.

dmit the general doctrine that the discharge of an obligation constituted by ng can only be proved by writ or oath. But then the question must be d at with reference to the whole circumstances of each case. Here there is d deal of writing; but the fault is not on one side, but on both sides, that ritings require explanation. The question is, whether the bills in question withdrawn or held as cancelled in consideration of a new lease being granted e same terms as the old lease. Now, looking at the written evidence which ave with a view to determine this, we find the letter written by the pursuer referred to in the defender's condescendence. It cannot be read without nation. Its date even is wanting, and its terms are of doubtful import. It goes to prove that in a certain event the pursuer was not to claim the amount e bills. What that event was exactly, and whether it has occurred, we t tell from the documents. We must therefore get this document explained, s manifest defects supplied by parole evidence. I see no incompetency in

But there is not only this one letter, there is all the correspondence en the parties, which more or less requires explanation from the surround- ircumstances, and that even if we set aside the somewhat disingenuous light ich part of it appears, when we look at it from the defender's point of view. nclusion, I do not think that in allowing this proof we impugn the general f law. We have plenty of written testimony here; all that is required is planation of its meaning and effect.

RD JUSTICE-CLERK.—I sympathise with Lord Benholme in the doubts which as expressed, and will make one or two observations upon the position of case.

e pursuer Macvean holds two promissory-notes, which are documents of , and the defenders say that the debt is discharged. Now, if it is proposed ove the discharge by parole I think that incompetent. But there are many nds upon which, in a case of this sort, proof may be allowed before answer; example, if there is suspicion of fraud, or if the documentary writings ire explanation.

does not follow that, when a proof before answer is allowed in such a case, lecide anything on the competency of the evidence which may be adduced, hich we cannot judge at this stage. I therefore differ from Lord Neaves as ese words "before answer," and object to their being omitted in this case. llow the parties a proof of their averments without the insertion of the words fore answer" would simply be to allow them to prove discharge of this debt arole testimony. The use of the words "before answer" is just to guard nst this result. I interpret the words to mean, not before answer only as to relevancy, but also before answer as to the competency; and so far from their ing crept into our practice through inadvertency I do not recollect a case re parole proof regarding a privileged document has been allowed without rting them in the interlocutor allowing proof.

ow, in regard to the proof which is to be allowed, I have no doubt that it mpetent to lead such evidence as is necessary to shew the effect of the ings. It is also competent to supply omissions in the documentary evidence

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by parole proof,—for example, to prove the date of the letter, which is only "Saturday evening." Then again, prior correspondence is a matter which have an important bearing as to the discharge, not as proving it, but as thr light upon the written documents.

I am therefore of opinion that we should adhere to the interlocutor c Lord Ordinary.

THE COURT pronounced this interlocutor:—"Refuse the note, adhere to the interlocutor complained of: Reserve the consi tion of the question of expenses: Allow the parties a proof of respective averments, and appoint the same to be taken by Neaves," &c.

MURRAY, BEITH, & MURRAY, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agent

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(In Multiplepoinding Scott v. Sceales.)

JAMES A. MOLLESON (Mackay's Trustee), Claimant.—*Sol.-Gen. Cla —Trayner.*

THOMAS CHALLIS AND OTHERS (Trustees for the General Fire and Assurance Company), Claimants.—*Watson—Strachan.*

Bankruptcy—Fraud—Right in Security—Assignation—Discharge.—A discharged bankrupt obtained a loan from an English assurance company, out of the sum lent, paid a former debt due by him to a Scotch assurance pany, but not having been made aware of the fact of the bankruptcy, in of getting an assignation of the securities held by the Scotch assurance comp obtained a discharge of the debt, and took from the bankrupt a new bon assignation in security over the rights disburdened by the discharge. *He* a competition between the trustee on the bankrupt estate and the second cre for a sum of money over which the assignation extended, that on groun equity the trustee could not be allowed to benefit by the fraud of the bank in concealing from the second creditor the fact of his bankruptcy.

2D DIVISION. Lord Shand. I.

IN an action of multiplepoinding, Scott v. Sceales, the Court, on July 1865, ranked and preferred the claimant, Miss Euphemia Rit to the sum of £500, with interest from Martinmas 1860. In July Miss Ritchie married Mr John Mackay.

Mr and Mrs Mackay, in April 1868, borrowed a sum of £500 from City of Glasgow Life Assurance Company, and on the 27th of that m granted a bond and assignation in security, by which, after acknowl ing receipt of the amount of the loan, and binding themselves for re ment, in the terms in which such obligations are usually granted married persons, they assigned in security of repayment the benef right and interest of every description of Mrs Mackay, and of her husband through her, in the trust-estate and effects of the late And Sceales, being a liferent right in a sum of £3000, held exclusive of *jus mariti* of her husband, and her right to the said sum of £500, which her husband's *jus mariti* extended. A policy of insurance effe on the wife's life was also assigned.

In November 1869 the estates of Mr Mackay were sequestrated u the bankrupt statutes, and the claimant, Mr Molleson, C.A., was ele and confirmed trustee in the sequestration.

The security in favour of the City of Glasgow Assurance Comp continued to subsist until 23d June 1871. On that date a sum of £ was advanced by the claimants, the General Life and Fire Assur Company, £500 of which was applied in paying off the loan by the of Glasgow Company, and the balance paid to Mr and Mrs Mackay.

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aking an assignation to the subsisting security, the claimants, al Assurance Company, who were in ignorance of the fact that vas an undischarged bankrupt, obtained a discharge of the y the City of Glasgow Company, and a new bond and assigna- :urity by Mr and Mrs Mackay, in their own favour, for the full 700, and by this deed the right to the sum of £500, the liferent the policy of insurance were assigned in security of the personal s by the granters for repayment of the money, in the same hese rights had been assigned to the City of Glasgow Company. it obligation the rate of interest was five, in the second, six per

state of the facts, Mr Molleson, the trustee on Mr Mackay's ne forward and asked decree in his favour for the sum of £500 ntioned, with the interest which had accrued on it.
rd Ordinary, on 27th January 1873, pronounced this interlocu- epels the claim of the said James Alexander Molleson, and prefers the said Thomas Challis and others, trustees of the said Fire and Life Assurance Company, as representing the said Ritchie, now Mackay, and John Mackay, her husband, for his o the said sum of £500, and interest thereon, to which the said Ritchie, now Mackay, was ranked and preferred by the pre- erlocutor of 20th July 1865," &c. *

E.— . . . The argument for the trustee in support of his claim this, that at the date of the sequestration Mr Mackay's right through the sum of £500 became vested in the trustee in his sequestration of his creditors, subject only to the burden of the assignation in hich had been granted to the City of Glasgow Company, and that this security subsisted to the exclusion of any benefit or advantage to rs down to 23d June 1871, yet, on that date, by the discharge of the anted by that company, the only burden which affected the right was ed, while an absolute right to the money remained in the trustee. It ned that the new assignation in security then granted in favour of the mants, the General Assurance Company, is ineffectual, because, Mr aving been divested of his estates, had no power thereafter to grant a nation to the sum of £500.
ther claimants, the General Assurance Company, maintain that, by ction entered into by them, as now explained, and the relative deeds, acquired right to the money, and that the trustee in the sequestration ctually found upon that transaction as having enlarged the bankrupt's division among his creditors. The Lord Ordinary is of opinion that nce company are right in their contention. It may be assumed that kay, from funds to which he had acquired right by succession or other- ren which he had borrowed without coming under an obligation to give r the benefit of the subsisting security in favour of the City of Glasgow , had paid off the loan to that company and taken a discharge of it, ome days thereafter borrowed the amount which he obtained from the ssurance Company, any assignation of the fund now in dispute would worthless, because the absolute right to the fund, discharged of the hich had subsisted over it, would in the interval have vested in the the sequestration.
the case which has occurred, and in fact raised the present question, opinion of the Lord Ordinary, essentially different from this.
creation of the new loan took place simultaneously with the settlement former lenders. The claimants, the General Assurance Company, in otiations with Mr and Mrs Mackay, agreed to lend the sum of £700 condition that the money advanced by them should, to the extent , be applied in payment of the debt to the City of Glasgow Company

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The trustee on the sequestrated estate reclaimed.

Argued for him;—(1) The radical right to the sum was in the trustee subject to the burden which affected it at the date of the sequestration which burden was now discharged. The General Assurance Company's alleged right arose under the assignation granted by the bankrupt, who at the time of granting it, had nothing to assign. It was impossible for the insurance company to make up a title. (2) It could not be said that the transaction was in reality a transference of the old debt and security for the sum was increased and also the rate of interest. (3) As regards equity, that was called into play only where a claimant got more than he had a true title to. When loss arose through one's own fault, *non intelligitur damnum subire*, and that rule applied here, for bankruptcy was a public fact of which everyone must be held to be aware. Further, if the company lost the £500 a benefit accrued to the creditors, and no real loss would be suffered by the company, which would still be amply protected by the other securities it held.

Argued for the assurance company;—The new debt and obligation was

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with a view to their own security, and that they should get the benefit of the securities which that company held. In virtue of this agreement it is not disputed that, on paying the debt due to the City of Glasgow Company, they were entitled to the benefit of the securities which that company held. If they had thought fit they might have taken an assignation to these securities, in which case the trustee could have had no possible claim; but it is said that by the form in which they carried through the transaction, taking a discharge of the old security, the trustee's right has emerged. The Lord Ordinary cannot adopt the view that the form of the transaction, rather than its substance, is to determine the rights of the parties, or hold that, because the new lender, through ignorance or want of care, completed the transaction in the particular way in which he did, when an assignation would have secured him, the trustee, who had no personal concern with the transaction, is to reap the large benefit claimed to the detriment of the creditors advancing the money. The case is not like that of a creditor who has, *per incuriam*, failed to complete a security by registration or otherwise before bankruptcy. In such a case, the trustee founds merely on the omission of the creditor to do an act necessary to complete his own right, while here the trustee further claims the entire benefit of a payment made by the creditor with his own funds.

"Accordingly, even in the form in which the transaction was carried through the Lord Ordinary is of opinion that the trustee's claim is excluded. It is not said that in the transaction the bankrupt, Mr Mackay, intervened in any way. On the contrary, the claimants, the General Assurance Company, with their own funds, paid the City of Glasgow Company directly, and took the discharge for them, with which they have never parted, but which they obtained as the writ or voucher for the payment, and still hold. Having made this payment the balance of the loan only was handed over to the borrowers, Mr and Mrs Mackay. This state of the facts is not disputed, but if any question on the subject had arisen it would have been competent to ascertain the actual circumstances by proof *prout de jure*—See Fairbairn, 6 Macph. 640.

"Can the trustee, in the circumstances now stated, plead on the discharge conferring a benefit on him? The Lord Ordinary is of opinion that he cannot. The new transaction was conditional on the creditor getting the benefit of the old security. The discharge was not delivered to the bankrupt, and, if seven days had elapsed after the date of the discharge, and before the completion of the transaction, Mr Mackay could not, in the meantime, have insisted on delivery of the discharge, or taken the benefit of it to the effect of obtaining payment of the money from Mr Sceales' trust. He was equally precluded from taking such benefit when the transaction was completed, and the Lord Ordinary is of opinion that, in the circumstances, the trustee is in no better a position."

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rrogatum for the old. So far as regarded the £500, the transaction s really an assignation, though in form a discharge. The radical right a trustee was different from the right of a creditor having a postponed urity; for the estate of the bankrupt went to the trustee subject to all equities to which it was subject in the hands of the bankrupt. On principle of recompense or restitution the bankrupt estate should not allowed to be enriched by the fraud of the bankrupt, or by an act of company which was not intended to effect a donation.[1]

The assurance company abandoned the claim to the interest of the £500 arded to them by the Lord Ordinary.

At advising,—

LORD JUSTICE-CLERK.—In this case the Lord Ordinary has found the General and Life Assurance Company entitled to the sum of £500 which Mr Mac-, as in right of his wife, receives under this process, notwithstanding that the d and assignation in security granted by them was legally discharged. The ition of matters is peculiar. That Mr Mackay, the bankrupt, was entitled *mariti* to the £500 which comes to his wife under the will of the late Mrs ales is not disputed. That sum was not yet payable, but was still in expec-y. Mrs Mackay was also entitled to a liferent of a sum of £3000, secluding husband's *jus mariti*, of which £1000 was burdened by another liferent. hing to raise money, the husband and wife agreed to borrow from the City Glasgow Life Assurance Company a sum of £500, and they assigned in secu-their beneficial rights under Mr and Mrs Sceales's trust-disposition and settle-t. At that time Mr Mackay was solvent. He became bankrupt in 1869, subsequent to that it occurred to him that he could get a further advance of y on the securities already assigned. He accordingly applied to an English , the General Fire and Life Assurance Company, but did not disclose the of his bankruptcy. The mode in which the transaction was carried out was :—The General Fire and Life office paid directly to the City of Glasgow the sum of £500, and the bond and assignation in security originally ed to the latter by Mr and Mrs Mackay was *simpliciter* discharged. The eral Fire and Life Assurance Company further made an additional advance 300 to the husband and wife, and took from them a bond and assignation 700 in the same terms as the previous one for £500 to the other office. , the £500 to which the husband was entitled under the Sceales's settle-has become payable in this process of multiplepoinding, and the trustee in ruptcy of Mr Mackay claims it on the ground that the original bond and nation has been discharged, and that Mr Mackay had no power again to it, he, the trustee, immediately acquiring right to it on the discharge. Lord Ordinary has found that the trustee is not entitled to it, on the ground the new loan took place simultaneously with the settlement with the former ns, and that the new transaction was conditional on the creditor getting the fit of the old security. Now, without saying whether I am disposed to with that ground of judgment or not, I am clearly of opinion that the ee cannot take advantage of the discharge obtained by the bankrupt by s of his own fraud, for it is quite clear that the English office, if it had en the true state of Mackay's affairs, would never have entered into this saction. It is equally clear that the bankrupt could not maintain that his e was to be increased to his creditors by liberating his own funds in this ner from the joint debt, and throwing the whole on his wife's funds. This lation of the General Fire and Life Assurance Company is one directed to equitable jurisdiction of this Court, and entitles us to look at this matter all sides. Now, that being the case, it has appeared to us that there are points to be considered than the one which occupied the attention of the Lord

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Stair i. 8, 6, 7; Erskine, iii. 1, 11; Gordon v. Sutherland, 1731, M. 11,534; , 1751, M. 15,394; Eliot v. Cleghorn, August 27, 1839, Maclean and 1033; Stainton v. Dawson, Jan. 17, 1868, *ante*, vol. vi. 240.

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Ordinary. A most important one is, what are the claims which can with propri be sustained at the instance of the English company against this sum of £500? T security they hold is one for more than £500, and so far as it is for a new de and in excess of the original £500, the trustee has no need to consider it. T bankrupt could not bind himself in a new debt so as to interfere with the rig of his creditors, and of the trustee as representing them. If the company rec £500, the whole original debt will be thereby extinguished. But then the qu tion arises, how much is to be paid by the husband's estate, and how much the wife's? The security granted from first to last was a catholic security o the beneficial interest of both husband and wife under this settlement. If, th the English company are to retain the security over the wife's separate estat meet the balance due to them, they may be bound to allocate the whole d over the two estates in some rateable proportion. For if these two estates co-obligants it would be manifestly unjust to throw the burden of payment the husband's to the full extent that it will carry. On the other hand, husband's estate may be the principal debtor, the wife's only cautioner. H then, matters are to be decided is yet to be cleared up. We are entitled bound, before finally disposing of the case, to see that the rights of all pa are fully protected. We require, therefore, further argument on this branc the case, and I think that the wife has a very material interest to be he Whether or not she should be represented at the bar we leave in the meant for the parties to consider.

Lord Cowan.—The fund in competition in this multiplepoinding is a sm £500, with interest at 4 per cent from Martinmas 1860, amounting now to wards of £740.

The competitors are—1st, the trustee on the sequestrated estate of John kay, to whom the legacy *jure mariti* belonged, as in right of his wife, his se tration having occurred in November 1869; and 2d, the trustees of the Ge Assurance Company, who claim the fund as assigned to them by Mr Macka June 1871, in security of a loan of £700 then made to these parties by the company. At the date of this loan there subsisted an assignation to the fund in favour of the City of Glasgow Assurance Company, in security to of the sum of £500 borrowed by Mr Mackay in April 1868 before his se tration. At the date of the transaction with the second company Mackay an undischarged bankrupt,—a fact which he did not make known to them he effected the loan for £700; and accordingly, while they stipulated fo obtained a discharge for the loan of £500, in security of which the City of gow Company held an assignation to the fund *in medio*, they took a new as tion from Mackay to this fund in security of their then loan for £700. however, the fund, subject to the burden of the security held by the C Glasgow Assurance Company, had passed to the trustee in Mackay's seque tion in 1869, the bankrupt had no right or power to deal with the fund in l and hence, on the documents founded on by the General Assurance Compa they stand, they have no legal claim to the fund in competition with the tr to whom the fund had passed subject to the security held by the City of gow Company. That security having been discharged in 1871 the right o creditors to the fund had become absolute by the extinction of the only sec by which it was burdened at the date of the sequestration. It is, therefor grounds of equity alone that the General Assurance Company can maintain claim to the fund, and their contention is, that having entered into the tra tion and carried it through in ignorance of the sequestration, and of Mackay b an undischarged bankrupt, and through the concealment of that fact by they are entitled to be dealt with in this competition on the same footing instead of taking a deed of discharge from the City of Glasgow Company, had obtained an assignation to the debt of £500 and the securities for pa ment thereof held by that company.

I am of opinion that, on principles of equity, the General Assurance Comp are entitled to the redress which they claim, subject to the condition afte plained. Had the company been aware of the position in which Mackay s

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the time they never would have allowed the transaction with him to have assumed the form which it did, the effect of which was to make the security on which they calculated in lending the £700 useless and effete so far as the fund *in medio* was concerned, and to leave the fund, unburdened by the money which was advanced to pay the loan to the City of Glasgow Company, to be claimed by the creditors. The concealment or fraud practised on the General Assurance Company by the bankrupt alone led to the form which the transaction in 1871 assumed, under which, instead of an assignation from the City of Glasgow Company of their security when the loan of £500 was paid, a deed of discharge was taken in them, by which means alone the inequitable position in which the parties are relatively placed has been effected. Equity forbids that such a result should be allowed to stand. The trustee and creditors cannot be allowed to be benefited by the fraudulent conduct of the bankrupt. In so far as the General Assurance Company have suffered loss, and the creditors of the sequestrated estate got benefit by the transaction as it stands, the Court are entitled and bound to give restitution or redress.

While I am of the opinion now expressed, I am not satisfied that the Lord Ordinary has fully appreciated and properly applied the equitable principle now explained. He has decerned for payment of the fund to the General Assurance Company in absolute and unconditional terms, without adverting to the fact that the General Assurance Company, and also the City of Glasgow Company, hold other securities for payment of their respective loans, in addition to the assignation of the fund *in medio*—1st, an assignation by Mrs Mackay of her present interest in the sum of £3000, subject to the deduction therein stated, to which she was entitled under the settlement of Mrs Sceales, free of her husband's *jus mariti* or right of administration; and 2d, policy of insurance effected on Mrs Mackay's life, the premiums on which, if not paid by her, the company are entitled to pay to themselves, charging the same in accounting with Mrs Mackay for their intromissions with her liferent interest in said sum. There are thus two securities besides the policy of insurance held by the assurance companies for their respective loans, and the question is, how, on equitable principles, the respective rights of the two competitors should be adjusted. On the one hand, it does not seem consistent with sound principle that the assurance company should be at once preferred, as it is by the interlocutor, to the whole fund *in medio*, to the entire defeat of the claim advanced by the trustee under the sequestration; and, on the other hand, the creditors cannot be preferred to the fund, which has been liberated through inadvertence, the effect of which admits of being redressed, free of the security with which the fund was burdened at the date of the sequestration. There must be an equalisation effected of the burden attaching to each of the two securities held by the company. At least this is a matter requiring consideration, and to which the argument of the parties was not addressed, and probably this part of the case may require further discussion.

LORD BENHOLME concurred.

LORD NEAVES.—I concur in the result which is proposed, and I adopt so far the view to which the Lord Ordinary has given effect. The Glasgow company held a security which was preferable to the right of the trustee. The London company advanced money which went to pay that debt. No doubt a discharge of that debt passed between the Glasgow company and Mackay, and had the apparent effect of extinguishing the claim against him. It is alleged that the effect of the discharge is to enable the trustee to come forward and say that he is the radical owner of the money, which is now disburdened of the only burden under which it was affected, and that consequently it is his property. That is not a very equitable view. It involves the idea that the London company made restitution of that sum of £500 to the creditors. On the other hand, the second company was not content to take over the original debt, but took a new assignation for a larger sum, in a way which looks very like a novation of the whole matter. That is the point on which I feel some difficulty; but it does not prevent

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me from acquiescing in the view of your Lordship. The Lord Ordinary is wrong however, on one point, for what the London company holds is a security, and is not entitled to immediate payment of the sum over which the security extends. Further, it is to be remembered that this is a catholic security partly over the £500 which belonged to the husband and partly over the wife's liferent interest in the £3000, and the question comes to be whether, as regards the debt of £5[illegible] it is to be paid out of the husband's estate, and the wife's separate estate is to be liberated altogether. Before determining this question, the wife must be heard for her interest. She already appears, for this discussion occurs in a multiplepoinding to which she was called; and all that requires to be done is to give her notice that her original claim in the action is said to be affected in this way.

The case was afterwards settled, the trustee on the sequestrated estate and the General Life and Fire Assurance Company agreeing to a division of the £500 found due to Mrs Mackay in the multiplepoinding, over which the *jus mariti* of her husband extended, and a concerted interlocutor embodying this arrangement was pronounced.

J. C. IRONS, S.S.C.—J. S. MACK, S.S.C.—Agents.

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Mar. 11, 1873. Trevelyan v. Trevelyan.

HARRINGTON ASTLEY TREVELYAN, Pursuer.—*Watson—Kinnear.*
MRS ELIZABETH LETHBRIDGE TREVELYAN, Defender.—*Sol.-Gen. Clark—Gloag.*

Parent and Child—Legitim—Discharge—Marriage-Contract—Provisions—Foreign.—In an action for legitim brought by the only child of a domiciled Scotsman against the executrix of his father, the defender alleged that the pursuer's claim was excluded by an antenuptial marriage-contract executed by the parents when domiciled in England, averring that by this deed two sums of £[illegible] and £6000 were conveyed by the spouses respectively in trust for behoof of the children of the marriage, and that, according to the law of England, the provisions made in the marriage-contract in favour of the issue of the marriage operated as a full discharge of all legal and other claims which the issue so provided for could prefer against the succession of their parents, or in respect of the death of either of them, and that the pursuer had accepted of these provisions, and in so doing had discharged all other claims against his father's estate. *Held* that the defender's averments in regard to the terms of the marriage-contract and its effect by the law of England were not relevant averments of such a deed as the law of Scotland would exclude a claim for legitim.

Parent and Child—Collatio inter liberos.—Advances made by a father to a child cannot be imputed to account of legitim, except in a question with other children entitled to legitim.

2D DIVISION. Lord Mure. I.

THIS action was brought by Colonel Trevelyan, only child of the deceased Lieutenant-General Willoughby Trevelyan, against Mrs Trevelyan his father's widow and executrix, for payment of legitim. General Trevelyan, who died on 3d July 1871, was twice married, first to the pursuer's mother, Anne Mary Astley; and secondly, to the defender. At the time of his first marriage General Trevelyan was domiciled in England, and at the time of his death he was domiciled in Scotland.

The defender averred,—(Stat. 1.) "By antenuptial contract or indenture of marriage in the English style, entered into in England on 24th December 1830, between the pursuer's father and mother, the former conveyed the sum of £5000, and the latter the sum of £6167, 3s. consols to certain persons therein designated, in trust for behoof of the children of their marriage, on the death of the survivor of them. Of this marriage the pursuer is the only child, and at the death of his father on 3d July 1871 the funds settled as aforesaid became payable to and have been

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ived by him. At the time of their marriage the father and mother the pursuer both had their domicile in England." (Stat. 2.) "According the law of England the provisions made in the foresaid marriage-con- or indenture in favour of the issue of the marriage operated as a discharge of all legal or other claims which the issue so provided for d prefer against the succession of their parents, or in respect of the h of either of them. The pursuer has accepted of these provisions, by so doing has discharged all other claims against the estate or suc- ion of his deceased father."

he defender pleaded;—(3) The pursuer's claim to succeed to part of the veable estate of his father falls to be determined by English law, and rding to the just construction of the marriage indenture of 1830, and whole claims in the present action being thereby excluded, the nder is entitled to absolvitor. (4) The pursuer's claim of legitim was ded in respect of the marriage indenture of his parents and of his er's deed of settlement in 1871, and of his having been forisfamiliated provided for in lieu of legitim before his father had acquired a Scotch icile, or on one or more of these grounds. (5) *Esto* the pursuer is itled to legitim, his claim is satisfied to the extent of the outlay and nces on his behalf by General Trevelyan, and his claim of interest is sive.

he Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary ing heard parties' procurators, and considered the closed record and actions, 1st, Finds it admitted that the pursuer's father, the late ral Trevelyan, was a domiciled Scotsman at the time of his death, that, by the will or deed of settlement executed by him in January , he did not make any provision in favour of the pursuer: 2d, Finds ese circumstances in point of law (1) that the pursuer, as the only d of his father, is entitled to legitim out of the free moveable estate which his father died possessed; (2) that the pursuer is not barred claiming legitim by the terms of the contract of marriage entered between his father and mother in 1830; and (3) that, in a question the defender, the pursuer is not bound to collate, or impute in satis- ion of his legitim, the provisions in his favour contained in that mar- e-contract, or any outlay or advances made to him by his father of nature set forth in the defender's statement of facts: Therefore to extent repels the defences, and appoints the case to be put to the that an account may be taken of the amount of the free moveable te of General Trevelyan at the time of his death, and reserves in the ntime all questions of expenses."*

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* "NOTE.—As the late General Trevelyan was a domiciled Scotsman at the od of his death the main questions here raised must, it is thought, be dis- d of according to the law of Scotland, in compliance with the well-established that all questions of succession to moveable estate are regulated by the law e domicile of the party whose succession is in question.

Now, it is not alleged that there has been, in the present case, any express ten discharge of his legitim by the pursuer; and the Lord Ordinary did not erstand it to be contended, on the part of the defender, that, if the question e pursuer's right to legitim had turned upon the terms of the will executed General Trevelyan in 1871, there would have been any good grounds in law sisting the pursuer's claim. Neither did the Lord Ordinary understand it to ntended, and he does not think that there are any grounds for holding, that has been, in the circumstances of this case, any such forisfamiliation of the er, in the sense in which the term is used in the law of Scotland, as was ated to operate a discharge of the pursuer's right to legitim—Ersk., iii., 9,

But it was maintained—(1) that the claim now made was excluded, in

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The defender reclaimed, and argued;—The claim of legitim was barred by the English contract of marriage. By the English law—according to which the marriage-contract must be construed [1]—that deed operated a full discharge of all claims which the children could otherwise have preferred against the succession of their parents. That being so the claim of legitim was excluded, for legitim was a claim which might be discharged by the parent, so long as the right to discharge was not so used as

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respect of the provisions of the marriage-contract entered into between the pursuer's father and mother in 1830, which ought, it was said, to be construed the law of England; and (2) that assuming the pursuer to be entitled to legitim the claim has been satisfied, and is excluded to the extent of the advances alleged to have been made by his father on his behalf in the purchase of commissions in the army, and towards payment of his debts.

"1st, The marriage-contract or indenture, on which the first of these pleas rested, was not in process when the case was debated. It has, however, since then been produced; but after examining its provisions the Lord Ordinary has been unable to find any of them which can be held to import a discharge of the pursuer's claim, or of any other legal rights which might accrue to him as one of the children of the marriage. The case must therefore, it is thought, be ruled by the decisions in the cases of Lord Chandos, 16th August 1836 (15 and M'L., p. 377), and Keith's Trustees, 17th July 1857, 19 D. 1040, the latter of which seems to be more specially in point. Because, while the deed was an English contract, executed between parties resident in England, where it was alleged that Lord Keith was domiciled at the time, the Court do not seem to have considered it necessary to direct any inquiry as to the domicile; thereby implying that, in such a case, they did not consider the ascertainment of the question of domicile at the date of the execution of the contract to be essential for the disposal of the case.

"2d, With reference, again, to the sums sought to be charged against the pursuer in name of outlay or advances for commissions and to pay debts, it appears to the Lord Ordinary to have been settled in the case of Nisbet's Trustees, 1st March 1868, following that of M'Dougall, 31st January 1804 (M. App. Bankrupt, No. 21), that such advances cannot be claimed as debts, except where an obligation for payment has been taken at the time, and the advances have thus been constituted and kept up as debts, which is not here alleged to have been done. While therefore claims of that description were allowed as against the eldest son in Nisbet's case, they were allowed not as sums claimable in name of debts, but on the footing that they were advances, which, in a question with *liberos*, required to be collated in settling the legitim. The doctrine of collation among children, however, has no application here, as the question is raised not with children, but with a widow under a general settlement, with whom it appears to be settled that a child cannot be called on to collate—Stair, iii, 8, 46; Ersk. Principles, iii., 9, 10; Keith's Trustees, *ut supra*.

"In the view which the Lord Ordinary thus takes of the law applicable to the case he has seen no sufficient reason for allowing the defender a proof as to the meaning and effect of the marriage-contract of 1830 according to the law of England; because it is not alleged that the marriage-contract contains words of technical import in the law or practice of England which can only be construed by those who are conversant with English law. It is for this Court therefore to put its own construction on the deed, as was done in the case of Thomson's Trustees, 18th December 1851, 14 D. 217, as well as in the cases of Lord Chandos and Keith's Trustees. And as the advances made to the pursuer by his father are not of a description which can, in the opinion of the Lord Ordinary, be imputed in satisfaction of the pursuer's claim, he has not deemed it necessary to allow the defender a proof as to the amount of those advances before disposing of the case."

[1] Story's Conflict of Laws, sec. 276.

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re the child portionless.[1] The child took legitim not as heir but as litor,[2] and if provision was made for the child to come in place of tim the debt was discharged. So the meaning of the English deed g that the whole provision of the children of the marriage was to ast of the provisions therein contained, goodwill excepted, the child id not claim legitim, for the parent had by that deed exercised the ht which the law of Scotland recognised, of making a provision for his ldren which was to come in the place of, and discharge the claim for, tim.

Argued for the pursuer;—As the marriage-contract was clear and unbiguous there was no need to go to the English law, but the case must decided entirely according to the law of Scotland; for the question at ue was whether the Scotch right of legitim had been discharged, and it s for the law of Scotland to say what constituted a valid discharge of t right. By the law of Scotland the claim for legitim could only be ed by express discharge,[3] and there was here no averment of such discge, but only the allegation that according to the law of England a tain deed implied a discharge of all claim against the succession of the ant. Now, legitim could not be discharged by implication, but only 'express discharge, and therefore the claim of the pursuer was well aded.

At advising,—

LORD JUSTICE-CLERK.—The two questions which have been raised in this case , first, whether the marriage-settlement executed between General Trevelyan . his first wife excludes the claim of the pursuer for legitim; and, secondly, ther the advances set out in the condescendence are to be taken as deducs or payments to account of the claim.

s to the first point, there can be no doubt that the right to legitim, although certain sense a debt, is so far a right of succession that it is to be determined the domicile of the defunct. That was not disputed by the defender; but it aintained that this right has been surrendered or discharged by virtue of English contract of marriage between General Trevelyan and his first wife; l in the second article of the statement of facts the effect of this instrument is ed as matter of English law.

According to the law of Scotland it is now well settled that legitim can only excluded by express discharge; and, certainly, as far as the contract in ques- is set out by the defender, nothing to that effect appears to be contained in

All that is alleged is, that by the indenture in question a sum of £5000 is veyed by the husband, and a sum of £6167, 3s. by the wife, to trustees, in t for the spouses for their lives, and for the children of the marriage. That h a provision would not by our law exclude the right to legitim seems not to doubtful; and the cases of Breadalbane and Keith, referred to by the Lord dinary, are decisions which appear conclusive on this point.

It is, however, contended that the law of England, and not the law of Scotd, must regulate this matter, and that any discharge which would by the glish law exclude such a claim must be accepted by the Courts of Scotland as ficient to extinguish it.

This point was not raised in either of the cases referred to, although it was volved in the circumstances in which they respectively arose. There can be tle question, as was laid down by Lord Eldon in the second branch of the case Hog v. Lashley, that when persons domiciled in England settle the incidents

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[1] Hog v. Lashley or Hog, 3 Paton's Appeal Cases, 247; Nisbet's Trustees v. Nisbet, March 10, 1868 *ante* vol. vi. 567.

[2] Erskine Inst., 3, 9, 15.

[3] Keith's Trustees v. Keith and Others, July 17, 1857, 19 D. 1040; Breadalbane v. Chandos, August 16, 1836, 2 Shaw and M'Lean, 377.

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of the marriage by an English contract, its stipulations, and the effect to b to them, will follow them to any domicile to which they may afterwards r an illustration of the general rule that contracts must be construed accor the law of the place where they are made, and where they are originally in to be fulfilled. Whether it be a sound corollary from this principle that like legitim, arising from the customary law of the domicile, can be dis otherwise than according to the law of the domicile, might be attend doubt; and certainly the cases of Breadalbane and Keith seem to have pr on an opposite assumption. If we had to decide on that proposition I have had difficulty in excluding the law of the place of the alleged conti

In the present case, however, I have a very clear opinion that the al in regard to the law of England is not relevant as it stands. It is as fol "According to the law of England the provisions made in the foresaid r contract or indenture in favour of the issue of the marriage operated discharge of all legal or other claims which the issue so provided for cou against the succession of their parents, or in respect of the death of them. The pursuer has accepted of these provisions, and by so doing charged all other claims against the estate or succession of his deceased

Now, before we inquire into the law of England, we must have a clea standing of what it is alleged to be. I own I gather no definite meani this allegation. It is not said that there are any claims which by th England would have been competent to the pursuer, and from which the would exclude him. It is not said whether the claims said to be discha claims arising on intestacy, or claims which would arise notwithstanding ment by will. It is not said that this marriage indenture was equival mutual contract of release between the father and child, nor what deman by the law of England be held to be thereby released. We could not case for the Courts in England which would be intelligible on this st We know, as matter of general jurisprudence, that the right of legitim place in the law of England, although in London and in York some a customs until recently prevailed. I doubt if the allegation is meant that the indenture would exclude the son's right *ab intestato*; and if i mean that, I am at a loss to gather its import. As to referring the inte question to the English Courts and asking them how they would decide I presume no such suggestion is made.

I am therefore prepared to hold the allegation irrelevant, and to repel founded on it.

On the second point, I concur in the opinion of the Lord Ordinary, a nothing to add to what he has said.

Lord Cowan.—Having regard to the legal questions raised in the and the argument under the reclaiming note, I am of opinion that no g ground has been stated which should lead us to disturb the interlocuto Lord Ordinary.

The legitim claimed by the pursuer is by the law of Scotland und due to him, as the only child of the marriage of his parents. At the da death his father was a domiciled Scotchman, and he had no power to t his whole moveable estate to the detriment of that right of succession w law the pursuer has in his father's executry, unless the same has been or discharged. Accordingly this is what the defender, the second General Trevelyan, as his general disponee under his settlement of 187 tains to be the actual state of matters. No express or special discharge legitim is alleged ever to have been executed. No provision in express tion of his legal right is alleged to have been settled on the pursuer father. Yet by the law of Scotland such special discharge, except peculiar circumstances, which do not here exist, is indispensable to excl claim of legitim.

The defender, however, maintains, in the first place, that by antenup tract entered into in England between the pursuer's father and moth the parties were both of them domiciled in England, a certain provis

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le for the children of the intended marriage, and that this provision, accord- to the law of England, "operated as a full discharge of all legal or other ns which the issue so provided for could prefer against the succession of r parents." From the statement made by the defender in article first it s not appear that any general settlement of the father's estate, either at date of the marriage or at his death, was made by the contract. All that aged is that a sum of £5000 by the father and the sum of £6167, 3s. ls by the mother, were given over to trustees for behoof of the issue on the h of the surviving parent. This being the nature of the provision to which defender refers, the first matter for consideration is, whether it is necessary make inquiry as to the law of England. That this course has been followed me cases may be true, and I observe in the case of Hog v. Lashley the ion of English counsel was taken by this Court as to the effect by the law of and of certain provisions contained in an English contract which had been ed into before the marriage as regards the *jus relictæ*. I do not think, how- that this course should be adopted in the present case.

) The provision in the contract is stated to have consisted of a sum of money, part, subject to the liferent of the spouses, as a separate fund for the child- not by their father alone, but by the mother also; and this fund they could as theirs, and, if not actually given over to the trustees, was a debt claim- nteably out of the general estates of both parents. In such a question as present there is no difficulty in dealing with such a provision without having ence to the law of England, there being no technical words or phraseology loyed requiring to be interpreted by that law.

nd (2) it is for the law of Scotland to judge of the effect of such a provision the right to legitim asserted by the pursuer, inasmuch as it is not alleged by the law of England any interest in or share of the moveable estate of the r is capable of being vindicated by his children, upon his death, domiciled in and. In this respect there is a distinction between the claim of the children gitim and the interest of the wife to share in the goods in communion. By law of England there is a corresponding right of dower in the wife, the im- discharge of which by an English contract may, when alleged to have been arged, be matter for inquiry. It is different as regards the legitim, there s no right whatever in the children similar to that by the English law able of being impliedly discharged.

ccordingly, in the case of Hog v. Lashley, the Court there, in the question gards the legitim, judged of the effect of a provision in an antenuptial con- very similar to the present, without having recourse to English counsel to tain the effect of the English contract (Hog v. Lashley, April and May , 3 Pat. App., 247), but at once proceeded to judge of it exclusively by our law. But where the question of the alleged implied discharge of the *jus* by the English contract came before the Court (Hog v. Lashley, March November 1804, 4 Pat. App., 586), recourse was had to English lawyers the effect of the contract in extinguishing the wife's right of dower, and far thereby her *jus relictæ* might be affected, becoming exigible by our law e change of domicile to Scotland. We have here to deal only with legitim, h, as there stated, is truly a right of succession, and is an interest which the gives to children on the father's death, and thus differing in its character the wife's share in the goods in communion, which might formerly, when predeceased, have been made effectual during the husband's life.

n the second branch of the case we have to consider only the effect of the plea for the defender, which exclusively relates to outlay for and advances e to the pursuer by his father, and as to this point the decisions referred to he Lord Ordinary in his note support his interlocutor. No plea is stated no argument was maintained with regard to the right of the pursuer to claim whole legitim without bringing into computation the marriage-contract pro- n, in so far as it was provided out of the father's estate. No question of that , therefore, requires to be considered.

RD BENHOLME concurred.

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LORD NEAVES.—I am of the same opinion, and I have little to add to what has been said by your Lordships. The first question—if it be a question—seems to be this, whether or not the succession of a domiciled Scotchman is to be governed by the law of Scotland. By the law of Scotland the succession to estate is divided into various portions, and one of these is legitim, and legitim due unless it is specially excluded. Now, in this case it is said that the claim excluded by an English contract of marriage, and that we must go to England for the law. In that contract the pursuer's father conveys the sum of £5[illegible] and his mother the sum of £6167 to certain persons therein designated, in trust for behoof of the children of their marriage, on the death of the survivor of them. Now, there is no doubt that a contract entered into between two parties, if a good contract in the country where it was made, is binding upon them all the world over. But there is nothing of that sort here. All that is said is that this contract of marriage operated as a full discharge of all claims which the children would otherwise have had against the parents, and, among other claims, that of legitim. It is not said that the marriage-contract imported a discharge of legitim, but that it operated such a discharge. Now, it is a very startling proposition to say that an English marriage-contract in 1830 operated a full discharge of a claim for legitim which did not arise till 1873. Can the law of England say any such thing? Would this deed operate as a discharge of all such claims in every country in the world? It is impossible that it should have any such effect.

It is not alleged that there is any obscurity in the deed requiring English law to clear it up. But it is said that the deed implied a discharge of all claims which might arise to the children. Now, that is the very case which, according to the law of Scotland, does not exclude the claim of legitim, for the law of Scotland says that nothing but an express discharge excludes that claim. Therefore the statement on record as to the law of England is utterly irrelevant. There is no need to go to England, where there is nothing to be construed, the English law.

In regard to the second question I entirely agree with your Lordships.

THE COURT adhered.

MACKENZIE & KERMACK, W.S.—GILLESPIE & PATERSON, W.S.—Agents.

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Mar. 14, 1873. Mather, &c. v. Macbraire, &c.

CHARLES THOMAS NATERS MATHER AND GEORGE YOUNG, Pursuers.—*Watson—Robert Johnstone.*

JAMES MACBRAIRE, Defender.—*Sol.-Gen. Clark—Macdonald.*

THE BERWICK SHIPPING COMPANY (LIMITED), Defenders.—*Sol.-Gen. Clark—Trayner.*

Property—River—Salmon-Fishing.—A and B were owners of salmon-fishings on the north and south sides respectively of a tidal river, the *medium filum* being the boundary between them. From time immemorial the main stream of the river had flowed in a narrow channel close to the northern bank of the river, in consequence of a gravel bank, partially dry at low water, stretching across the *medium filum* from the south; and it had been the practice of the proprietor of the northern fishings to repair the bank when injured by extraordinary floods so as to prevent the main channel of the river from being diverted to the injury of his fishing. In a process of declarator and interdict brought by B to prevent A interfering with the operations of nature upon the *alveus* of the river, held that the original grant as well as the custom of the river implied a right in each proprietor to keep the stream, so far as practicable, in its normal state, and that A was entitled to restore the *alveus* to its normal condition when altered by extraordinary floods.

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1st Division.
Lord Jervis-woode.

B.

CHARLES T. N. MATHER of Longridge, in the county of Northumberland, as proprietor, and George Young, fishmonger, was tenant of the Watham hery, in the river Tweed, situated in the county of Northumberland. mes Macbraire of Broadmeadows was proprietor of the Scotch New ter fishing *ex adverso* of the lands of Tweedhill, in the county of rwick, in which the Berwick Shipping Company were his tenants. The ndary between these two fisheries was the *medium filum* of the river, ich also formed the division between England and Scotland.

At the place in question the Tweed was a tidal river, its *alveus* being t 150 yards in breadth. A bank or bed of sand or gravel stretched s the *alveus* from the south or English side, and being almost dry at water confined the main body of water in the river to a narrow nel of about twenty yards in width close to the northern bank of the . At low water salmon ascending the river could do so only by this nel. The salmon were caught at this part of the Tweed by a process d "fording the fish." The fishermen watched the fish as they ascend narrow and rapid currents, and when they saw a salmon approach immediately gave the signal to their fellow fishermen to shoot the , and this watching or fording was carried on at night as well as during day at the time of low water.

In 1867 and in 1871, in consequence of heavy floods and masses of ice ing down the river, and also in the latter year in consequence, as was ged, of certain operations of the pursuers, the bed of the river at the nder's fishery was injured, and the defenders restored matters to their ner condition by filling up the holes and replacing the bed in its ordi- y condition.

Mr Mather, and his tenant, Mr Young, brought this action, concluding declarator "(1) that the defenders had no right or title to interfere with ank or bed of sand, gravel, and stones forming part of the *alveus* of the er Tweed, situated near the middle of the said river, *ex adverso* of the d lands of Tweedhill, and lying partly within the limits of the said otch New Water fishing, and partly within the limits of the salmon hery of Watham, in the county of Northumberland, and that in so far as e said bank or bed of sand, gravel, and stones lies to the north of the *dium filum* of the river Tweed; or to embank or otherwise protect the id bank or bed of sand, gravel, and stones against the natural flow or rrent of said river; and that the defenders have no right or title to erect nbankments or obstructions, or to deposit stones or other materials upon e said bank or bed of sand, gravel, and stones, or in any channels or eams of water intersecting the said bank or bed, so far as the same is uated to the north of the *medium filum* of the river;" that the operations the defenders in 1867 and 1871 were illegal and unwarrantable, and at they should be ordained to remove them. There was a conclusion r interdict; and, further, it was concluded, "or otherwise and in any event e defenders ought and should be interdicted, prohibited, and discharged, decree foresaid, from executing all or any of the foresaid operations, d also from scraping or excavating or otherwise interfering with the ds of the said river to the north of the *medium filum* thereof, for the rpose or with the effect of preventing the natural flow of the water ough or over said bank or bed of sand, gravel, and stones, and channels d streams intersecting the same, to the injury of the pursuers' right of mon-fishing, or fishery of Watham, situated to the south of the *medium* m of the river and *ex adverso* of the said Scotch New Water fishing."

The pursuers pleaded;—1. The operations of the defenders complained being illegal and unwarrantable, and injurious to the property of the rsuers, the pursuers are entitled to decree of declarator to the effect

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concluded for. 2. The defenders having no right to interfere w *alveus* of the river Tweed to the injury of the pursuers' right of fishing, the pursuers are entitled to decree interdicting and prohibiti in terms of one or other of the conclusions of the summons for int

The defender, Mather, pleaded;—3. The defenders' operation entirely on their own side of the *medium filum*, and having had n on that part of the stream which flows to the south thereof or u pursuers' fishery, which lies to the south of the *medium filum*, the d are entitled to absolvitor. 4. The defenders' operations having bee sary for the purpose of preventing injury to their fishings, resulti the illegal and unwarrantable proceedings of the pursuers, they are to absolvitor. 5. The defenders not having altered the course of th in any way, but only having kept it the same as it has been f years and upwards or from time immemorial, the defenders are en absolvitor. 6. *Separatim*, the whole of the defenders' operations been performed according to the usual and immemorial custom Tweed fisheries, and having been necessary to maintain the fis working condition, the defenders are entitled to absolvitor.

The defenders, the Berwick Shipping Company, pleaded;—3. fenders were entitled to execute the operations which they carried in 1867 and since then, in respect (1) these operations did not a *alveus* to the south of the *medium filum;* (2) the said operations h the effect of maintaining the river in the natural course in whic run from time immemorial; and (3) the said operations were not i to the pursuers' fishings.

A proof was taken before the Lord Ordinary, from which, in add the facts already stated, it appeared that the operations complaine been executed by the defenders on the south side of the *medium filu* river, and had not been inconsistent with the usage and custom of prietors and tenants of salmon-fishings in the river Tweed; and defenders had not altered but merely restored the bed and stream river to their ordinary condition.

The Lord Ordinary pronounced an interlocutor (30th Novembe finding "as matter of fact (1st), That the operations forming the of the present action, and which were executed by the defender upon the bank or bed of sand, gravel, and stones described in the and forming part of the *alveus* of the river Tweed, and in or upo parts of said *alveus*, were executed upon the north or Scotch side *medium filum* of said river, and with relation to the salmon-fishing as the Scotch New Water fishing belonging to the defender, Mr Ma and situated *ex adverso* of his lands and estate of Tweedhill: (2) T the said salmon-fishing the main body of water now flows, and forty years and upwards flowed, along the north or Scotch side river: (3d) That the said operations of the defenders had not the e diverting the water of the river from its natural or ordinary cours changing the same: (4th) That the said operations were performed purpose of repairing the damage caused to the bed of the river by floods and floating masses of ice or otherwise, and of restoring the c to its former state, and so maintaining the said salmon-fishing in a s condition for the due and proper use of nets therein, and otherwise due exercise of the rights of the defenders in relation to the said and that said operations did not go beyond reasonable repair to the the river: and (5th) That the defenders and their predecessors ha in use for forty years and upwards, and for the like purpose, to operations of the description complained of: Further, and as m law, finds that the defenders were and are entitled to execute such

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s, and that these are not such as to warrant the interference of the suers with the same: Therefore assoilzies the defenders from the conions of the summons, and decerns: Finds the pursuers liable to the nders in expenses, in so far as they have not already been found liable ain: Allows an account of the expenses now found due to be lodged, remits the same to the Auditor to tax and report."

he pursuers reclaimed, and argued;—All operations *in alveo* by a on having a common interest in a river were unlawful, and the deers had no right to interfere with the *alveus*. While a river kept in its banks a riparian owner had no right to interfere with the ations of nature in its bed and stream.[1]

he defenders argued;—The only interest of the pursuers was, that the nders were interfering with a prospective advantage which Mather, as a rietor of fishings, might derive from a sudden natural change in the se of the river. The distinction between a gradual and imperceptible nge in the stream or its bed and a sudden change caused by an extrainary flood was obvious.[2] The cases referred to for the pursuers all ted to private streams, except that of Lindsay v. Thomson, in which hing touching the present question was decided.

t advising,—

ORD DEAS.—The question in the present case involves some elements of lty, and requires careful consideration. It relates to salmon-fisheries in a ion of the river Tweed, at a place where the river is mutually admitted to a public tidal river. The pursuer, Mr Mather, is a domiciled Englishman, and defender, Mr Macbraire, is a domiciled Scotsman. The pursuer, Mr Mather, proprietor of the Watham salmon-fishery, connected with the English or thern bank, and the defender, Mr Macbraire, is proprietor of the salmonry on the Scotch or northern side, immediately opposite, connected with nds of Tweedhill. I understand the *medium filum* to be admittedly the dary of the two fisheries, as well as of the two countries, recognising the line laid down in the case of Milne Home v. Smith, 23d November 1850, D. 112, noticed by your Lordship in the chair in the course of the discussion. oth rights of fishing necessarily flow from crown grants, and although it id appear that one or other of these grants may have originated before the n of the Crowns, I do not think that this creates any specialty of import-. The two Crowns are now united, and the case is, I think, to be dealt with a the footing of two grants flowing from the same sovereign power, and giving ights which in both countries are deemed *inter regalia minora*.

he defender, Mr Macbraire, is, as I have said, proprietor of the lands of edhill, upon which he draws his nets. The pursuer must, no doubt, have t to draw his nets on the southern side. Allusion is made in the proof to r Mather's land," but it is not averred in the record that he is proprietor of land there. This, however, is of no moment, because neither party pre- to be exercising or enforcing any rights as a riparian proprietor. The title interest asserted on both sides are exclusively the title and interest of protors of salmon-fishings in a tidal public river. Neither of them has any proy in the *solum* of the river, which remains vested in the Crown. The ques- between them substantially comes to be, whether, if a sudden and unusual d has altered the *solum* or bed of the river upon one side of the *medium filum*

Morris v. Bicket, May 20, 1862, *ante*, vol. ii. p. 1082,—affd. July 13, 1866, , vol. iv. H. L. p. 44, L. R. 1 Sc. Ap. 47; Lindsay v. Thomson, Nov. 15, 6, *ante*, vol. v. p. 29; Jackson's Trustees v. Marshall, July 4, 1872, *ante*, x. p. 913; Town of Nairn v. Brodie, 1738, M. 12,779; Farquharson v. rquharson, 1741, *ib.*; Town of Aberdeen v. Menzies, 1748, M. 12,787; nzies v. Earl of Breadalbane, July 4, 1828, 3 W. and S. 235.

E. of Zetland v. Glover Incorp. of Perth, Jan. 31, 1868, *ante*, vol. vi. 292.

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in a manner prejudicial to the salmon-fishing upon that side, the party wh fishing is thus injured can be prevented by the other from *de recenti* restor the *solum* on his own side to the same state in which it was immediately be the flood. That is what the defender has done, and it is clear, I think, u the proof, that that is all which he has done.

A gravel bank of considerable breadth extends from near the English side 125 yards or thereby across the river towards the Scotch side, being about th fourths of the width of the river, and reaches to within 20 yards or thereb the Scotch side. These are the measurements averred by the pursuers in ar 4 of their condescendence, but accuracy or precision as to these measuremen not material to the question at issue. The main body of the water flows wi this last-mentioned space,—hypothetically assumed to be 20 yards or thereb on the Scotch side; and at low water the salmon can only ascend in this comp tively limited space, so that the defender, Mr Macbraire, and his tenants ha much better opportunity of watching (or, as it is called, of "fording") the f and consequently, of catching them, than they would otherwise have.

It appears that about July or August 1867, and again in August 1871, defender, Mr Macbraire, and his tenants performed certain operations on the of the river, on their own side of the *medium filum*, by filling in stones gravel for the purpose and with the effect of filling up gaps in the gravel b already mentioned, which had been caused by unusual floods in the course of of the two immediately preceding winters respectively, and thereby restoring bank to the state it had been in prior to these floods. These are the operati which the pursuer complains of and seeks to have undone. The gaps, while remained, had the effect of causing the deeper portion of the water, in wh the fish prefer to ascend, to flow nearer than formerly to the *medium filum*, this the pursuer alleges gave him an opportunity, which he had not before watching the fish from his side of the *medium filum*, and, consequently, a be opportunity than formerly of securing them.

The pursuer does not say that the operations complained of will or can any way, prevent him from exercising his rights of fishing, in precisely the manner and with the same results, as these rights had been exercised for t immemorial prior to the floods in question. What the pursuer complains not any injury or possible injury, but that he is deprived of a benefit which resulted to him from the floods. His argument is, that whatever changes upon the *alveus* of the river from the floods, however unusual, or from any accidental cause, the parties must accept the benefit or injury, as the case be, to their respective fisheries resulting from these changes, and can law do nothing to restore themselves against these results, so long as the river tinues to flow within the same banks as formerly.

The immemorial usage of proprietors and tenants of salmon-fisheries in river has certainly been adverse to this contention. The pursuer's witnesses doubt say that any operations they have known to be performed on the be the Tweed have always been confined to the space over which the nets drawn in bringing the fish to the shore, and consisted in smoothing that gro and filling up holes which would otherwise have enabled the fish to escape of the nets. But of these witnesses the three last only are of considerable and speak to a period of from forty to fifty years. The others, so far as t ages are mentioned, are all comparatively young men, and have had very s experience. Besides, the evidence of all the pursuer's witnesses is, upon point, merely negative, and cannot be regarded as contradictory to the pos evidence of the defenders' witnesses, nine of whom are persons of from sixt seventy-two years of age, and speak to periods of from forty to sixty y during all which time they say it consists with their own knowledge that invariable custom on the Tweed has been for the proprietors and tenants of salmon-fisheries to restore the bed of the river against all important cha such as occurred in the two winters which respectively preceded the defen operations of 1867 and 1871, and this in a manner precisely similar to which the defenders adopted in these years. Two other witnesses for the fenders give evidence to the same effect, applicable to their shorter experi

twenty years and the other of thirty years prior to this action. All itnesses expressly state that the operations so habitually performed imited to the space over which the nets had to be drawn towards the were performed wherever they were required, for the restoration of the river. The witnesses on both sides, at the same time, agree that nder had not performed the operations complained of, or some equally perations, the result would have been that the main body of the water y soon have come to be established permanently much nearer the *lum* than it has ever hitherto been, to the great depreciation and of the defenders' fishery, and this to an extent greatly disproportionate efit resulting to the pursuers' fishery.

the case, then, upon the above footing, I apply the law to it thus— construe the original grant in favour of each of the grantees as a grant fishery in the river in its then normal state, implying a right to each e the *solum* of his own fishery so far as practicable in that same state. It being proved that for time immemorial the *solum* of the defenders' s been maintained and enjoyed in the same state in which it was im- before the floods in question, and to which state the defenders *de* tored it, I hold that this state must be presumed to have been its nor- tion at the date of the original grant, and, consequently, to have been n which the grantee obtained right to preserve and enjoy it.

lum of the river remains, as I have said, the property of the Crown, terest in that *solum* was necessarily implied in the crown grant of a hery. Even the Crown, I rather suppose, could not thereafter, by : otherwise, have taken away that *solum*, and so have destroyed the its own grant, any more than it could have taken away or destroyed of the river, if these had been the property of the Crown. The ex- the *solum* is as essential to keep the water in its place as the existence ıka. The *solum* may be called the floor of the fishery. Without that s could be no water, and without the water there could be no fishery. ever the Crown might do, the one grantee cannot destroy the right ıer. Although the Crown did not part with the property of the floor, ne bound to maintain it, an interest in the floor of his own fishery, and maintain it at his own expense, was, I think, beyond all doubt, con- the grantee of the one fishery in a question with the grantee of

be so, it may fairly be held to follow that the crown grants likewise right to each grantee to prevent the other from altering the *solum* on his of the *medium filum* to the injury of the other. That deduction from nent is not, however, necessary to enable the defenders to stand upon sive. It is rather a position assumed by the pursuers, for the very foun- their action is, and must be, that Mr Mather's right of fishery implies n interest in the *solum* of Mr Macbraire's fishery, which entitles Mr o complain of Mr Macbraire's operations, although these are entirely on s of his own fishery.

me interest I have been speaking of as an interest in the *solum* may, for oses of the present case, be equally intelligibly described as an interest urse of the main body of the water. For it is abundantly proved on s that the main body of the water has immemorially flowed on the north ı side of the *alveus*, and that, but for the defenders' operations, it would ome permanently established at a much greater distance from that side. est in this change is the very interest which the pursuers seek to vindi- l the law they contend for is, as I have already said, that so long as the ps within its banks neither party is entitled either to prevent the shift- e main current, or to bring it back if it has recently shifted. I know of iple or authority for that alleged law. It would operate very unfairly ants of salmon-fishings holding leases for a term of years, as well as upon ors. For instance, the rent of the pursuer's fishery is only £54 a-year, e rent of the defenders' fishery is £300 a-year. No tenant, I should ould engage to pay this rent for the defenders' fishery for a term of

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years on the footing that nothing could lawfully be done to keep the of the stream from deserting its immemorial course, on which the chi the fishery depends. Such a law would go far to prevent leases fisheries for a period of years from being entered into at all.

I can find nothing in any of the cases referred to in the discussion the principle on which, I think, this case falls to be decided. The case v. the Marquis of Breadalbane, H. of L., 3 W. and S. 235, involved r of salmon-fishings. It was a case between riparian proprietors upo banks of the Tay, at a part of the river which, so far as appears, w tidal nor public; and what was held was that the one proprietor was r to build a bulwark, although mainly on his own ground, across an o of the river, which still remained the only course by which the surpl periodically recurring winter floods could get away without overflowi flat land belonging to the other proprietor. The House of Lords di interlocutor of the Court below to be so far varied as to limit the i the erection of "any bulwark or any other *opus manufactum* upon th the river Tay which may have the effect of diverting the stream of t times of flood from its accustomed course, and throwing the same upo of the appellant." But this was upon the footing that, besides the channel, there existed also a regular flood channel. Accordingly, Chancellor, while observing that the ordinary course of the river was t it took in ordinary times, further observed,—"There is also a flood ch am not talking of that which takes place in extraordinary or acciden but the ordinary course of the river in the different seasons of the yea apprehend, be subject to the same principle." And again, he observe apparently conflicting passages on the subject in the Roman Digest m bably be reconciled by attending to the distinction between the usual the river at different seasons of the year and "accidental and extr casualties from the flood suddenly bursting forth, and they" (that is, t rently conflicting passages) "go to this, that in such a case the parties r to the prejudice of their neighbours, for the sake of self-preservation, gu selves against the consequences."

It is obvious that there is nothing in these views adverse to the def the present case, but rather the reverse. There is not alleged to have habitual winter channel in the Tweed, from which the water has been by the defenders' operations. The floods, against the consequences of w defenders have restored themselves, are not said to have been other th ordinary and accidental floods which altered the normal state of the *alv* river.

In a subsequent part of the same opinion the Lord Chancellor exp case of Farquharson of Invercauld in 1741, as to embanking upon the attributing importance to the custom of that part of the country,—a vie rather favours than otherwise the recognition of the custom of the Twe portant in the present case, although the question here is between two pr of salmon-fisheries in a public river, and not, as in the Invercauld case, two riparian proprietors in a private stream.

The case of Bicket v. Morris, decided in the House of Lords, 13th Ju 4 Macph. H. of L. p. 44, and 1 Law Rep. Scotch App. p. 47, cited pursuers, has no application here. It was not pretended that the newly wall of the house, which in that case encroached on the *alveus* of the stre intended either to restore the stream to its usual course or to keep it wit course. On the contrary, the objection which was sustained was that a the encroachment was slight it could not with any certainty be predicte might not to some extent alter the usual course of the stream.

On the other hand, the case of the Town of Nairn v. Brodie, 28th Jul M. 12,779, seems to be strongly corroborative of the principle on which I posed to decide the present case. That case related to a public tidal river, the river Nairn, at and shortly before its junction with the sea. The to a stell-fishing at the mouth of the river. A sudden spate or flood char course of the river, and it was held that the town was entitled to build a

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ring the river back to its usual course. The case of Straiton v. Fullarton, mber 1752, M. 12,797, mentioned by your Lordship in the chair in the se of the argument, would seem to imply that, if the river could not be re- d to the course it had deserted, the proprietor of the fishery would be entitled llow his fishery, which equally implies a right to enjoy that fishery as ly, so far as practicable, although that is a sort of case which it is unne- ry to discuss here.

is of no moment to the authority of the decision in the case of the town of what the nature of a stell-fishing was. It is enough that it was a legal of fishing for salmon, till struck at by the prohibition in the statute 20 and ict., c. 148, sec. 2. It had been immemorially practised in different ways ferent parts of the country, generally by rowing out into the stream as in se of net and coble, but with this important difference, that the further end net was either fastened by an anchor in the river, or held by a man in a till the fish were seen or felt to strike the net, which was then immediately d round them and drawn to the shore. Its deadly character accounts for olition, and I mention its nature for explanation merely.

e case of the Magistrates of Aberdeen v. Menzies of Pitfoddel, 22d November M. 12,787, is in no way inconsistent with the case of the town of Nairn. e ground upon which Menzies was held not entitled to restore the channel stream, so as to recover his fishing, was that, although he might have done *ale recenti*, he could not do it after having acquiesced in the change for rds of twenty years.

y opinion, upon the whole, is that the defender, Mr Macbraire, was entitled ep the *solum* of his fishery, or, what comes practically to the same thing, ain flow of the water, in the normal condition in which the same had existed time immemorial before the accidental and unusual floods in question, and as he and his tenants did nothing more than restore the *solum* and flow of ater to that normal condition they have been rightly assoilzied from the lusions of this action.

e other Judges concurred.

THE COURT adhered to the interlocutor of the Lord Ordinary.

, MACKAY, & MANN, W.S.—TODS, MURRAY, & JAMIESON, W.S.—E. WALLACE, W.S.—Agents.

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Muir v. Muir.

MRS JANE LIDDELL OR MUIR, Pursuer.—*Fraser*—*Scott.*
GEORGE MUIR, Defender.—*M'Laren.*

rocess—Proof—Commission—Criminating Question.—Where a criminating tion was proposed to be put to a witness to be examined before a foreign missioner, *held* that the commissioner should be instructed (1) to intimate e witness that he was entitled to decline to answer the question; and (2), in vent of the witness electing to answer the question, to allow all competent tions bearing on the matter to be put with a view to test his credibility.

1ST DIVISION.
Ld. Mackenzie.
B

n an action of divorce raised by Mrs Jane Liddell or Muir against ge Muir, her husband, on the ground of adultery, the pursuer applied e Lord Ordinary for a commission to examine a woman of the name Weir on interrogatories in support of the averments that she had com- d adultery with the defender. The defender moved the Court to rt in the interrogatories an instruction to the commission in New land to warn Weir that she might decline answering the question ether she had been guilty of adultery with the defender. The pursuer osed the motion, on the ground that she was not entitled to this pro- tion, having made the matter public by bringing an action against the nder for the aliment of an illegitimate child.[1]

[1] Statutes 15 and 16 Vict. cap. 27 (Evidence Amendment Act, Scotland, 2), sec. 3; 32 and 33 Vict. cap. 68 (Evidence Further Amendment, Eng-

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The Lord Ordinary reported the point to the First Division.

At advising,—

LORD PRESIDENT.—Among other questions proposed to be put to the witness is this,—whether on a certain occasion she had illicit intercourse with the defender. If that question were put in a trial before the Lord Ordinary or Judge and jury the witness would at once be informed by the Court that she was entitled to decline answering,—the defender having been a married man the time of the alleged intercourse. The witness is to be examined by commission in New Zealand, and we have no security as to who the commissioner may be, or whether he knows the Scotch law. It might not occur to him to inform her that she need not answer unless she chose. But it is necessary that the witness should be so warned; and accordingly the direction of the Court is that the Lord Ordinary, in pronouncing the interlocutor approving of the interrogatories, shall instruct the commissioner that when the fourth interrogatory is put the witness shall be informed that she is entitled to decline answering that or any of the following questions.

On the other hand, it is necessary also to provide for the contingency that the witness may not choose to decline answering the question, but may answer it in the negative. If she shall do so, then it becomes the right of the pursuer to test her credit by all competent questions bearing on the matter of that interrogatory. The commissioner, therefore, ought to be instructed that in that event the questions which follow may be put.

The other Judges concurred.

GEORGE BEGG, S.S.C.—MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

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Stobbs v. Caven.

JAMES STOBBS, Pursuer and Appellant.—*Watson—Balfour.*
THOMAS CAVEN, Defender and Respondent.—*Sol.-Gen. Clark—M'K*

Process—Jurisdiction—Sheriff—Servitude—Thirlage—Petitory and Possessory Actions—Title to Sue—Statute 1 *and* 2 *Vict. c.* 119, *sec.* 15.—*Held* that an action by the tenant of a mill for abstracted multures, involving a question to the extent of the thirl, was competent in the Sheriff-court under the 15th section of the Sheriff-court Act, 1838 (1 and 2 Vict. c. 119), being an action relative to a question touching the constitution of a prædial servitude—Lord D. dissenting, on the ground that the section did not apply, the action not being raised by a person who had a title to try a question relative to the constitution of a heritable right; but holding that it was competent in the Sheriff-court as a possessory action.

Observations (*per* Lord Deas) on the distinction between petitory and possessory actions.

Question, whether an action of declarator of the constitution of a right of thirlage is competent in the Sheriff-court.

Servitude—Thirlage—Usage.—In the titles of lands which were thirled to a barony mill the thirl was described as of "the whole grindable corn growing on the said lands except teind and seed corn," or "except teind and horse corn." In a decree-arbitral pronounced in 1787, in a submission entered into between the proprietor of the mill and the proprietors of the lands it was found that the lands were astricted for their whole growing corns, seed and horse corn excepted. *Held*, upon consideration of the terms of the titles, and of the de-

land, 1869), sec. 3; Nicolson v. Nicolson, 18th February 1771, 3 Pat. App. 655; Marshall v. Anderson, 26th June 1798, M. 16,787, and H. of L. 8th April 1799, 4 Pat. App. 72; Don v. Don, 25th May 1848, 10 D. 1064; Gall v. Gall, 23d Nov. 1870, *ante*, vol. ix. 177; M'Lean and Hope v. Fleming, 9th March 1867, *ante*, vol. v. 579; Dysart v. Dysart, 10th May 1843, 3 Curteis Eccl. Rep. p. 543; Swift v. Swift, 1832, 4 Hag. Eccl. Rep. p. 139—see p. 15 Ersk. iv. 4, 53; Hume, i. 454.

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Sheriff of Dumfries-shire.

M.

d other evidence of usage, that the ambiguous terms "grindable corn" onstrued by usage to mean *omnia grana crescentia.*

James Stobbs became tacksman of "the mill of Snaid, and kiln thereto, with the mill lands, multures, knaveship, and sequels." ie lands astricted to the mill, which was a barony one, were the Birkshaw and Moatland, both being parts of the two merk land of which was the property of the defender. As appeared from arters by progress between 1792 and 1854 in favour of the pro- Birkshaw, these lands were held on condition of the proprie- eir tenants "grinding their whole grindable corns growing on the (excepting teind and seed corn) at the mill of Snaid, and paying and other services conform to use and wont." The astriction ds of Moatland was in the same terms, with this difference only, exception was of "teind and horse corn." In 1784, in conse- questions and differences having arisen relative to the astriction nd other lands, a submission was entered into between the pro- id tenant of the mill on the one part, and the proprietors of the lands on the other part, whereby these questions, and a process ted multures, and a declarator of thirlage, were referred to the of Alexander Wight, Esq. By his decreet-arbitral, of date 1787, he found, *inter alia*, that "the lands of Birkshaw, belong- omas Collow, are astricted and thirled to the miln of Snaid for e growing corns, seed and horse corn excepted," and he decerned ied "the heritors or possessors of the said lands to frequent the with their whole growing victual, to be grinded thereat, seed and excepted, and to pay therefor the multures and services follow- ie lands of Birkshaw in the 25th grain of multure, and that over the 32d grain of the whole corns growing on these lands, of and sequels." This submission contained a consent to regis- r preservation and execution, and in virtue thereof it was re- the Books of Council and Session on 22d June 1787.

Stobbs raised an action against Caven as proprietor of Birk- Moatland, in which he concluded—"Therefore the defender, been in the constant and immemorial use, and is bound and frequent the said mill with his whole growing victual to be hereat, seed and horse corn excepted, and to pay therefor the n of multure, and that over and above the 32d grain of the ns growing on the said lands, of knaveship and sequels, con- ecreet-arbitral, dated the 22d day of June 1787, pronounced by Wight, Esquire, advocate, ... but who notwith- whereof has for these five crops and years bypast most illegally rrantably taken upon him to abstract from the said mill con- quantities of victual which had grown upon the said lands, and ect to payment of multure, knaveship, and sequels as aforesaid, e decerned to make payment to the pursuer of the sum of £25 ore or less, as may be ascertained in the process to follow here- he converted value of the multures, knaveship, and sequels cor- g to the quantities of grain severally abstracted by him from ill during the five years bypast, with the interest of the said e rate of five per centum per annum from the date of citation."

fence was:—*Preliminary.*—The action is incompetent in the rt, in respect that it involves a question of heritable right. *rits.*—(1) A denial that the whole growing victual or corns on lands are astricted to the mill of Snaid, or that he has fre- r is bound to frequent the mill with his whole growing victual

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as libelled, it being only the grindable corns that are so astricted; denial that any victual of the nature libelled has been abstracte That if any grindable wheat or barley has been abstracted it was b said mill is insufficient for grinding these grains.

A proof before answer of their averments having been allowed t parties and taken, the Sheriff-substitute (Hope) on 12th July 187 nounced an interlocutor finding the defender liable in £11 as th verted value of the abstracted multures. He found "that from tir memorial, or at least since the date of the decreet-arbitral, the de and his predecessors in the lands libelled have been in use to fr the mill of Snaid with their whole growing corns, except as afte tioned, and to pay multures, knaveship, and sequels to the tenants mill, either in kind at the rates specified in said decreet-arbitral, commuted money payment." He also repelled the preliminary p the ground that the question of heritable right was *res judicat* decreet-arbitral founded on by the pursuer, which had been pron in a submission, the contract of which contained a clause of regis and which had been recorded in the Books of Council and Session, the same effect as a decree of the Court of Session.

Caven appealed to the Sheriff (Napier), who on 7th Decembe recalled his Substitute's interlocutor, sustained the defender's preli plea, and dismissed the action.

The pursuer appealed to the First Division of the Court of S Parties were first heard on the question of competency.

Argued for appellant;—Thirlage was a prædial servitude, a Sheriff-court (Scotland) Act, 1838 (1 and 2 Vict. c. 119), sec. 15, that "the jurisdiction, power, and authority of Sheriffs of Scotlan be and the same are hereby extended to all actions or proceeding tive . . . . to questions touching either the constitution exercise of real or prædial servitudes." But independent of the s such actions as this had always been competent in the Sheriff Further, the decree-arbitral having been registered in the Books of cil and Session had the effect of a decree of Court.[1]

Argued for respondent;—(1) Thirlage was not a prædial ser It was more of the nature of a tax. (2) Even if it were a prædial tude the action involved a question as to the constitution of a he right, which the tenant had no title to try.[2]

Lord President.—My Lords, in this case the Sheriff on appeal fr Sheriff-substitute has dismissed the action on the ground that it is incon in the Sheriff-court, in respect it involves a question of heritable right.

The summons concludes for a sum of £25 sterling, and the ground of as disclosed in the conclusions of the summons in the somewhat awkwa in use in the Sheriff-court where there is no record, is, that the whole g corn on the defender's lands being thirled to the pursuer's mill by consti immemorial use in manner there described the defender has for five cro years previous to the date of the summons abstracted considerable quant victual grown on his lands from the pursuer's mill, and has so prevent from obtaining multures to the extent above mentioned. This ground of is further strengthened by reference to a decreet-arbitral pronounced on 22

[1] Milne v. Kyd, June 26, 1787, Hume, 728; Beattie v. Low, June 26 Hume, 729; Thomson v. Murdoch, May 21, 1862, 24 D. 975; Harris ville, May 29, 1863, *ante*, vol. i. 833.

[2] Earl of Hopetoun v. Brewers of Bathgate, 1753, M. 16,029; Erskin allan's edition), ii. 9, 18; Bankton's Institutes, ii. 7, 14; Ross's Lectures, Bell's Prin. 1016.

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1787 by Alexander Wight, Esq., advocate, sole arbiter in a submission between the heritable proprietors of the mill and lands respectively.

The ground of defence is that the growing corn of the defender's lands is not restricted, but merely his grindable corn, and as the defender is willing to pay for his grindable corn he is entitled to absolvitor. It seems to me that the question thus raised is not only whether the defender is owing £25 for abstracted multures, but also what are the terms of the thirl as to growing and grindable corn. That depends on the constitution of this servitude of thirlage. This question the Sheriff has held to be a question of heritable right, and perhaps it is; but it is also a question as to the constitution of a servitude. Section 15 of 1 and 2 Vict. cap. 119 (Sheriff-court Act, 1838), touches upon this question, and it is of importance to observe precisely what the words there used are. The section enacts that "the jurisdiction, power, and authority of Sheriffs of Scotland shall be and the same are hereby extended to all actions or proceedings relative . . . . to questions touching either the constitution or the exercise of real or prædial servitudes." Under that provision a Sheriff is not only entitled to entertain questions regarding the constitution or exercise of real or prædial servitudes, but his jurisdiction is extended to *all* actions relative to the constitution or exercise of real or prædial servitudes. The only question, then, that arises to my mind is, is this an action or proceeding relative to the constitution or exercise of such a servitude. It has been contended to us that thirlage is not only a prædial servitude. That, if a correct proposition, would settle this question; but in reality there is no difficulty about it. It may be a subject for philosophical jurists to discuss, but that is not what is before us. The point is, how is it dealt with in the law of Scotland, because it is to administer that law that we are here. When we find the three great institutional writers class it as prædial servitude we can fairly conclude that it was the intention of the Legislature, in framing the section of the statute I have read, to include it among them. It was also contended that while the Sheriff's jurisdiction was extended to actions of the above nature, he was not entitled to entertain declaratory actions. I do not think it necessary to decide whether that is the case or not. I am clearly of opinion, however, that the true application of the statute is that this action is competent.

It was suggested also that the tacksman of the mill was not entitled to try this question. That might have been a serious objection had he raised a declarator in this Court, or a declaratory action in the Sheriff-court. But he has not done so. The action is a petitory one for abstracted multures. Unquestionably the general question as to growing or grindable corn is raised too, but that is unavoidable. I think the action is competent as an action for recovery of £25 of abstracted multures, and that we must proceed with it.

LORD DEAS.—I cannot help thinking that there has been some misapprehension about the nature of this case. If this had been an action to try a question of the constitution of this right of servitude either in whole or in part, at the instance of a party competent to raise such an action, it would certainly have been necessary to consider whether the 15th section of the Act of 1838 did or did not apply. But as I do not consider this an action of that kind I shall not enter into that question. All I shall say on that subject is, that there is nothing, in my opinion, in the case of Harris v. Magistrates of Dundee, 29th May 1863, that would prevent me from deciding it either way. The question considered in that case was, whether the right claimed by the town of Dundee was a right maintainable in point of law at all. The right claimed there was a right to make exactions upon all grain whatever brought within the bounds of the burgh, no matter where it came from. If it had been necessary there to make out a right of servitude proper it would have been very difficult to maintain that such a right could exist without there being a servient as well as a dominant tenement, whereas there was there a servient tenement. My observation was to the effect that although the right was anomalous—a sort of mixed right—it fell more within the category of rights to petty customs than of proper rights of servitude, but that it might, notwithstanding, be a perfectly good right in law. And, indeed, to hold it not

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to be so would strike deep against many such rights to dues and custom are very various in their nature. But the right claimed in the presen undoubtedly a proper right of servitude. There is a dominant and a tenement, and the question is whether the thirlage applies to all growi the produce of that servient tenement, or to all the grindable corn o the case of Harris we indicated opinions to the effect that questions as to stitution of rights of servitude might be competent before the Sheriff u Act of 1838. But that question is not, I think, before us in this case cannot decide it here any more than we did there. I will explain why

The pursuer is tenant of the mill upon a nineteen years' lease, and he has a right during that period to all the multures. There is a g which is superfluous in the summons, but in substance it is a summo concludes for £25, being the multures payable to this tenant for the fi libelled. Now, I am clearly of opinion that in such an action as that question comes to be, whether the pursuer is or is not entitled to a p judgment. It has been suggested that this is not a possessory but a petitor But there is scarcely any possessory action which is not petitory in th An action is not the less a possessory action for containing petitory con What is meant by a possessory action is an action in which you look to of possession, or, in other words, to the practice for the last seven years lating the judgment. If this tenant of the thirlage was in the exercis right, and could shew that the practice had been for seven years to up tures of the kind now claimed from the servient tenement, that was all bound to prove, and all that the Sheriff was called upon to try. No dou might be a question as to the date from which the seven years backward be counted. That is a question of circumstances. The period is not ne counted from the date of the action. It may be from the date of the But the nature of a possessory action is a matter so familiar that I could supposed it necessary to quote authority on the subject. We need not, go further than Mr Erskine. He says,—"Petitory actions are so ca because something is sought to be awarded by the Judge (for in that actions must be petitory), but because some demand is made upon the in consequence either of a right of property or credit in the pursuer. Possessory actions are those in which the point of right is not directly c but barely that of possession."—(Institutes, iv. 1, 47.) Then he disti possessory from declaratory actions thus,—"A declaratory action is that some right either of property or servitude, or some other inferior right, to be declared in favour of the pursuer, but where nothing is deman paid or performed by the defender."—(Inst. iv. 1, 46.)

Of course petitory conclusions may be and often are combined wit tory conclusions. But declaratory conclusions for the constitution of a right (which is the character of thirlage) can only be insisted in by t who has in him the heritable title to the right which is sought to be c and declared. If the landlord had brought an action of this kind in th court, the question would then have arisen whether it was authorise clause of the statute of 1838. Very probably it would have been h so. But the tenant of the thirlage has no title to try the question of right, which can only be settled and declared in an action between the prietors. The practice of payment during the possessory period ma cient to entitle the tenant to continue the same exactions in the me that practice is held to be proved. But the statute neither prevents from bringing a possessory action which he could bring before, nor does upon him a title which he had not before to raise an action for the co of the heritable or feudal right vested in his landlord. It is not the fo action which prevents it from coming within the statute. There m special words necessary for that purpose. But what excludes any questi kind here is that the statute applies only to actions brought by parties title to bring them. I cannot imagine that because the statute makes to the constitution of certain servitudes competent before the Sheriff a right to bring such actions upon parties having no title to try them

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At the same time I do not think this action incompetent, or that it must necessarily fail. On the contrary, it is likely to be easier for the pursuer to make out his case upon the possession for seven years than to establish the constitution of the permanent right. He has simply to prove that during the possessory period the multures in dispute have been uplifted by himself or his predecessors upon a title on which possession might proceed. That does not involve possible objections to the validity of the title; but the competency of the Sheriff looking at the title for certain purposes is, nevertheless, undoubted. In the case of Johnstone v. Lady Murray, 5th March 1862, 24 D. 709, from the same county, as to the loch called Lochmaben, an objection of that kind was taken, and we affirmed the familiar doctrine that in the Sheriff-court it is always competent for the Sheriff to examine the title as a title to support possession, though not for the purpose of deciding the question of right. The proof of possession is not in any case necessarily limited to the last seven years. It may go back for many years for the purpose of shewing the character of the possession during the seven years, but for that purpose only. The statute of 1838 was not required to make this competent. What that statute did was to extend the Sheriff's jurisdiction in certain cases to a competition of heritable rights, but there can here be no such competition between the tenant of the mill and the abstracter of the multures, for the simple reason that they are not the proper opponents in such a competition. If the present case admitted of anything more than a possessory judgment that judgment would necessarily be a judgment on the matter of right. But would the proprietor of the mill be barred from bringing an action to declare his right by any judgment to be pronounced in this action to which he is no party? It is surely impossible to suppose such a result. I am therefore clearly of opinion that the statute does not apply to the present case, but at the same time that there is no incompetency in the action in the Sheriff-court, and consequently that we must either send the case back to the Sheriff to consider the case on its merits or proceed ourselves to do so.

LORD ARDMILLAN.—The question here raised is one of some nicety. It is important to observe (1) that this is not an action of declarator, and (2) that it could not be an action of declarator. The Sheriff has not jurisdiction to entertain a proper action of declarator, and the tenant has not the title or proper instance to raise the question in a declarator. What we have before us is a petitory action for £25, and although the summons contains a number of statements in accordance with the practice in the Sheriff-court, where the condescendence is really embodied in the conclusions of the summons, and is not, as in this Court, kept quite separate, still this is not a declarator. The defence is that the pursuer has no such right as he claims. It is the defence which raises the question. The right of thirlage is admitted, but to the extent claimed it is disputed. Certainly the question raised by that defence is one relating to the constitution or exercise of a servitude, but only in so far as involved in the petitory conclusion. I have nothing to add on the curious question whether thirlage is a proper servitude or not. I am disposed to think that it is a prædial servitude. However that may be, no one can doubt that, in this action, where there is a dominant tenement and a servient tenement, and an acknowledged right of thirlage, it must here be held to be, at least to a certain extent, a prædial servitude, and if so the statute applies. I do not think that the statute gives the Sheriff power to dispose of a declaratory question. But under the wording of section 15, the Sheriff has certainly the power to settle questions of a nature like this—not indeed to the extent of deciding a proper action of declarator, but to the extent of deciding the cause before him. He is not to be stopped in trying a question relating to a claim for £25 because it may be that a question of heritable right is connected with that claim, or lies at the root of it.

In my opinion this is a petitory and not a possessory action—not an action to maintain or to regulate possession. It is an action for £25, and a petitory action. The effect of the section of the statute is to give the Sheriff power to deal with a declaratory question so as to dispose of this action.

LORD JERVISWOODE concurred with the Lord President and Lord Ardmillan.

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The Court recalled the Sheriff's interlocutor of 7th December 1
repelled the preliminary plea, and sustained the jurisdiction of the She
On the merits.

Argued for defender;—The title only applies to *grindable* corn, tha
corn which the tenant requires to grind. Where the terms were ambig
they were to be construed in favour of freedom.

Argued for pursuer;—Unless the thirl was of all growing corn the
ception of seed and horse corn was meaningless. The terms of the dec
arbitral, regarding it in no higher light than a piece of evidence, w
conclusive in favour of the pursuer's construction. If the terms w
ambiguous these could be interpreted by usage, and the usage had b
all in favour of the same construction.

LORD PRESIDENT.—This mill of Snaid was a barony mill. At what tim
came into existence, or when the thirl was created, we have no evidence. I
only know that the pursuer is tenant of the mill, to which the lands of the
fender are thirled to some effect. Nor do we know in what terms the la
were astricted in the constitution of the original right. We have only t
evidence of certain charters by progress, which describe the astriction in s
stantially the same terms, and we must assume that in the titles of the servi
tenement the thirl has been described throughout in these or similar terms. T
astriction is in these terms:—"The feuar and his tenants grinding their wh
grindable corns growing on the said lands, except teind and seed corn, at t
mill of Snaid, and paying multures and other sequels conform to use and wo
The only variation in any charter is that in the exception the words are so
times "seed and horse corn;" but the exception occurs in each charter produ
This astriction may mean that the thirl extends to *grana crescentia*, or that
extends only to such portions of the crop as the cultivator requires or choose
grind. The term "grindable corn" is an equivocal and flexible term, susceptib
of interpretation from the context or from usage. The terms of the excepti
favour the more extensive view of this expression; for if the grindable co
meant only such corn as is actually sent to be ground, the exception of teind a
seed and horse corn would be useless and unmeaning, for that portion of t
crop never is sent to the mill to be ground. That is a point in favour of t
miller on the construction of the titles of the servient tenement. His o
titles, so far as the leases are concerned, do not throw much light on the matt
for the mill is conveyed in very general terms; but in tracing the history of t
thirl we come upon one remarkable piece of evidence, for it is chiefly as a pie
of evidence that it is valuable,—the decreet-arbitral of 1787. There was then
dispute between the owner of the mill and the proprietors and tenants of app
rently the whole astricted lands. It is not possible to read the decreet-arbit
and the submission, making special reference to an action of abstracted multu
and also a declarator of right, without seeing that the question which was decid
was just the question raised now. The arbiter determined that in a very cle
and distinct manner, finding that the astriction extended to the whole corn grow
on the lands. It is plain as a matter of inference that at this time the existi
usage was to pay on the whole *grana crescentia*, for we cannot suppose a lawy
of the eminence of Mr Wight would have pronounced a decreet which wou
have been quite indefensible if the usage had not been so. Further, it appe
that the tenants and possessors of the thirled lands had settled the whole clai
of the miller from 1785, when the dispute arose, down to the date of the decre
and of course these could only be paid on the principle of Mr Wight's awa
Here, then, is usage of a most distinct and precise kind as regards the pari
when the decreet was pronounced, and some years preceding. Some proceedin
followed in the Bailie Court, in which the decreet-arbitral received effect,
compel the tenants to maintain the roof of the mill,—one of the ordinary burde
of the thirl,—not to force them to pay abstracted multures. From this ari
the inference that as regards the multures the tenants had, at least for the tim
no repugnance to pay them. All this is strong foundation for usage. There

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:t evidence of usage until a much later period. In 1828 and onwards lence is on the whole satisfactory that the multures continued to be paid *rana crescentia*. In the earlier period, as regards the lands of Moatland, distinct evidence from the witness Johnston that the possessor took all n to the mill except seed and horse corn; that he never sold, and did not : himself entitled to sell, any grain. Then we have, as to both properties, dvin and others, evidence which brings usage down to 1856, and we have :t account of what the usage was. The way of regulating the thirl was ı estimate was made of the yield of the lands, one-third was taken off for l horse corn, one twenty-fifth from the remainder for multures, and one :ond taken off in kind for knaveship and sequels. On this footing nents were made for money payments, and among other lands for which arrangement was made were these lands of Birkshaw and Moatland. The d when the defender became proprietor of both lands was £4, and it is evidence that this sum was fixed on the footing of the decree-arbitral. The r never seems to have refused making the money payments in terms of this nent. No doubt in 1856 a dispute arose. The pursuer, however, has suffi- roved usage up to the time of the dispute, and that usage is in his favour.

Deas.—This is an action at the instance of the tenant of the mill of in the county of Dumfries. The mill is let to him under a lease for ı years, with a right to all the multures and other pertinents of the mill. ant brings this action for £25 of abstracted multures, and that is quite a nt action for him to raise before the Sheriff, independently altogether of ute of 1838, which has nothing to do with this case. The Sheriff has tion, at common law, in all possessory actions, whether they relate to ng to be done or suffered, or to some periodical or even incidental pay- r exactions, of which last the numerous cases in the books as to petty , toll and ferry dues, &c., are familiar examples. I continue, however, pinion I formerly expressed in the case, that the tenant could not com- ' have brought an action to establish the constitution of the heritable When his lease comes to an end any interest he has will be at an end but to enable him to pursue for the £25 of abstracted multures it was for him to produce a *prima facie* title, and to offer to prove a practice of t during the possessory period. I greatly doubt whether he was bound any other title besides the tack under which he holds, and thereupon to ossession for the seven years previous to the commencement of this dis- 1866, taking into view the previous practice as illustrating the character possession. If anything further were required by way of title there is reet-arbitral to which your Lordship has referred.

only doubtful thing in the case seems to me to be the matter of fact, : the compoundings for the servitude were on the footing of the smaller he greater kind of thirlage. Upon that point, however, I come to a con- favourable to the pursuer.

easy to account for extraneous matter having been introduced into this · the fact that the landlord, though not actually a party to the action, is ly desirous to take advantage of it so as to have the right constituted. necessary to say that no judgment in this action can be *res judicata* to ect. But as between the present parties I think the pursuer is entitled e for the amount proposed by your Lordship.

Ardmillan.—The pursuer is tenant of the mill, and if it had not been nature of the defence stated there would have been no difficulty in this case. The legal question, which is not very clear, is raised by the r; his plea is that he does not dispute the existence of the right of thirlage it maintains that the right is restricted to grindable corn only,—that is, actually taken to some mill to be ground. The pursuer's contention, on er hand, is that his right extends to all *grana crescentia* except seed and orn. This question may be, and ought to be, decided in this action to ot concluded for.

I very strongly that the claim of this pursuer to the extent urged is one

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for which the law has no favour. The thirlage of *invecta et illata* is what called odious to the law. The thirlage of *omnia grana crescentia* is not quite unfavourably viewed. But there is a presumption against it. The law will willingly, nor without strong proof, sustain a thirl of all growing grain. T milder thirl of grindable corn stands in much higher favour, and will *in d* be presumed. I admit fully that the pursuer must meet an adverse presu tion, but, under the decreet-arbitral, he has a strong foundation for his claim.

That decree shews the usage at its date, and a usage to which the emin lawyer who pronounced that decreet would never have given effect had it been sufficiently proved as an existing usage. Next in the titles which we h had to consider, titles by progress, but not to be lost sight of, there is the exc tion of seed corn and horse corn, which would seem to imply that what th were excepted from was not grindable corn, but all growing corn. The excepti is scarcely intelligible on any other view. Erskine and Hume both say that t word "grindable" is capable of construction, and to be construed accordi to the usage. That being the case, and looking to the proof of usage here connection with the views of the case which I have stated, particularly t existence of the decreet-arbitral and the construction I put upon the titles of t defender, I am of opinion that the pursuer has discharged himself of a very he burden successfully, and that we should find in his favour.

LORD JERVISWOODE concurred.

THE following interlocutor was pronounced:—"Recall the interlocu of the Sheriff-substitute of 12th July 1872: Find that the purs (appellant) is tenant of the mill of Snaid under a tack for nine years from Whitsunday 1866: Find that the defender's (respo dent's) lands are thirled to the said mill: Find that for a per past the memory of man the defender has paid multures to t tenant of the said mill upon all grains grown on the ground of t said lands, excepting seed and horse corn, at the rate of o twenty-fifth grain of multure, besides one thirty-second grain knaveship, or has paid a sum of money annually as a commutati for the said rates on all grain grown on the said lands: Find t the defender has refused to pay any multures for the years 18 1867, 1868, 1869, and 1870: Find that the quantities of grain which multures at the above rates are payable are—for the y 1866, 135 bushels of oats; for the year 1867, 70 bushels of bar and 160 bushels of oats; for the year 1868, 9 bushels of bar and 219 bushels of oats; for the year 1869, 10 bushels of bar and 16 bushels of oats; and for the year 1870, 328 bushels oats: Find that the value in money of the one twenty-fifth o one twenty-third of said quantities of barley and oats, accordi to the fiars' prices of the respective years mentioned, would ha been—for crop 1866, £1, 10s. 5¼d.; for crop 1867, £3, 2s. 10½ for crop 1868, £2, 15s. 6¾d.; for crop 1869, 6s. 0½d.; and for cr 1870, £3, 5s. 2¾d., amounting in all to the sum of £11, 0s. 2 sterling: Therefore repel the defences, and decern against the d fender for payment to the pursuer of the said sum of £11, 0s. 2 sterling, with interest as libelled: Find the defender liable i expenses both in this Court and in the inferior Court; allow," &c

TAWSE & BONAR, W.S.—SCOTT, BRUCE, & GLOVER, W.S.—Agents.

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Mar. 18, 1873. O'Neil v. Rankin & Sons.

THOMAS O'NEIL, Pursuer.—*J. C. Smith—M'Kechnie.*

WILLIAM RANKIN & SONS, Defenders.—*Sol.-Gen. Clark—Maclean.*

Ship—Liability of Owners for Master—Merchant Shipping Act, 1854 (1 *and* 18 *Vict. c.* 104, *sec.* 246).—Section 246 of the Merchant Shipping Ac 1854, confers on "the master, or any mate, or the owner, ship's husba

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signee" of a vessel power to apprehend a seaman who deserts; and pro- that, if the apprehension is made on improper or insufficient grounds, the who makes the same, or causes it to be made, should incur a penalty, if inflicted, should "be a bar to any action for false imprisonment in of such apprehension." *Held* that the powers conferred by this section masters, &c., were conferred upon them in their individual capacity, and acting for the owners, and consequently that the owners were not re- ible for any misuse of these powers.

1ST DIVISION.
Lord Mure.
M.

is was an action of damages by Thomas O'Neil, against William in and Sons, owners of the ship "Earl Grey."

omas O'Neil was engaged to act as cook and steward for a voyage Kirkcudbright to Lisbon on board the brig "Earl Grey," of which rs Rankin and Sons were the owners, and Edward Nankivell was the er. While the vessel was lying at Kirkcudbright, the pursuer, on 23d mber 1871, left the vessel, taking with him his body clothes and personal effects. Nankivell, acting in virtue of the powers con- d by the 246th section of the Merchant Shipping Act, 1854,* imme- ly caused him to be apprehended. Nankivell then presented a ion to the Steward to have the penalties specified in the 243d section e Act inflicted on O'Neil, on which petition a warrant was granted is apprehension. Before the trial came on the ship had sailed, and equently the master did not appear, and no further proceedings were n. Nankivell had, it was further alleged, also taken possession of pursuer's clothes, conveyed them on board his vessel, and sailed with The pursuer alleged that the whole of these actings and proceed- of Nankivell, as master, and as acting on behalf of the owners, Rankin Sons, were illegal, unwarrantable, nimious, and oppressive. He dingly raised this action of damages, which were laid at £200, against kin and Sons, the owners, and Nankivell, the master. The summons however, not executed against the latter.

e pursuer pleaded against Rankin and Sons;—(1) The defenders, the William Rankin and Sons, as managing registered owners of the l Grey," were bound by the suits and contracts pursued and under- n by the said other defender, the said Edward Nankivell, the master, in his province; and in respect that the proceedings complained of

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"Whenever, either at the commencement or during the progress of any ge, any seaman or apprentice neglects or refuses to join, or deserts from or es to proceed to sea in any ship in which he is duly engaged to serve, or is d otherwise absenting himself therefrom without leave, the master, or any , or the owner, ship's-husband, or consignee, may, in any place in her sty's dominions, with or without the assistance of the local police officers or tables, who are hereby directed to give the same if required, as also at any e out of her Majesty's dominions if and so far as the laws in force at such a e will permit, apprehend him without first procuring a warrant; and may upon, in any case, and shall, in case he so requires and it is practicable, ey him before some Court capable of taking cognisance of the matter, to be t with according to law; and may, for the purpose of conveying him before Court, detain him in custody for a period not exceeding twenty-four hours, uch shorter time as may be necessary, or may, if he does not so require, or ere is no such Court at or near the place, at once convey him on board; and ny such apprehension appears to the Court before which the case is brought ave been made on improper or insufficient grounds, the master, mate, owner, 's-husband, or consignee, who makes the same or causes the same to be e, shall incur a penalty not exceeding twenty pounds; but such penalty, if cted, shall be a bar to any action for false imprisonment in respect of such rehension."

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were undertaken by the master in matters within the sphere of his d the said defenders are liable to the pursuer therefor in reparation as c cluded for. (3) The proceedings complained of being illegal, unwarra able, nimious, and oppressive, malicious, and without probable cause, pursuer was entitled to damages against the defenders severally, as c descended on, with expenses.

The defenders, Rankin and Sons, pleaded;—(1) The pursuer has set forth facts relevant or sufficient to warrant the conclusions of action against the present defenders, and the same should be dismi with expenses. (2) All parties not called, in respect the summons not been executed against the captain of the ship. (3) Assuming the proceedings taken by the master of the ship were as stated by pursuer, the present defenders are not answerable for the same, and should be assoilzied, with expenses.

The Lord Ordinary, on 23d December 1872, pronounced this in locutor:—"Sustains the first plea in law for the defenders, William Ran and Sons, dismisses the action, and decerns: Finds them entitled expenses, of which appoints an account to be given in, and remits same, when lodged, to the Auditor to tax and report." *

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* "NOTE.—In this action the pursuer seeks to recover damages from the fenders, as owners of a vessel in which the pursuer was engaged as cook, respect of certain alleged illegal proceedings of the master of that vessel, wh also called as a defender, but against whom the summons has not been exec The damages are laid on two grounds—1st, certain irregularities in proceed taken at the instance of the master for apprehending the pursuer as a des from the vessel when at Kirkcudbright in November 1871; and 2d, for master having illegally carried away the pursuer's clothes, bedding, bed-cl &c., from the railway station at Kirkcudbright, and taken them on board vessel on the day it sailed. It is not, however, said that any of the things plained of were done by the master by orders from the defenders, or with authority, or after communication had with them on the subject; and, in absence of any such allegations, it appears to the Lord Ordinary that the ments are not relevant to found a claim of damage against the present defen

"As regards the removal of the clothes and bedding, the charge appe amount almost to one of theft on the part of the master. It was at all event a proceeding within his ordinary duties as ship-master, but one apparently of an irregular and illegal description as—having regard to the opinion of the C in the case of Macdonald, 16th May 1860, 22 D. 1075—cannot, it is thought made the foundation of a claim of damages against owners unless directly au rised by them. The claim made in respect of the alleged illegal apprehen is attended with more difficulty, as it has the appearance of having been a p ceeding adopted for the benefit of the vessel and its owners. It is one, how which would not, it is thought, at common law, have been competent to master in the discharge of his ordinary duty, or as falling within his ordi powers delegated to him by the owners. For it relates to the exercise of a po specially conferred upon him, as well as upon all 'owners, ship-husbands, or e signees,' by section 246 of the Merchant Shipping Act, on which the applicat against the pursuer was founded. It is made competent by that section for an or any of these parties to adopt such proceedings on their individual respon bility; and the statute bears expressly that, when the proceedings appear to t Court before which the case is brought to have been improperly taken, it is t party making the application who is to be responsible for the penalty incurr Now, the petition in the present instance bears to have been presented und the statute in the name of the master alone; and, in the absence of any allega tion of direct authority, or any instructions from the defenders, it appears to t Lord Ordinary that in such circumstances it is against the master, and not t owners, that the party complaining ought to proceed in order to obtain redres

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he pursuer reclaimed.

rgued for him;—(1) The proceedings were illegal, in respect that the ner had been detained without a warrant for more than twenty-four s after his apprehension;[1] that the concurrence of the fiscal was not n to the petition in terms of section 531;[2] that, contrary to section , the clothes had been taken possession of without a conviction, and ugh not on board the vessel. (2) The owners were liable for acts e master within the scope of his authority, even when the authority derived from statute.[3]

rgued for Rankin and Sons;—(1) As regards the master's taking pos- n of the clothes and carrying them on board ship, that was not an for which the owners could be responsible, not being within the ary scope of his duties.[4] (2) The master and the seamen were col- rateurs.[5]

RD PRESIDENT.—The principle of the doctrine of collaborateur is, that the n on entering the service takes the risk of the acts of his fellow-workmen. that apply here; does the person take the risk of illegal apprehension?

The authority of the master was derived not from the owners, but the statute. He had an independent power, and, when using it, he d in the interest of and as representing not the owners alone, but the ers of the cargo, the crew, and all concerned.

t advising,—

ORD PRESIDENT.—This is an action at the instance of the cook or steward on d the brig "Earl Grey" of Liverpool, against the owners of that vessel, to er damages for certain proceedings taken against him by the master of the el at Kirkcudbright, when the ship was about to sail for Portugal. The er is called and concluded against in the summons, but it was not executed inst him. We have, therefore, only the owners to deal with. The proceedings plained of were taken under sec. 246 of the Merchant Shipping Act, and the nce, which the Lord Ordinary has sustained, is that the pursuer has not set h on record facts relevant and sufficient to warrant the conclusions of the on. The defenders further plead that they are not answerable for what was e by the master, even though it were illegal, under the 246th section of the t. This raises a question of great importance, but it is very special, because provisions contained in this section are very different from those contained he former Acts regulating the relations of masters and seamen. The title is given to a large number of persons to adopt proceedings. The section runs llows:—(His Lordship here read the section above quoted.)

he proceedings complained of were at the instance of the master, on the ged ground that the pursuer had deserted from the ship; and it is averred the pursuer that the procedure was illegal and irregular. Whether that be or not it must be assumed to be true at present. The question is, whether owners are answerable for the master's behaviour in such circumstances. If y are answerable for the master, are they to be answerable for any of the er persons mentioned in the section—mates, ship's-husbands, consignees of go? It seems quite impossible to maintain under this section that they can liable for a ship's-husband or consignee. There is no such liability at com-

[1] Merchant Shipping Act, 1854, sec. 246.
[2] M'Kelvie v. Barr, Dec. 3, 1860, 3 Irv. 631.
[3] Gowans v. Thomson, Feb. 6, 1844, 6 D. 606; M'Naughtan v. Allhusen and , Dec. 11, 1847, 6 D. 104, and 10 D. 236; "The Druid," April 25, 1842, Wm. Robertson's Reports, 391; Fraser v. Younger and Sons, June 13, 1867, s, vol. v. 861; Parsons on Shipping, ii. 26.
[4] Paterson v. Walker, Nov. 29, 1848, 11 D. 167; Macdonald v. Chisholm, y 16, 1860, 22 D. 1075.
[5] Leddy v. Gibson, Jan. 18, 1873, *ante*, p. 304.

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mon law. It would be something new if they were held to be liable for a mate —that is, whether first or other mate. There is no common law liability of this sort. It seems that all the persons here enumerated are *in pari casu*. I think it is impossible that the owners can be responsible for the master and not for the others named in the section. I am the more confirmed in this opinion by the wording of the close of the section,—"And if any such apprehension appear to the Court before which the case is brought to have been made on improper or on insufficient grounds, the master, mate, owner, ship's-husband, or consignee who makes the same, or causes the same to be made, shall incur a penalty not exceeding £20." In the first place, I am led to inquire whether anybody but the person who commits the illegality is to be answerable, and in reply to that I at once say he alone must be liable. No one ever heard of the master of a ship binding the owners in a penalty unless it is expressly so stated in the statute inflicting the penalty. Next we have this provision :—"But such penalty if inflicted, shall be a bar to any action for false imprisonment in respect of such apprehension." Shall this mean that the inflicting of the penalty is to be a bar to action against the master, but not against other people who are responsible for him? It seems to me the clause means that no action for false imprisonment shall lie in respect of actings for which a penalty has been inflicted; and that goes a long way to shew that every person mentioned in the section is liable for himself and for his own actings. That is clearly what was meant by the Legislature in providing that no action for false imprisonment shall lie against any of the enumerated persons. It never was contemplated that any person was to be liable except the wrongdoer. I therefore come to the conclusion that under this statute no liability lies against any one except against the person who has done the wrong.

Several cases were quoted to us during the discussion, and of these I shall notice the two most important. The first is M'Naughtan v. Allhusen and Co., of which there are two separate reports—the first under name M'Naughtan v. Halbert in 6 D. 194, and the second in 10 D. 236. The first contains the report of the proceedings brought by a seaman, M'Naughtan, against the master of a vessel, for the purpose of having a sentence and warrant obtained by the master under the 9th section of 5 and 6 Will. IV. cap 19 (the then Merchant Shipping Act) suspended. That section provided,—"That every seaman who shall absolutely desert the ship to which he shall belong shall forfeit to the owner or master thereof all his clothes and effects which he may have on board and all wages and emoluments to which he might otherwise be entitled . . . and in case any such desertion shall take place in parts beyond the seas and the master of the ship shall be under the necessity of enaging any seaman as a substitute for the deserter at a higher rate of wages than that stipulated in the agreement to be paid to the seaman deserting, the owner or master of the ship shall be entitled to recover from the deserter by summary proceeding, in the same manner as wages are by this Act made recoverable, any excess of wages which such owner or master shall pay to such substitute beyond the amount which shall be payable to the deserter." Here I would observe that the owners and master are in exactly the same category; proceedings may be taken by either. But the object of the process is to obtain possession of the clothes to meet any loss the ship might have suffered by the desertion of the seaman. It is quite obvious that in such circumstances the proceedings are taken *for* the owners, whether in the name of the master or of themselves; and in that case no doubt the master, in proceeding against the seaman as a deserter, was acting for the owners, and all that was held was that the owners were liable for the expenses awarded to the seaman as against the master. The question which subsequently arose was as to whether the seaman was entitled to recover against the owners expenses incurred by him in a suspension in this Court, but the distinction was drawn there that though the master had a mandate to proceed in the inferior Court he was not entitled on his own responsibility to litigate in the Court of Session.

The other case quoted (Gowans v. Thomson), also in 6 D. 606, approaches somewhat nearer to this one, although there is still a difference. It was under

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t statute from the present one. By that statute it is put in the power ster, in the management of his ship in a foreign port, to leave behind who has absolutely deserted, but the policy of the statute clearly ap- be that no such step was to be taken except on very clear evidence of , because people so left behind generally became pirates. So the mas-) obtain a certificate from some person setting forth that desertion had :en place. But the duty was laid on the master, and the master alone, s certificate before setting sail and leaving one of his crew behind him. ns' case the master sailed without a certificate of desertion, and did so clothes and whole personal property of the seaman on board his vessel. n was raised in this country against the owners to recover the clothes erty, as having come wrongfully into their possession. The Court held master was wrong, and that he was acting for the owners, as what he was in the ordinary management of the vessel, and also because what was for the benefit of the owners, because he detained the clothes as a r the desertion of the seamen. There the owners were not only repre- y the master, but had taken benefit from his actings. I think we must the Lord Ordinary's interlocutor.

DEAS and LORD JERVISWOODE concurred.

ARDMILLAN absent.

THE COURT adhered to the Lord Ordinary's interlocutor.

RUMMOND & MACKENZIE, S.S.C.—J. W. & J. MACKENZIE, W.S.—Agents.

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Cuninghame's Trustees v. Duke *et al.*

IES MERRY and OTHERS (Alexander Cuninghame's Trustees), First Parties.—*Sol.-Gen. Clark—W. J. Mure.*
R DUKE and OTHERS, Second Parties.—*Marshall—Macdonald.*

ion—Annuity—Statute 33 *and* 34 *Vict. c.* 35 (*Apportionment Act*, 1870). itor left an annuity of £200 to his sister "during all the days and her life," payable in equal portions at Whitsunday and Martinmas, ncing the first year's payment" at the first term after his death. He 9th November 1866. She survived till 27th October 1871, having five years' payments of the annuity during the four years and eleven of her survivance. Her representatives maintained that the testator's to make a year's payment at the first term after his death was intended the half year current at the date of his death, and that the annuitant only received four and a half years' payment of the annuity, and was o a proportion for the half year current at the date of her death. *Held* testator's intention was that the sister should receive payment for the ring which she should survive him at the rate of £200 per annum, she had received full payment.

ion—Trust—Legacy—Discretion of Trustees.—A testator left legacies f his nieces, to be paid "when my trustees shall find it suitable and nt to pay the same, and which shall be so secured to said children as es may consider best for their welfare and benefit . . . . which . . . . . are hereby specially provided and given for the liferent alimen- of my . . . . legatees, exclusive of the *jus mariti* of their husbands;" ther declaring that the simple receipt and discharge of my said legatees, the consent or concurrence of their respective husbands, shall be a exoneration, acquittance, and discharge to my trustees for said . . . .

Held that although the trust-estate was in a condition conveniently e legacies the trustees were not bound to make immediate payment to nters of the sums bequeathed.

1ST DIVISION B.

ate Alexander Cuninghame, Esquire, of Craigends, left a trust- on and settlement, dated 14th August 1856, whereby he appointed lerry, Esquire, and others, trustees. By the third purpose of the position he provided—"That my trustees shall, from the said

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residue of my estates, make payment of the following annuities and legacies—viz., to my sister Mrs Margaret Cuninghame or Duke, wife of Ro Duke, Esquire, of an annuity of £200 sterling yearly during all the d and years of her life, and after her death each of her children shall paid a legacy of £1000 sterling when my trustees find it suitable and c venient to pay the same, and which shall be so secured to said child as my trustees may consider best for their welfare and benefit; and my sister Mrs Williamina Cuninghame or Main, wife of the Rever Thomas Main, a like annuity of £200 sterling yearly,—payable, both nuities, half-yearly, by equal portions, at the usual terms of Martin and Whitsunday in each year, commencing the first year's payment each of said annuities at the first term of Martinmas or Whitsunday af my death, and continuing the same half-yearly thereafter; and wh annuities to my said sisters, and legacies to the children, where female, my said brothers and sisters, are hereby specially provided and given the liferent alimentary use allenarly of my said annuitants and fem legatees, exclusive of the *jus mariti* and right of administration of th present or future husbands; and the said annuities and legacies shall no ways be liable to or affectable by the debts or deeds of such husban or in any way subject or liable to the diligence of their creditors; a further declaring that the simple receipt and discharge of my said sist and female legatees respectively, without the consent or concurrence their respective husbands, shall be a sufficient exoneration, acquittan and discharge to my trustees for said annuities and legacies." Mr C inghame died on the 9th day of November 1866. On the 11th of same month, two days after the truster's death, being the term of Mart mas, there was paid to Mrs Duke a sum of £200, being a full ye annuity. Nothing was paid to her at Whitsunday 1867, but she receiv a half year's annuity at Martinmas 1867, and the half-yearly payme were continued down to Whitsunday 1871, being the term immediat preceding her death on the 27th October 1871. She left five children.

A special case was presented by Mr Cuninghame's trustees, and children of Mrs Duke as her representatives and legatees. At the ti of bringing the special case the daughters were of age and unmarri and the trustees were in a position conveniently to pay the legacies.

The parties of the second part contended (1) that the first payme of one year's annuity directed by the testator to be made at the first te after his death was intended to cover the half year current at the date his death, and that Mrs Duke had not received the half year's annu for the half year current at her death, and was entitled to a proporti thereof; that Mrs Duke having died during the currency of the te from Whitsunday to Martinmas 1871 her representatives were entitl to a proportionate part of the annuity which would have been paya to her at the term of Martinmas had she survived till that term; and (2 that the female legatees were each entitled to payment of the legacy £1000 at once, on their own receipt and discharge, and that the trustee were bound to make immediate payment thereof.

The parties of the first part contended (1) that the annuity which wa payable and paid to Mrs Duke at Whitsunday 1871 was paid in advan for the term from Whitsunday to Martinmas 1871, and that her repr sentatives were not entitled to claim any farther sum in name of annuit for the period from Whitsunday 1871 till the date of Mrs Duke's death and (2) that the trustees were not entitled to pay the legacies of £100 each to the female legatees, but were bound to hold the same for the liferent alimentary use allenarly; or, otherwise, that it was in the discre tion of the trustees either to pay or to continue to hold said legacies, an

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were therefore not bound to make payment thereof until they nsider it to be suitable to do so.

lowing were the questions of law submitted:—"(1) Whether Mrs nnuity was payable in advance, from the 11th day of November , Whether a proportional part was due for the period from 15th l till 27th October 1871, the date of her death? (2) Whether e's daughters were entitled to payment of the legacies to them at their own receipt and discharge? or, Whether the trustees were entitled to continue to hold the capital?"[1]

ising,—

RESIDENT.—The first question regards the annuity of the testator's sister, . Her representatives contend that as she died during the currency of ney are entitled to a proportionate part of her annuity; while the trustees settlement contend that the annuity was payable and was paid in ad- l that consequently nothing more can be claimed. I cannot quite affirm position. The view which I take depends on the precise words of the —(*Reads*). It is impossible to read the terms of this part of the set- ithout seeing that the testator's true meaning was that his sister should nnuity corresponding in amount to the time that she should survive s to be payable during all the days and years of her life. If she has tained payment to that extent her representatives can claim nothing r Cuninghame died on 9th November 1866, and Mrs Duke on 27th 371. She thus survived him four years eleven months and fourteen w, it appears that the whole amount paid to her was £1000, just five uity. She has therefore obtained payment of rather more than the nd the representatives are not entitled to anything further.

t question regards the legacies left to the children of Mrs Duke. The provides that after her death each of her children shall be paid a £1000 "when my trustees shall find it suitable and convenient to pay and which shall be so secured to said children as my trustees may con- for their welfare and benefit." So far no distinction is made between laughters, but it is further provided that the legacies to the children, ale, are given for their liferent use allenarly, exclusive of the *jus mariti* sbands. The daughters of Mrs Duke contend that they are entitled ate payment, upon their own receipt and discharge; the trustees con- they are not entitled to pay the legacies, but that they should hold the heir liferent use allenarly, or otherwise, in their discretion, to pay or In this contention there is a confusion of two distinct things. The e not to pay these legacies until they find it suitable and convenient. ts to the convenience of their management of the trust-estate. When which is suitable and convenient to them as trustees arrives another arises,—to wit, that the legacies shall be so secured to the children as s may consider best for their benefit, and, in the case of daughters, gacies shall be secured so as to give them only a liferent use. The of the settlement which creates a little difficulty in so reading it is the that the simple receipt and discharge of the female legatees, without rence of their husbands, is to be a sufficient exoneration to the trustees acies,—a provision which suggests payment of the capital of the lega- to the daughters themselves. When taken in connection with the isions this provision means only this, that whatever the daughters y be discharged by the daughters alone. Even as regards the capital,

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rities.—33 and 34 Vict. c. 35 (Apportionment Act, 1870), sec. 2; ık v. Sandeman, Feb. 16, 1843, 5 D. 643; Hard v. Anstruther, Nov. *ante*, vol. i., H. L. 14; Paul v. Anstruther, Feb. 15, 1863, *ante*, . L. 1; Wood v. Menzies, May 26, 1871, *ante*, vol. ix., 775; Lady lcott's Trustees, Dec. 5, 1872, *supra*, p. 173; Lord Herries v. Max- ıtor, Feb. 7, 1873, *supra*, p. 396.

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this provision can be read consistently with the view I have expressed. when the legacies are settled by the trustees so as to secure a liferent use then is the time for the trustees to obtain their exoneration and discharge, w may be done by the daughters without the concurrence of their husbands. leading idea has been that the settlement would take place when the daug were married, and the trustees would for that purpose become parties to marriage-contracts. But what the trustees may hereafter be bound to do I am prepared to state in general terms. That may depend on circumstances, b present they are not bound to pay the legacies at once on discharge by daughters; and that is the only question before us.

LORD DEAS.—I concur in the opinion expressed as to the annuities. the legacies, I likewise concur in holding that the daughters are not entitl insist on immediate payment. In the course of the argument we were ask consider what deed the trustees ought to execute, or what plan they sh adopt in settling these legacies on the daughters. I am not disposed to into those questions, even to the extent of considering whether the leg right was restricted to a liferent. Questions as to the mode of securin legacies are, in the first instance at least, for the consideration of the tru A very considerable discretion is left with them, and I am not disposed to the responsibility of interfering with or superseding that discretion.

LORD ARDMILLAN and LORD JERVISWOODE concurred as to the annuities as to the immediate payment of the legacies, but expressed no opinion as t future duty of the trustees in settling and securing the legacies.

THE following interlocutor was pronounced:—"Having heard co on the special case, in answer to the first question find declare that Mrs Duke obtained payment of the full amou the annuity due to her during her lifetime, and that no thereof is now due to her representatives: In answer to the se question find and declare that Mrs Duke's daughters are entitled to payment of the legacies to them at once on t own receipt and discharge, and that the trustees are not bo to make such payment, and decern."

MACLACHLAN & RODGER, W.S.—MACKENZIE & BLACK, W.S.—Agents.

No. 94.

Mar. 18, 1873. West Calder Oil Co. v. Fell.

THE WEST CALDER OIL COMPANY, Pursuers.—*Sol.-Gen. Clark—Mack*
ALEXANDER MORRISON FELL, Defender.—*Millar—Keir.*

Process—All parties not called.—Circumstances in which a pursuer allowed to proceed with an action without transferring the cause against representatives of a person deceased who had been called as a defender fo interest but had not appeared in the action.

1ST DIVISION. Ld. Ormidale. B.

THE WEST CALDER OIL COMPANY raised an action against A. M. F "and also against J. W. Fell, for any right or interest he has in the mises," concluding to have A. M. Fell decerned to assign certain le Expenses were concluded for against A. M. Fell, and also against J. Fell, "but only in the event of his opposing any of the conclusions of summons." This action was met by an action of reduction brought A. M. Fell, to set aside an agreement by which he and J. W. Fell retired from the company. The actions were conjoined. J. W. Fell not appear in the original action, and was not a party to the action of re tion conjoined with it. A similar action as to other leases was bro against J. W. Fell, and was similarly met. J. W. Fell died insol in February 1872. On the pursuers' proposal to have a diet of proof i in the action against A. M. Fell, the Lord Ordinary (Ormidale) refuse

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stion, "in respect the representatives of the defender, the now deceased hn Wilson Fell, are not yet sisted as parties to this or the relative action the instance of the said pursuers against the said deceased John Wilson ll, and in respect it is expedient that these two actions should be pro- led with together."

The pursuers reclaimed.

At advising,—

LORD PRESIDENT.—This action is directed against Alexander Morrison Fell, d also against John Wilson Fell for any right or interest he has in the pre- es. The conclusions of the summons are that A. M. Fell should be decerned xecute the assignations of certain leases. It is not necessary, nor is it con- ed for, that J. W. Fell should concur in their execution, and the only other tion of him is that in the event of his opposing any of the conclusions of the mons, and in that event only, he should be liable in expenses. J. W. Fell not appear as a party, at which I am not surprised, for he appears to have terest. Another action has been raised by the company against J. W. Fell similar kind to that before us. The Lord Ordinary has refused to appoint t of proof, the effect of which refusal is to postpone the trial of this cause finitely. J. W. Fell died insolvent. Sequestration cannot be awarded l six months after his death, which is practically six months from this date. equently, if the interlocutor stands, the case is sisted for six months, and that very probably the trustee will have nothing to say to it. I think that pursuers should not be put to the hardship of such a delay, unless it is shewn e incompetent or greatly inexpedient to proceed. As to the competency of eeding there is no doubt. The only parties having any interest in this question both before the Court. But then the Lord Ordinary thinks it desirable that two cases should be tried together. No doubt they resemble one another y much, and under ordinary circumstances it would be expedient that the cases should be tried, not together, but at the same time, for many of the esses would do for both cases. But that is a matter of convenience which y be and is outweighed by other considerations of convenience, and it is by , that in consequence of its inability to procure assignations of these leases to ich it thinks itself entitled the company cannot assign or dispose of its busi- s. I think this case must go to proof.

LORD DEAS.—The question of the sisting or delaying for the other action is a stion of discretion, and I am averse to interfering with the Lord Ordinary's cretion in that matter. The other question is, whether this action can com- ently proceed, J. W. Fell being dead, and no person being sisted in his place. ppears on the very face of the summons that J. W. Fell has an interest both s trustee and as an individual. Indeed we may assume that from his being led for his interest. Being so called he must be dealt with as an ordinary fender. If we go on, we may be going on without all the parties interested. may be very inconvenient to delay the case, but that is no reason for going without the proper parties.

LORD ARDMILLAN and LORD JERVISWOODE concurred with the Lord President.

THE following interlocutor was pronounced:—"Recall the interlocutor, and remit to the Lord Ordinary to fix a diet of proof in the conjoined actions, and proceed thereafter as shall be just, and reserve the question of expenses."

J. & R. D. ROSS, W.S.—T. F. WEIR, S.S.C.—Agents.

No. 95.

Mar. 19, 1873.

M'Kernan v. Greenock Lodge of United Operative Masons' Association.

PATRICK M'KERNAN, Pursuer and Appellant.—*Brand—M'Kec*
THE GREENOCK LODGE OF THE UNITED OPERATIVE MASONS' Assc
OF SCOTLAND, Defenders and Respondents.—*Watson—Balfo*

Friendly Society.—By the rules of a friendly society, divided into l member who sustained an accident disabling him for life was entitled vision, on the lodge of which he was a member reporting in favour of l cation therefor, and on the same being approved of by a majority of t lodges of the society, in which case the central committee of the soci directed to pay over the sum. *Held* that an action by a member to re above provision, directed against the lodge to which he belonged, and no the society or its central committee, was incompetent.

Question as to the effect of a rule of a friendly society excluding the tion of Courts of law in questions between the society and its members

Observed (*per* Lord Deas) that although the society was by its rules mate judge of any claim, a Court of law, notwithstanding the exclusi rules, might compel it to adhere to its rules in arriving at a determinati

1ST DIVISION. Sheriff of Renfrewshire. M.

THIS was an action raised in the Sheriff-court at Greenock by M'Kernan, a member of the Greenock Lodge of the United O Masons' Association of Scotland, against that lodge, to recover provision to which a member of the society was entitled by its r sustaining, while following his employment, an accident disabl for life.*

* The following were the rules of the society applicable to the case:- IV. Law I.—1. Members disabled for life by any real accident receiv following their employment as a mason (and also those specified in la I.) may lay an application before the society, according to law 7 of th and if a majority of those voting on the application consider him ent shall receive the sum of £80 sterling. 3. Members who receive an however trifling it may seem at the time, shall send or cause to be sen to the secretary of the lodge of which he is a member (that is, where hi in), and such notice must be given within six weeks from the date of Any one failing to give such notice within the said six weeks to have r on the provisions of this class; and no lodge shall entertain any appli this law has not been complied with, unless it can be proved to have fault of any lodge office-bearer. On receipt of such notice the lodge point a doctor and delegate to investigate the case, the doctor's and d reports to be submitted to the society, along with the member's app 7. Three months must elapse from the time of accident before any makes application for the provision in law 1 of this class (except in amputation of leg, hand, or arm, by accident—the application to be mad society without restriction to time, and the C. C. to pay over the prov soon as convenient after the decision of the society is known). Members ing to make application within six calendar months after the date of shall have no claim, and their application shall not be entertained by a whatever. 8. When any application is made the lodge applied to shall a doctor and delegate to examine the applicant, and if satisfied that he is for life from following his trade to send such information to the cent mittee, who, if not satisfied, may authorise a lodge, or appoint a delega vestigate the case—the delegate to send a full report to the C. C., w submit the same to the society. A majority of those voting on the ap shall be held binding, without power of appeal to any Court of civi equity; but should any dispute arise between a member and the soc same may be submitted to arbitration, as in law 14, class III., each pay one-half of the expenses; the C. C. to pay over the amount wit month after the decision of the society is known. Any delegate sendir statement shall pay a fine of £1."

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'Kernan averred that in January 1872 he had sustained an accident, h rendered him blind of one eye; that he duly reported it; that ase was reported on by the medical officer of the lodge; that a majo- of the members of his lodge voted in favour of his application; but the central committee of the society refused to pay the said sum. lso complained of certain irregularities in the proceedings taken with ence to his claim; in particular, that the medical certificates sub- ed to the members voting on an application had been so misprinted o alter their meaning; and further, that to a large number of the es the claim had never been submitted.

he defenders denied the statements as to the alleged irregularities, stated that by the rules a claim was decided on, not by a majority of lodge to which the member belonged, but by a majority of the whole ety, and that a majority of the whole society had voted against the uer's application.

he Sheriff (Fraser), on 9th December 1872, dismissed the action as mpetent, but found no expenses due to either party.

he pursuer appealed to the First Division of the Court of Session.

rgued for appellant;—The society, in dealing with the application, not adhered to its rules, and it was only where that had been done ; the society could avail itself of the provision excluding appeal to the rts of law.

rgued for respondents;—(1) The action was directed against the wrong ties. It was the central committee, and not the Greenock lodge, held the funds from which such provisions were paid. (2) The n had been rejected by a majority of the lodges, and it was the majo- of the lodges who had the right of deciding. (3) The operation of Courts of law was excluded.[1]

t advising,—

ORD PRESIDENT.—My Lords, it appears to me that the title of this pursuer ake the claim embodied in this summons is that of a member of the United rative Masons' Association of Scotland, and that his claim, when properly erstood, is against that association. The association for the purposes of this n, if not otherwise, is properly represented by the central committee, for it e has the power to pay money.

low, he has called not the central committee, nor the association, but the lodge hich he belongs, and the defence is that they are not the proper parties to be ed in such an action. I am inclined to give that defence very great weight, I have not heard any relevant or satisfactory answer to it in the course of discussion.

he laws of the association dealing with accidents such as this one are con- ed under class IV., and provide as follows—"1. Members disabled for life my real accident received while following their employment as a mason (and those specified in law 7, class I.), may lay an application before the society rding to law 7 of this class, and if a majority of those voting on the applica- consider him entitled he shall receive the sum of £80 sterling." Law 7 is his effect—"Three months must elapse from the time of accident before member makes application for the provision in law 1 of this class (except ases of amputation of leg, hand, or arm, by accident—the application to be le to the society without restriction to time, and the central committee to over the provision as soon as convenient after the decision of the society is wn). Members neglecting to make application within six calendar months r the date of accident shall have no claim, and their application shall not be rtained by any lodge whatever." The right to receive assistance depends— n being disabled; 2, on making application; and 3, on a majority of those ng on the application considering him entitled to it. Without complying

[1] Manners v. Fairholme, March 5, 1872, *ante*, vol. x. 520.

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with these conditions no one can recover any compensation. The 8th law under this class, which is the most important as regards this question, provides—"8 When any application is made the lodge applied to shall appoint a doctor and delegate to examine the applicant, and if satisfied that he is disabled for life from following his trade to send such information to the central committee, who if not satisfied, may authorise a lodge, or appoint a delegate, to investigate the case,—the delegate to send a full report to the C. C., who shall submit the same to the society. A majority of those voting on the application shall be held binding, without power of appeal to any Court of civil law or equity; but should any dispute arise between a member and the society, the same may be submitted to arbitration, as in law 14, class III., each party to pay one-half of the expenses; the C. C. to pay over the amount within one month after the decision of the society is known. Any delegate sending a false statement shall pay a fine of £1." The course of procedure under these laws is quite obvious. The injured person is to apply to his own lodge first, and if they are satisfied that he is disabled for life, after an examination by a doctor and a delegate, they are to report to the central committee, but the central committee are not bound by the opinion of the lodge, and they may accordingly send a delegate to make further inquiry—the delegate to send a full report to the central committee, who have to submit it to the society. A majority of those voting on the application is to be held binding, without power of appeal to any Court of law; but if any dispute arise between a member and the society it may be submitted to arbitration. The parties are agreed on the meaning of this rule, and hold it to be that a majority of the whole lodges in Scotland must vote for it, and if the majority vote in favour of the application the central committee must pay the claim.

The lodge to which the applicant belongs has no more to do after reporting the case. The matter then passes into the hands of the society itself, as represented by the central committee. The central committee takes the vote of the whole society, in the manner directed by the laws of the society.

If the whole society had been brought here as defenders there would be a very difficult question. I reserve my opinion as to what would be the effect of the exclusion of Courts of law in the rules.

I cannot help concurring in the Sheriff's expression of sympathy with the pursuer, but we can do nothing for him under this action, the proper parties not having been called.

LORD DEAS.—There have been cases in this Division directed against societies of this kind, in which we held that although they were the judges of the claim yet they must go fairly to work in arriving at a determination. If this action had been properly framed perhaps this society would have had to shew that they had done so. Although we would not interfere with their ultimate judgment yet we might compel them to go properly and regularly to work before arriving at it. But I agree with your Lordship that the action has been directed against the wrong parties; and that is conclusive. I also agree with your Lordship and the Sheriff that, so far as appears, this man's claim was a fair and a just one, and I hope the society will act with liberality, and avoid further litigation on the subject.

LORD ARDMILLAN.—I do not think it necessary to consider the broad question which might have arisen if the central committee had been a party to the action. I avoid giving expression to any opinion on that subject. Looking to the dates mentioned in the record it would appear that the pursuer has been hasty, and not very judicious, in his course of proceeding. Some degree of irritation seems to have arisen which has caused this mistake on his part, and which has probably led to his being less handsomely treated than he ought to have been.

LORD JERVISWOODE concurred.

THE following interlocutor was pronounced:—"Refuse the appeal and decern: Find the appellant liable in expenses," &c.

T. LAWSON, S.S.C.—RHIND & LINDSAY, W.S.—Agents.

JOHN KIRKPATRICK, Pursuer.—*Sol.-Gen. Clark—M'Laren—Asher.* No. 96.
SIR JAMES EDWARD ALEXANDER AND ANOTHER (Kirkpatrick's Trustees), Defenders.—*Millar—Watson—Balfour.*

Mar. 19, 1873
Kirkpatrick v. Kirkpatrick's Trustees.

Property—Disposition.—Held that a *mortis causa* conveyance of heritage executed by a person who died prior to the Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101), was invalid in respect that the word "dispone" was not used.

Succession—Revocation.—Held (*diss.* Lords Deas and Benholme) that a revocable deed, conveying the granter's whole estate, heritable and moveable, was revoked by a subsequent deed by necessary implication, although the new deed contained no express revocation, and although, owing to the omission of the word "dispone," it proved ineffectual as a conveyance of heritage.

Writ—Delivery.—Observations (*per* Lord Deas) on the delivery necessary in the case of gratuitous *inter vivos* deeds granted by a wife in favour of her husband.

1ST DIVISION, and three consulted Judges. Lord Jervis-woode. B.

JOHN KIRKPATRICK, Esq., advocate, and Chief-Justice of the Ionian Islands, was married in 1820 to Miss Jean Glas, daughter of Mr John Glas, merchant in Glasgow. There was no antenuptial contract of marriage. In 1821 Mrs Kirkpatrick succeeded as heir-at-law to certain heritable estates in Lanarkshire. In June 1866 Mrs Kirkpatrick executed a disposition, whereby, on the narrative of "good and onerous causes and considerations," she, with consent of her husband, and he for his own right and interest, disponed her whole estates, heritable and moveable, to herself and her husband, and the survivor, whom failing, to certain trustees, for the purpose substantially of dividing the property among the eight daughters of the marriage, with this provision, that four of the daughters should have one-fourth more than the others. The name of John Kirkpatrick, the only surviving son of the marriage, was not mentioned in the deed. The deed contained the following clause:—"Reserving always full power to me at any time of my life, and even on deathbed, with consent of my said husband, and to us both with joint consent and assent, and to the survivor of us, to add to, alter, or revoke these presents, either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure."

On 4th March 1867 Mrs Kirkpatrick executed a trust-disposition, with consent of her husband, which bore—"In order to regulate the management and distribution of the means and estate of me, the said Mrs Jean Glas or Kirkpatrick, after my death, do hereby give, grant, assign, convey, and make over to and in favour of Miss Annabella Kirkpatrick, our eldest daughter, Colonel Sir James Edward Alexander of Westerton," and others, as trustees, "All and Sundry the property, means, debts, and estates, heritable and moveable, real and personal, presently belonging to me, or which may belong to me, the said Mrs Jean Glas or Kirkpatrick, at the time of my death." The chief purposes of the trust were (1) to pay to her husband, in case of his survivance, the free income of her whole estates; (2) to convey the fee of the said estates after her death to her four daughters, viz. Annabella, Jane, Christina, and Marianne, but burdened with an annuity of £100 per annum to each of her four other daughters, viz. Susan, Margaret, Ellen, and Charlotte, and of a similar annuity to her son, John Kirkpatrick, on the death of his wife. The deed contained no express clause of revocation of the previous deed, but it varied from it in its leading terms and purposes. The deed contained, *inter alia*, the following clause:—"Reserving always full power to me at any time of my life, and even on deathbed, by myself alone, to add to, alter, or revoke these presents, either in whole or in part, and to sell, burden, or dispose

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Mar. 19, 1873. Kirkpatrick v. Kirkpatrick's Trustees.

On 10th November 1867 Mrs Kirkpatrick died, without having executed any other deeds than those above mentioned.

On 26th June 1868 Mr Kirkpatrick executed a trust-disposition and settlement relative only to the property of his deceased wife, whereby, (the narrative that he was then sole fiar of the estates of his late wife heritable and moveable, he disponed the whole of them to the trustees therein named, for purposes identical with or similar to those of the deed executed by Mrs Kirkpatrick on 4th March 1867.

Mr Kirkpatrick had previously (4th March 1867) executed a settlement disposing of his own property, and by a codicil dated 23d May 1869 he left an annuity to his son of £200 per annum.

Mr Kirkpatrick died on 10th February 1871. Miss Kirkpatrick and Sir James Edward Alexander, two of the trustees nominated in the two prior deeds, were nominated and they accepted office as trustees under this deed, as well as under Mrs Kirkpatrick's deed of 1867.

John Kirkpatrick, the only son of the marriage, as heir-at-law of his mother, raised this action against Sir James E. Alexander and other trustees under the deeds of 1866, 1867, and 1868, concluding for declarator that the said trust-disposition and settlement, dated 18th June 1866, was effectually revoked and recalled *in toto* by the said trust-disposition and settlement dated 4th March 1867; and for declarator that the said last-mentioned trust-disposition and settlement dated 4th March 1867 did not contain any valid conveyance to the trustees therein named of the heritable property then belonging to the said Mrs Jean Glas or Kirkpatrick, or belonging to her at the time of her death, and that the last-mentioned deed was ineffectual to convey the heritable property; and further, for declarator that on the death of the said Mrs Jean Glas or Kirkpatrick the fee of the whole heritable property, of every description then belonging to her, and in particular of certain specified subjects, fell to and devolved upon the pursuer, as her heir-at-law, as his own exclusive property; and for declarator that the deceased John Kirkpatrick had no right or title whatever to the fee of the heritable property belonging to his spouse after the execution of the trust-disposition and settlement of 4th March 1867, or at any time thereafter, either in virtue of any of the said deeds, or of the death of his said spouse, or on any other ground. There followed conclusions for reduction of the disposition by Mr Kirkpatrick of 26th June 1868, and a disposition granted by the trustees in favour of the Clyde Navigation Trustees, who were also called as defenders.

After the production had been satisfied the action was, in terms of a joint minute, dismissed as against the Clyde Navigation Trustees.

The pursuer pleaded;—(1) The disposition of 18th June 1866 was effectually revoked by the trust-deed of 4th March 1867. (2) The trust-deed of 4th March 1867 contained no dispositive words, and was ineffectual as a conveyance of heritage. (3) Mr Kirkpatrick had no right or title to the heritage of his late wife, and had no power to convey the same by the disposition of 26th June 1868.

The trustees pleaded;—(1) The pursuer has no right to call for production or to sue for reduction of the deeds sought to be reduced, in respect that, assuming the trust-disposition and settlement executed by Mrs Kirkpatrick on 4th March 1867 to be ineffectual as a conveyance of heritage, the pursuer's claims, as her heir-at-law, are excluded by the trust-disposition and settlement of 18th June 1866. (2) The pursuer barred from challenging the deeds sought to be reduced by having accepted payment of an annuity of £200 a-year bequeathed to him by his

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ther. (4) The action cannot be maintained, in respect that the trust-position and settlement of 4th March 1867 contains words of *de præsi* conveyance, and is in law operative as a conveyance of the heritage hich belonged to Mrs Kirkpatrick. (5) Even assuming the said deed of h March 1867 to be ineffectual as a conveyance of heritage, the pur-r's claims are excluded by the disposition executed by Mr Kirkpatrick 26th June 1868, in virtue of the powers reserved to or conferred upon by the deeds.

On 20th July 1872 the Lord Ordinary pronounced the following terlocutor:—"Finds (1st) that the late Mrs Jean or Jane Glas or kpatrick, died on 10th November 1867; (2d) That no antenuptial tract of marriage was entered into between Mrs Kirkpatrick and said husband, and that the pursuer is the only surviving son of r marriage, and heir-at-law of his said mother; (3d) That Mrs Kirk-ick succeeded as heir-at-law to the whole heritable estates of her t, Miss Janet Semple of Finnieston, Glasgow, and made up a title reto in the year 1821, all as set forth in the record; (4th) That by position and settlement (containing also a conveyance in trust) dated June 1866, and, with relative codicil of same date, recorded in the ks of Session 10th May 1871, Mrs Kirkpatrick, with the special advice consent of her said husband, and he for himself, his own right and erest, and they both with joint consent and assent, 'for certain good onerous causes and considerations,' alienated and disponed, and gave, ated, assigned, conveyed, and made over to and in favour of them and survivor of them, whom failing, to Colonel Sir James Edward Alex-er of Westerton, and the other parties therein named, in trust, for the s, ends, and purposes therein mentioned, all and sundry the property, ans, debts, and estates, heritable and moveable, real and personal, then longing to Mrs Kirkpatrick, or which might belong to her at the time her death; and the said disposition and settlement also contains a use in the following terms, viz., 'Reserving always full power to me at y time of my life, and even on deathbed, with consent of my said hus-nd, and to us both with joint consent and assent, and to the survivor of to add to, alter, or revoke these presents either in whole or in part, d to sell, burden, or dispose of the whole subjects, heritable and moveable, reby conveyed, or any part thereof, at pleasure;' (5th) That by trust-dis-sition and settlement, executed by Mr and Mrs Kirkpatrick of date 4th of rch 1867, she, with the special advice and consent of her said husband, d he for himself, his own right and interest, and they both with joint con-nt and assent, 'in order to regulate the management and distribution of s means and estate of me, the said Mrs Jean Glas or Kirkpatrick, after my ath,' did 'give, grant, assign, convey, and make over,' to and in favour Miss Annabella Kirkpatrick, their eldest daughter, and the other rties therein named, in trust for the uses, ends, and purposes therein ntioned, and to the assignees of the said trustees, heritably and irre-emably, all and sundry the property, means, debts, and estates, heritable d moveable, real and personal, then belonging to Mrs Kirkpatrick, or hich might belong to her at the time of her death; and the said trust-sposition and settlement also contains a clause in these terms, viz.—Reserving always full power to me' (Mrs Kirkpatrick), 'at any time of y life, and even on deathbed, by myself alone, to add to, alter, or revoke ese presents, either in whole or in part, and to sell, burden, or dispose of e whole subjects, heritable and moveable, hereby conveyed, or any part ereof, at pleasure;' (6th) That the said trust-disposition and settlement, hile it contains no express revocation of the previous deed of 18th June 866, varies from it as regards certain of its terms and purposes; (7th)

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That after the death of Mrs Kirkpatrick, her husband, the said John Kirkpatrick, executed a disposition, bearing date 26th June 1868 (being the first of the deeds to which the reductive conclusions of the summons apply), and, proceeding upon the narrative of the foresaid disposition and settlement of 18th June 1866, and of the said trust-diposition and settlement of 4th March 1867, and upon the further narrative that, with the view of carrying out the purposes intended by the said last-mentioned deed, he had resolved to grant the said disposition (which purports to be executed by him as the survivor of him and his said spouse, and as such the fiar of the heritable property and estate conveyed by the said disposition and settlement of 18th June 1866, and in virtue of the whole powers conferred upon him by the said deed), and by said disposition he gave granted, assigned and disponed to and in favour of the foresaid Miss Annabella Kirkpatrick, and the other parties therein named, in trust for the uses, ends, and purposes mentioned in the said trust-disposition and settlement, and specified in the said disposition granted by him heritably and irredeemably, the heritable subjects therein particularly described, and which had belonged to his said spouse; and (8th) That the said John Kirkpatrick had previously, on 4th March 1867, executed a disposition *mortis causa* for the disposal of his own heritable and moveable estate, and that by codicil thereto, dated 23d March 1869, he left and bequeathed to his son, the pursuer, a free yearly annuity of £ sterling during all the days of his life after the testator's death, and by said codicil declared that the said annuity should form a burden upon 'the before-written conveyance, and upon my disponees under the same and shall form a charge upon my estates, heritable and moveable, thereby conveyed;' and with reference to the foregoing findings, Finds as matter of law (First), That the foresaid trust-disposition and settlement of 4th March 1867, having been executed before the date at which 'The Titles to Land Consolidation (Scotland) Act, 1868,' came into operation, and Mrs Kirkpatrick having predeceased the date of the commencement of said Act, the terms of the said trust-disposition and settlement are to be construed and dealt with according to the law and practice subsisting before the commencement of said Act; (Second), That as the disposition clause in the said trust-disposition and settlement does not contain the word 'dispone,' the said deed was ineffectual to convey the heritable estate belonging to Mrs Kirkpatrick; (Third), That the said trust-disposition and settlement must be held to have operated as a revocation of the previous disposition and settlement executed by the spouses on 18th June 1866; (Fourth), That in consequence of such revocation the late Mr Kirkpatrick acquired no right or title through his survivance of his said spouse to the fee of the heritable estate which belonged to her; (Fifth), That therefore the foresaid disposition executed by Mr Kirkpatrick after the death of his said spouse, bearing date the 26th June 1868, and purporting to convey as aforesaid the heritable subjects therein particularly described, and which had belonged to his said spouse, was ineffectual to convey the same, and that the pursuer as heir-at-law foresaid to his mother, Mrs Kirkpatrick, is entitled to sue for reduction of the said disposition, in so far as respects the said heritable subjects; and (Sixth), That the pursuer is not barred from challenging the said disposition in so far as regards the said heritable subjects by having accepted payment of the annuity of £200 provided to him as aforesaid by the codicil to said deed: Therefore, and with reference to the preceding findings, and to the minute of restriction annexed to the summons, repels the defences stated on behalf of the defenders, the said Sir James Edward Alexander and Miss Annabella Kirkpatrick, Mr and Mrs Kirkpatrick

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stees: Finds, decerns, and declares in terms of the declaratory conclu- s of the summons now insisted in against them only, and as respects the l disposition by the deceased John Kirkpatrick, dated 26th June 1868, nces, decerns, and declares, in terms of the conclusions for reduction," &c. The trustees reclaimed, and after a hearing before the First Division, cause was appointed to be argued before the Judges of that Division h the assistance of three Judges of the Second Division.

Argued for the defenders, the trustees;—(1) The use of the word "dis- e" was not essential to the conveyance of heritage. There were *obiter* s, but there was no express decision to that effect. Stair and Erskine tioned other words as being equally efficacious. It was enough that ds of *de præsenti* conveyance should be employed; and in the deed of 7 such words were employed. (2) But assuming that the use of the d "dispone" was essential to an effectual conveyance of heritage, and , therefore, the deed of 1867 was ineffectual so far as regarded the itage, how could it operate as a revocation of the deed of 1867? The d of 1867 contained no express clause of revocation which might d although the deed as a conveyance fell. It was simply and solely ull deed. It was only as an inconsistent conveyance that the second d could be regarded as a revocation, but the pursuer's contention being t it was not a conveyance, his only reason for holding it a revocation s destroyed. The principle that a deed which failed of its purpose did , if it contained no express clause of revocation, revoke a prior and nsistent deed, had been established in deathbed cases; that was not n any peculiarity of that class of deeds; indeed these cases were nger applications of the doctrine, because the deathbed deed which d not the effect of revoking the previous deed was not, like the present d, a mere nullity not requiring to be reduced. The intention of the ker of a deed was the ground on which the doctrine of implied revoca- n was founded; but that intention must be clearly shewn, and if any tention was more clearly shewn in these deeds than another it was the tention to exclude the heir-at-law. But was the deed of 1867 so inconsis- nt with the deed of 1866 that both could not stand together? If the deed of 67 revoked anything, it revoked some of the trust purposes and bene- ial provisions—not the conveyance in the deed of 1866. Regarded in s aspect the deed of 1867, though ineffectual as a conveyance, would rate as a direction to the trustees under the first deed, and the first d would remain effectual as a conveyance under which the trustees ght be obliged to make the estate effectual for the purposes of the ond deed. (3) The deed of 1868 by Mr Kirkpatrick was to be regarded one with the two previous deeds. The pursuer who had accepted an nuity of £200 under a codicil was, on the principle of approbate and probate, barred from challenging the other deeds, which were just other rts of the same scheme or plan.[1]

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[1] *Authorities cited at the debate in reference to the word "dispone":*—Stair, ii. , 14—iii., 2, 3; Erskine, iii., 8, 20; Bell's Prin., sec. 1692; More's Notes, i., 8; Sandford on Heritable Succession, 56, 61, 65; Mitchell v. Wright, 1759, L. 8082, 8084; Ogilvy v. Mercer, 1793, M., 3336; Simpson v. Barclay, 1752, Br. Sup., 794, 1 Ross, L. C., 1; Stewart v. Stewart, Nov. 16, 1803, Hume, 31 (note per Baron Hume); Hamilton v. Macdowal, March 3, 1815, F. C. per rd Meadowbank; Howden v. Glassford, July 7, 1864, *ante*, vol. ii., 1317, r Lords Curriehill and Deas; Hardy's Trustees, May 13, 1871, *ante*, vol. , 736.

Authorities cited at the debate in reference to the question of revocation:— thier, Pandectæ, xxviii. tit. iii., art. i., secs. 2 and 3; Coutts v. Crau-

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Argued for the pursuer;—(1) It was trite law that the word "dispone" was essential to an effectual conveyance of heritage; and this view was confirmed by sec. 20 of the Titles to Land Consolidation Act. Mr Erskine, in using other words along with "dispone," was not suggesting words of style to be used in a conveyance, but giving a description of the kind of words necessary to be employed *de præsenti*, as opposed to *de futuro*. (2) The deed of 1867 must be held to be a distinct although indirect revocation of the deed of 1866. The first was an *inter vivos* deed either of the nature of an onerous postnuptial contract, or of a *donatio inter virum et uxorem*, and bore to be revocable by joint consent. In either view it was revoked by the deed of 1867, that deed having been expressly granted by joint consent of the spouses, and containing an express reservation to Mrs Kirkpatrick of the *sole* power to revoke the deed, or sell or burden the estate at pleasure. Both deeds dealt with the whole estate, and their provisions were quite inconsistent with each other. Under the first deed Mr Kirkpatrick, on his survivance, had the fee of his wife's estate; under the second deed, only the liferent. The conveyance in the deed of 1866 to the husband, as joint fiar, had clearly been revoked by the express reservation of powersto Mrs Kirkpatrick alone, and the whole deed must therefore fall. The cases as to deathbed, in which a distinction was drawn between a deathbed deed which did and one which did not contain an express clause of revocation, had no application here. It was incorrect to say that, on the pursuer's contention, the deed of 1867 was a nullity, for it was a good deed as regarded the moveable property, and not being a nullity, was perfectly habile to express the intention of the granter in regard to her heritage. It was settled law that a probative deed might contain an effectual revocation of a disposition of heritage, without containing any new conveyance of that heritage, and this was the case with the present deed.

At advising,—

LORD JUSTICE-CLERK.—The questions which have arisen between the parties

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furd, March 14, 1806, 2 Bligh's App. 605, 5 Pat. App. 73, 1 Ross, L. C., 61; Rowan v. Alexander, Nov. 22, 1775, 5 Br. Sup., 423, Hailes, 695, 2 Bligh App. 922, 1 Ross, L. C., 653; Mure v. Mure, June 1, 1813, F. C., June 9, 18; 6 Pat. App. 339; Duke of Roxburghe v. Wauchop, Dec. 13, 1816, F. C., H. L., May 25, 1820, 3 Bligh's App. 630, 2 Sh. App. 619, 6 Pat. 548, 1 Ross, C., 659; Ersk. iii. 8, 98, Lord Ivory's note; Bell's Com. i. 96; Bell's Pr. 1812; Wilson v. Henderson, Jan. 31, 1797, M. 15,444, H. of L., March 1802, 4 Pat. 316, 1 Ross, L. C., 594; Dundas v. Dundas, May 21, 178 Ross, L. C., 667 and 724; Leith's Trustees v. Leith, June 9, 1848, 10 D. 11 Purvis's Trs. v. Purvis's Executors, March 23, 1861, 23 D. 812; Somerv and Others (Richmond's Trustees) v. Hunter and Winton, Nov. 25, 1864, vol. iii. 95; M'Ewan v. Dunn's Trustees, March 27, 1865, *ante*, vol. iii. 7 in H. of L. as Barstow v. Black and Others, July 23, 1868, *ante*, vol. vi. 1 1 Law Rep. (Sc. App.) 392; Sibbald's Trustees v. Greig, Jan. 13, 1871, vol. ix. 395; Leith v. Leith, June 19, 1863, *ante*, vol. i. 949; Thomas Tenant, Nov. 12, 1868, *ante*, vol. vii. 114; Powell on Devises, i. 600 (Jarm edn.); Williams on Executors (6th edn.), i. 142; Onions v. Tryer, 1 Eq. C 1 P. Williams, 343; Earl of Illchester, May 21, 1803, 7 Vesey, 372 (Sir W Grant, 378); Grant v. Stoddart, Feb. 27, 1849, 11 D. 860, H. of L., June 1852, 1 Macq., 165; Millar v. Marsh, July 8, 1853, 15 D. 823; Montgom v. Fowles, June 9, 1795, 2 Bell's Fol. Ca., 203, 1 Ross, L. C., 7; Hende v. Selkrig, June 10, 1795, M. 4489; Cunninghame v. Whitefoords, June 1748, M. 16,119, 5 Brown's Sup. 423; Neilson v. Stewart, Feb. 3, 1860, 22 646; Brack v. Hogg, Feb. 25, 1831, 5 W. and S. 61; Willoch v. Ochterlo Dec. 14, 1769, M. 5539; Sandford on Succession, p. 77; Bell's Prin. 1938-9; M'Laren on Wills, i. 475-8.

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this case depend mainly upon the construction and effect of two deeds of lement between the late Mr Kirkpatrick and his wife, the first dated in 1866 l the second in 1867. Other deeds are brought into question in the case, but ubstantially depends upon the construction and effect of these two instruments. first of these is dated on the 18th of June 1866. It is a joint deed between the band and the wife, having for its purpose to dispose of the estate then belong-; or which might belong, to the wife prior to her death; and it proceeds to state t for certain good and onerous causes and considerations the spouses have nated and disponed, "as I, the said Mrs Jean Glas, otherwise Kirkpatrick, with nsent of my said husband, and we both, with joint consent and assent as said is, hereby alienate and dispone, and give, grant, assign, convey, and make over nd in favour of us, the said John Kirkpatrick and Mrs Jean Glas or Kirk-rick, and the survivor of us, whom failing," to certain trustees, "all and ilry the property, means, debts, and estates, heritable and moveable, real and sonal, presently belonging to me, or which may belong to me, the said Mrs n Glas, otherwise Kirkpatrick, at the time of my death, with the whole titles my said heritable property, and the vouchers and instructions of the said veable property." There then follows a declaration of the purposes for which destination or the substitution in favour of the persons nominated as trustees been made, which are substantially these—that the estate, heritable and veable, when the substitution takes effect, shall be divided among the eight ghters of Mr Kirkpatrick, and his wife, with this provision, that four of the ghters shall be entitled to have one-fourth part more than the others. There a son, but he is not mentioned in this deed at all. The deed then goes on, some further clauses, to revoke two deeds of settlement which had been iously executed by the spouses, and it contains this clause at the end,—serving always full power to me at any time of my life, and even on death-with consent of my said husband, and to us both with joint consent and t, and to the survivor of us, to add to, alter, or revoke these presents either whole or in part, and to sell, burden, or dispose of the whole subjects, heri-le and moveable, hereby conveyed, or any part thereof, at pleasure." There no nomination of executors, and there is no dispensation with delivery of the d.

I stop for a moment to consider what the nature of this deed was; and it does appear to me that there is much difficulty in solving that question as far as form and terms are concerned. In the first place, I think it must be held, tever the effect of that may be, to be a deed that was delivered. It was ed by husband and wife, but their joint interests were involved, and the umption is certainly that it was in the possession of the husband, and there be little doubt that such was the fact. In the second place, in form it was veyance *inter vivos*. It is quite true that it contains a contingent con-ce of any property which may belong to the wife at the time of her death, s regarded the property which then belonged to her it was a conveyance *vivos*. It has been said that the deed was entirely testamentary. I do not that is a true or accurate description of it. It contains a contingent testa-ary purpose unquestionably, in the substitution in favour of the trustees; then that is a mere destination, or a bare substitution, failing the survivor ing a different disposition of the property. The main effect of this deed is est the property conveyed by it in the two spouses jointly, as joint or con-t fiars, and the whole of it absolutely in the survivor, and that not by sub-tion, but by the operation of accretion. I think that is the nature of the , according to the terms in which it is expressed. One is liable to be misled the fact that it might be set aside by the wife on the ground of being a dona-*inter virum et uxorem*, but this cannot enter into the question as to what character of the deed was as long as it stood, or what the nature of the con-t was between the husband and the wife. Now, that is its form, and that, prehend, was also its legal effect. It effected an immediate transference of personal right to the whole estate according to its terms. There could be no n in this case, as there has been in some analogous cases, for limiting either he disponees to a liferent, and for this plain reason, that the right of survivor-

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ship was protected by a stipulation not to alter without mutual con thus the whole fee was carried absolutely to the survivor *jure accresce* is a stronger case for such a result than the case of Ferguson v. M'Geo rison, 4202, or the case of Forrester in the House of Lords,[1] which is t authority on this subject. Reference may also be made to the case of v. M'Farquhar, 4 Dunlop, 1484.

So stood the respective rights of the husband and wife in this prop the second deed was executed in the following year. Now, this dee is in every way in contrast to that of 1866. It is, with the excepti provision, purely testamentary. It makes no allusion to the former co but has for its avowed object to settle the estate of the wife after h The spouses accordingly proceed to convey the whole estate of the wi death to trustees, who are named as executors also, and are directed t annual income to her husband in case he should survive her, and on t to divide the property among four out of their eight daughters, bu with an annuity of £100 a-year to the other four daughters, the son b excluded, except that an annuity is left him, which is to commence death of his wife. The dispositive clause of this deed does not contai "dispone." The wife predeceased her husband, who, fearing, I sup this flaw in the dispositive clause would be fatal to the second convey up the property under the trust-conveyance of 1866; and having do veyed to the same body of trustees the whole estates, heritable and which were the subject of these two deeds. In these circumstances th after the death of Mr Kirkpatrick in 1871, conveyed and disponed th to the disponees under the second deed. Accordingly the heir-at-law brought this action to set aside the deed by which Mr Kirkpatrick co the trustees named, and also to set aside a conveyance which the dispo that deed granted to the Clyde Trustees, who purchased part of the est action also has declaratory conclusions to the effect that the deed of ineffectual to convey the property, so far as heritable, and that the dee is not now a subsisting deed, but was set aside and recalled by that o

It is only necessary further to explain that the wife's property at t both deeds, and also at the date of her death, consisted mainly of certai subjects on the banks of the Clyde, which became of the value of about and that she also left at her death about £1000 of personal property siderable portion of the heritable property has been scheduled and tak trustees of the Clyde Navigation at the price of upwards of £39,000. Ordinary has decided in favour of the pursuer, and has found that t 1866 no longer subsists. The case is now before us on a reclaiming n defenders.

The questions raised for judgment are substantially three: first, w trust-settlement of 1867 was effectual to convey Mrs Kirkpatrick's estate; secondly, whether, if it were not so, the deed of 1867 can s declaration of purposes to qualify the trust-conveyance contained in t 1866; and, third, whether the settlement of 1867 had the effect of r revoking the conveyance of 1866.

1. On the first of these questions I am of opinion that the omiss word "dispone" in the dispositive clause of the deed of 1867 is fa deed as a conveyance of heritage. *Voces signatæ* used in conveya always the growth of time and practice, and probably the word "dispone originally set apart and appropriated to the special signification which wards acquired. It has, perhaps, a certain propriety in expressing the *præsenti* disposition which other terms sometimes used as equivalents be supposed to possess. This word, however, was so long recognise sense in the practice of our conveyancers that I think it clear that it e essential to a valid disposition. It is unnecessary to quote authorit saying that the opinion of Lord Meadowbank in the case of Hamilton and the unanimous opinion of the whole Court in the case of the L

[1] MacGregor v. Forrester, April 13, 1835, 1 S. and M'L. 441

m to place this matter beyond controversy. Although the recent
i altered our forms in that respect I think we have no choice but to
e former rule in regard to writs which were executed while it was in
t.

he second point I think there is no ground on which the proposition
ted can be maintained. The deed of 1867 was in no respect in aid or
t of the first. It was wholly inconsistent with and subversive of it.
nded to take effect immediately on the death of the wife, and not on
of the survivor of the spouses, and never could have operated as a
structions or declaration of purposes to a body of trustees who were
e in substitution to the survivor. The case of Willoch v. Ochterlony
5539, Hailes, 321, rev. 3 Pat. 659), and the series of decisions which
wed on it, no doubt established the doctrine that when heritable pro-
been effectually conveyed to trustees the purposes of the trust may
d or varied by a writing without dispositive words. But it is suffi-
y that the circumstances of this case afford no room for the application
nciple.

third point is one of great difficulty. It is whether the deed of 1867
i a revocation or renunciation or extinction of the conveyance of 1866;
ords, whether the defect in the dispositive clause of the deed of 1867,
nsequent failure of that deed as an effectual conveyance of heritage,
ffect of leaving the deed of 1866 as a subsisting title to the heritable
lthough in all other respects it is superseded and recalled. I do not
cessary, in order to explain the view at which I have arrived on this
o go at any length into the elaborate legal argument which we heard
ar in regard to the rules or canons of construction applicable to such

Revocation is, of course, a question of intention, to be gathered from
r expressed will of the granter or maker of the settlement. There is
nothing in law to prevent the revocation of a former settlement being
y clear implication from the words of an effectual posterior deed. If the
lid and the implication clear, the intention of the granter must receive
or, on the other hand, can I think that if a deed be altogether ineffec-
fective from want of form or solemnity, the mere fact of the attempted
e to another disponee can be held to indicate an intention to revoke
settlement.

d to the cases which have occurred in reductions *ex capite lecti*, I only
hem in order to set them aside as having no bearing on the question
considering. A deed executed on deathbed is, and always was, a
valid expression of the will of the testator; although it was, prior to
statute, liable to be set aside by the heir-at-law, in so far as it con-
itage to his prejudice. The cases which have been referred to arose
may be called a hypothetical issue. The heir-at-law proponed his
of the deathbed deed. It was replied by the holder of the deed that
ood already excluded by a prior settlement *in liege poustie*, and there-
no interest to reduce the deathbed conveyance, because the former
would revive if the posterior settlement were reduced. The heir's
o that plea was that the deathbed deed contained an express revocation
ttlements, which revocation did not fall under his challenge, but stood
expression of the will of the granter. This latter rejoinder was sus-
he case of Coutts v. Crauford, and a series of cases which followed on
on. The same question was raised in cases in which there was no express
contained in the deathbed deed, but in which it was contended that
rance of the heritable property, although reducible by the heir, being
lid and complete while it stood unreduced, must be held to import a
of prior inconsistent settlements. But in Rowan v. Alexander this
epelled, and it was held that it was impossible to maintain the con-
i a revocation, while it was itself the subject of challenge by the heir-
executed on deathbed. Lord Loughborough and Lord Eldon doubted
of this view, and seemed to hold that the intention to revoke was as
licated in the latter class of cases as in the first, although the principle

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was too firmly settled to be disturbed. With that matter, however, we have no concern here. The question is not, whether the deed of 1866 would revive if that of 1867 were out of the way, but whether in point of fact it now subsists —a question which never arose in any of the deathbed cases, in all of which the prior settlement was necessarily extinguished, whether the heir's challenge prevailed or was excluded.

On the other hand, it has been very clearly decided that where a deed is not merely reducible, as in the case of deathbed, but is wholly null from want of form and solemnity, such a deed can have no effect as a revocation, because it is not the completed expression of the granter's will or intention. That was decided in the case of Henderson v. Wilson, and was followed in the case of Law v. Leith, and I conceive that the decisions rested upon clear and sound principles; for a deed which is null and ineffectual expresses no completed intention. But it is manifest that these decisions rest on a totally different basis from the principle adopted in the case of deathbed deeds, and the ground of judgment might apply to express as well as to implied revocation.

In regard to the argument that the clauses of a settlement are always to be understood as conditional on all the other parts of the settlement taking effect, it is manifest that if this were held to its full extent it would be quite as applicable to clauses of express revocation as to revocation only implied from the purport of the deed. It is not sound as a general canon of construction, although such a condition may be deduced from the context of the clause in the particular deed.

But the present case arises in circumstances altogether different, and presents for solution a question depending on different principles. It is a case of two incompatible general settlements of the *universitas* of the wife's estate, both of which proceed on the joint agreement of the husband and wife, and in which the posterior settlement provides for a distribution and an administration entirely inconsistent with the provisions of the first. The second settlement has failed as a conveyance of the heritable estate, but it has failed no further. It remains in all other respects valid and effectual. It certainly does not follow as matter of course that, although the second settlement has failed as regards part of the property, the administration and distribution are to divide, and that the provisions of the first settlement must regulate the administration and succession to that part of the estate which the second deed has failed effectually to convey. That is a matter to be regulated by the intention of the parties as expressed in the settlement, which, although partly ineffectual, is also in part the complete expression of the will of the granters. The question we have now to decide is whether the second deed of 1867, which is a valid and subsisting deed, operates a recall or extinction or revocation of the *inter vivos* conveyance of 1866 and the contingent trust purposes.

I have come to the conclusion, not certainly without some hesitation, that this is the effect of the deed of 1867. I found nothing on the fact that the attempted but defective conveyance of the heritable property in the deed of 1867 was one which would have been inconsistent with the previous disposition of it. I rest my opinion on the general scope of the operative and effectual portion of the deed, which not only proceeds on the footing that the conveyance of 1866 was superseded and abandoned, but seems to me to cancel and destroy it. It will not require any minute analysis of the settlement of 1867 to bring out the grounds of this opinion. The view which I take of that settlement is that it was intended to obliterate all trace of the former conveyance,—that it dealt with the property on the footing that it was then, and had all along been, solely vested in the wife, and hitherto undisposed of by her either *inter vivos* or *mortis causa*, and so reinstated her in the fee of the whole estate during her life that no one could thereafter pretend that any title to it had ever been vested in the husband. I deduce this result from the following considerations.

At the date of the deed of 1867 there can be no question that the fee of the whole of this estate, heritable and moveable, was vested in the spouses jointly during their lives, and absolutely in the survivor. As I have already shewn the right of survivor was not a right of succession, but was a right of accretion

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ıg entirely upon his or her right of conjunct fee during the marriage. ıing of this kind is recognised in the narrative of the deed of 1867. It f the property as belonging solely to the wife, as if it never had passed ; and the object of the deed is stated to be to settle this property after wife's) death, thus holding the right of survivorship on the husband's er to have existed. Before, therefore, we reach the conveying words of 1 of 1867 its purpose and meaning are sufficiently apparent. It is l precisely in the terms we should expect to find if no previous con- had ever been made.

ɔnveyance to the trustees under the deed of 1867 and their nomination ːors is, of course, perfectly valid as regards the personal property. I do ɜrstand it to be contended that this part of the conveyance was condi- . the whole deed taking effect. It might have taken effect on the whole operty conveyed, for it is a mere accident that at the death of the wife, ssolution of the marriage, the bulk of the property was heritable. It is ːo see how any part of the management provided in the deed of 1867 ɜsibly co-exist with the clause of substitution in the deed of 1866. The ıe trustees under the former, taking by an immediate *mortis causa* con- from the wife at the moment of her death, does not merely destroy, as estroy, Mr Kirkpatrick's right as survivor under the latter, but implies system of administration of the whole property, which was never in- ɔ be broken up into two. Indeed, on the part of the defenders it was d that although Mr Kirkpatrick was entitled to take up the heritage e deed of 1866 he was still bound by the purposes expressed in the 867,—a concession which goes very far indeed to shew that the expres- ıese purposes, even as regarded the heritage, must have superseded the ce of 1866.

ustees are directed to pay the whole free income of the estate to Mr ick himself, but he is not even given a liferent of it. No doubt, by the defect in the conveyance of the heritage this right of enjoyment ıcome is limited to the personal property, but it is difficult to exclude which this provision throws on the meaning of the settlement. The ate might have been personal property at the wife's death, and yet this 1867 does not so much as allude to the fact that in that event Mr ick would, but for its provisions, have been the absolute proprietor or e whole. I forbear to go at length through the details of the trust passing by most of them with this remark, that no one of them is t in spirit or intention with any part of the property being administered ɔ deed of 1866. I shall only allude specially to two of its provisions.

st is a clause which carefully directs that if any of the four daughters ɔrovided with an annuity should claim legitim the annuity is to be for- The care with which the provision is expressed seems to suggest what ng in the minds of the granters of this deed. It is impossible not to he object of this settlement was quite as much to exclude as to favour. very partial settlement. The eldest son was to be all but excluded, and ɔf the eight daughters to be but scantily provided for. But the law of ives some protection to children against settlements of this kind, as ıeir father's personal estate, but not as regards that of the mother. If rty conveyed, worth some £50,000, had been purchased, as it afterwards he Clyde Trustees, it might have so chanced that at the death of Mr ck the whole estate might have been personal, and under the deed of 1866 legitim. This contingency seems to have been guarded against by the ındonment of all right of fee in the property on the part of Mr Kirk- nd I think this is made perfectly clear by the clause of reservation at f the deed.

lause is very important, and seems to be conclusive upon the question considering. It will be recollected that the deed of 1866 contained a which that deed was only alterable, and the property could only be ɔy the joint consent of the husband and wife. The clause of reserva- h I now refer to in the deed of 1867 is expressed in terms somewhat

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similar, but with this essential difference, that the power is not reserved to the granters of the deed, the husband and wife, nor is joint consent in any way required, but the words are "by myself alone," and the whole clause runs thus:—"Reserving always full power to me (that is, the wife) at any time of my life, and even on deathbed, by myself alone, to add to, alter, or revoke these presents either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure." Now, although this is expressed in the form of a reservation, that is obviously not its nature, for it neither reserves to the granters that which they had prior to the execution of the deed, nor does it reserve to the wife that which she possessed prior to the execution of the deed. It is, in truth, of the nature of a grant, not of a reservation. Under the former deed, according to its terms, the wife could only have revoked with her husband's consent, and therefore this clause, professing to reserve, in reality grants to the wife power of revoking without her husband's consent, and renounces on the part of the husband the right which he had to have the settlement remain entire unless he consented to its alteration. Even as regards this part of the clause it is sufficiently clear that the failure of the words of conveyance would not have had the effect of reviving this right on the part of the husband. But the remainder of the clause admits of no limitation, and gives the wife an absolute power to sell or dispose of the whole estate, heritable and moveable, at her pleasure. The failure of the conveyance of 1867 as regarded heritage could have no effect whatever on this part of the clause, which, if it ever came into effect at all, must have operated during the lifetime of the spouses, and before the trust conveyance could have any effect. Indeed the power reserved would, if it had been exercised, have superseded in whole or in part the trust conveyance of 1867, and therefore I gather that it was to take effect on the *inter vivos* right in the deed of 1866. Now, the effect which the power thus conferred on the wife of selling or disposing of the estate during the subsistence of the marriage had in the deed of 1866 was simply that of absolute revocation and extinction, because such a power was wholly inconsistent with the right of conjunct fee which had been conferred by the deed of 1866 on the spouses. It can signify nothing that it was not exercised. If the wife resumed the uncontrolled fee of her own property, unburdened by any right or claim on the part of the husband, there was an end absolutely both to the conjunct fee during the marriage, and to the right of survivorship thereafter. When the husband consented that his wife should have this power he renounced, and I think he meant to renounce, all the rights he had as conjunct fiar, including his right of survivorship, which being a right of accretion could only be engrafted on the conjunct fee which he enjoyed during the marriage. I am therefore of opinion that this deed of 1867 effectually terminated and extinguished the former conveyance. I am satisfied that such was its intention, and that such is its legal effect. I think it was intended to replace the wife in the position in which she stood before the execution of the deed of 1866, to leave her thereupon to deal with the property as being exclusively her own, and to give her power not only to regulate the succession to it by this deed of 1867, but so to liberate the fee in her person absolutely from all rights in the husband, present or eventual, as to leave in her the uncontrolled disposal of it at any time during her life, whether before or after the dissolution of the marriage.

I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

Lord Deas.—The late Mr and Mrs Kirkpatrick were married in 1820. There was no antenuptial contract. Mrs Kirkpatrick died in November 1867, Mr Kirkpatrick in February 1871. There are nine children of the marriage, a son and eight daughters, who have all survived both parents. In 1821 Mrs Kirkpatrick had succeeded to and was infeft, as heiress to her aunt, in certain lands or portions of ground on the banks of the Clyde, which have latterly become of the value of about £50,000, in consequence of their becoming available for the purposes of the Clyde Navigation Trustees, who accordingly acquired the lands or portion thereof, by compulsory statutory purchase, in Mr Kirkpatrick's lifetime in 1870, for about £40,000.

In February 1872 the pursuer, as only son and heir of his mother, brought

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tion to have it found and declared that a deed executed by her, 's consent, in June 1866, had been revoked by a deed executed by h 1867, but that this latter deed, owing to the omission of the " in the dispositive clause, is ineffectual to convey the heritable h he is therefore entitled to succeed as his mother's heir-at-law. ial question in the case, of course, comes to be whether the omis- d "dispone" in the dispositive clause of the deed of 1867 is fatal s a conveyance of heritable property. That is a question upon o doubt. In Dallas's Styles, published upwards of a century ago, pone" will be found to occur not only in all the examples given or nsmissions by one vassal to another, but likewise in all examples n charters of lands, whether original or by progress. In Ross's e the history of our deeds is traced from the introduction of the lownwards, he gives, as the dispositive words of an original charter, essisse et disposuisse" (vol. ii. p. 157), and as the dispositive words ice by a vassal to his superior or other purchaser, "have sold, disponed, as I by these presents sell, alienate, and dispone"—(ib., and he says (p. 233), "the proper effective words in all cases of alienate, and dispone.'" The corresponding words given by all for gratuitous conveyances are, "give, grant, and dispone;" and is does not prove the word "dispone" to be essential, it goes to having come to be held to be so in the ruling clause of the deed, s not unnaturally thought that there ought to be some fixed term tter of solemnity, although in modern legislation a different view n, and by express statute the word "dispone" may be dispensed *rtis causa* deeds subsequent to the periods specified in the statute, said to be the position of this deed. The only authority cited sentiality of the word, previous to the statute, is a passage in Institutes (iii. 8, 20), in which he says that a man may effec- is heritable property by a testamentary—that is, a *mortis causa* ving his liferent and a power of revocation, provided he makes nveying clause, of the words 'give, grant, or dispone,' in place bequeath,'" and he refers to the case of Mitchell, 21st November nd M. 8082. But it appears to me that Mr Erskine was not here for a disposition, but explaining the necessity for *de præsenti* reyance in place of *de futuro* words, which would not do, and e question in the case of Mitchell, which he refers to, was simply ether a sum of money exceeding £100 Scots, handed over on particular purpose, was a *de præsenti* gift or a verbal legacy, which en inept. Mr Erskine, it is well known, never himself revised his publication, and he seems just to have transferred to it, in the the loose language of the report in the Faculty Collection. skine's death and the publication of the Institutes took place long se of Galloway, 12th January 1802, F. C., in which the passage is quoted, and it was nevertheless decided that the words "I transfer, and make over," although undoubtedly *de præsenti* t effectual to convey heritage. The Court doubted the efficacy of e on some additional grounds, but the report bears that they "were he proper terms of conveyance of heritage were not used," and ee successive reclaiming petitions against the interlocutor of the , who had held the deed ineffectual, were refused. That judg- nounced upwards of seventy years ago, and since then, besides uthorities which I shall not stop to canvass, we have the succes- of Sir Ilay Campbell, the first Lord Meadowbank, and the nion of the consulted Judges in Glassford's Trustees v. Glassford, 2 Macph. 1324. And I am free to confess that since I came to the -five years ago, I have never looked upon the essentiality of the e" in a conveyance of heritage as being a debatable question, and ubt at all that its omission in the deed now in dispute was a mission, either in the extended deed or in the draft, or it may be

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in both, for I do not suppose that any conveyancer in Scotland, and fa experienced conveyancers who prepared this deed, would ever have k left it out.

But however accidental the omission may have been, we cannot esc giving to that omission its legitimate effect, and that raises the import tion in this case, whether the deed of 1867, although ineffectual as a co revokes the deed of 1866, and so lets in the right of the heir-at-law.

By the deed of 1866 Mrs Kirkpatrick disponed and conveyed t heritable and personal estate then belonging or which might belong to h death to herself and her husband, and the survivor of them, whom f trustees, for the purpose of being converted into money, and the proceed among her eight daughters in the proportions therein mentioned.

The deed of 1867 likewise bears to convey (but without the word "c the whole heritable and personal estate then belonging or which might her at her death, to trustees, for payment of the rents and interest to band during his life, and for distribution in equal shares amongst her fo daughters of the fee of the personal estate, and also the fee of the estate, or the proceeds thereof if sold, subject to certain annuities to ea four younger daughters, certain bequests to servants, and an annuity of her only son (the pursuer) in the event (but in the event only) of his his present wife.

I shall notice the terms of these two deeds somewhat in detail herea the meantime I mention them thus generally for the purpose of e in the outset what the question between the parties really is, and u I think it turns, which may, I hope, tend to make my more detailed upon the deeds, and any observations I may make upon the authorit easily followed.

The deed of 1866 expressly revoked certain previous deeds and codic had been executed by the spouses. But the deed of 1867 contains n clause of revocation either of the deed of 1866 or of deeds generally. obvious, however, even from what I have already said, that if the dee were to take effect it would supersede the deed of 1866 in all its pa question is, whether the mere fact that the one deed was obviously in supersede the other operates a revocation of the earlier deed, so as to heir in heritage, although the later deed is a mere nullity as to the heri fails, indeed, substantially in its purposes, even to the personalty, s have occasion afterwards to explain.

Confessedly, there is no decision to that effect, and none of our ins writers—or any of our commentators upon them—have so laid it down question of intention undoubtedly. But even apart from authority, mother destines (as in this case) the whole means and estate which sh to her at her death for the benefit of her husband and family, with the of one member, and by a subsequent deed varies the distribution amo bringing in, for a certain limited benefit, the member who had been l cannot think that the implication that her intention was to die intest any blunder this last deed should prove ineffectual, so clearly recomme to our acceptance that we ought to require no precedent for adoptin ought even to disregard precedents which, by analogy at least, are oppo

An important question, however, in the case is, whether there are r direct precedents and authorities for the doctrine that where there is n revocation the implication is that the granter does not mean the prior d revoked unless the purposes of the deed intended to supersede it take e

That this is settled law, when the later deed is set aside on the head bed, is clear beyond dispute. Mr Erskine observes (iii. 8, 98) that, as t of a revocable deed is suspended till the granter's death, "therefore, w actually revoked, the heir's right is the same as if it had never existe quently he may pursue reduction of any subsequent deed *in lecto* to his p Upon which Lord Ivory remarks in his note, "This is true where th express revocation of the *liege poustie* deed." But where the revocation i conditional, "or where there is no express revocation, so that the p

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ıbsist but for the contrary provision of the deathbed deed, the heir suf- rejudice by the latter, and his right of challenge is consequently barred." in his Commentaries (vol. 1 edn. p. 95), says,—"The total exclusion of s right by a deed *in liege poustie* gives efficacy to a deed on deathbed that settlement,"—the heir having then no interest to reduce,—and he *ıter alia*) to the case of the Duke of Roxburghe, which I shall after- otice. After stating the law applicable to express revocations in differ- mstances, he says,—"5. Where the revocation is not express, but implied n the deathbed deed, it has been held that the testator is to be regarded g virtually declared the efficacy of the new deed to be a condition of the n of the old. This has been greatly doubted in point of principle. But l as a decided point not now to be shaken."

now that in the same high tribunal in which the doubts referred to were l it has been most strongly laid down that the doctrine which was is not now to be shaken. I refer of course to the observations made in se of Lords in the case of Coutts v. Craufurd (March 14, 1806, 5 Pat.), to the consideration of which I shall return immediately.

meantime I have to observe that the case of Rowan v. Alexander, 12th 75 (F. C. and M. 11,371, 2 Hailes, 659, and Brown's Sup. 423), was a sidered case. It is only necessary to glance at the account given of it in 's Leading Cases as to land rights (vol. i. p. 653), to see that the argu- both sides was able and exhaustive. The judgment of the Court was to on a reclaiming petition, full opinions being given at both advisings. desire no more reliable account of the decision than that given by Mr ch is quoted by Mr Ross (p. 659), and is in these terms:—"The defence sisted on was, that the first deed was not expressly revoked by the last; efore, although the last deed should be taken out of the way, the first ill subsist; and so the Lords found. They held a virtual revocation of not sufficient, and assoilzied the defender. And the decision was well ; for if a deathbed deed contains both a disposition and a revocation y be some reason for maintaining that though the disposition be set revocation may subsist, because they are distinct; *et utile per inutile tur.* But when the deathbed deed contains no revocation, and is cut the head of deathbed, it cannot be maintained, with plausibility, that to subsist as a revocation."

this to be a doctrine which is not now to be shaken, I pause to observe ve heard no ground stated in argument why it is to be limited to deeds on the head of deathbed. The Solicitor-General did not require from couragement I willingly gave him to develope a satisfactory ground for stinction, if it could have been presented to us. The cases of deathbed uld rather appear to me to be *a fortiori* authorities in a case like the The deathbed deed is good against all the world, if the heir does not personal privilege to reduce it. It might therefore be plausibly main- at he can reduce it so far as adverse to him, and yet leave the implied n untouched, because he has no interest to challenge that implication, than he has an interest to challenge an express revocation. But in the se the deed, which the heir founds upon as a revocation, is an absolute o far as the heritage is concerned. It requires no reduction, and accord- re is no conclusion for reduction of it. What the pursuer asks is, that be found and declared that the deed of 1867 "does not contain any veyance to the trustees therein named of the heritable property then ; to the said Mrs Jean Glas or Kirkpatrick, or belonging to her at the er death, and that the said last-mentioned deed was and is ineffectual the said heritable property, and does not convey and has not conveyed " Even a declarator was not necessary to establish the nullity in this if it had not been for the deed of 1866 the heir might, *de plano*, have titles to the heritable estate and pleaded the nullity, by exception, y challenge of these titles. And yet it is this null conveyance which ounds upon as a valid revocation of the deed of 1866. And the sum- ordingly, while concluding for a declarator of nullity, inconsistently

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as I think, also concludes that it should be found and declared that the 1866 was "effectually revoked and recalled *in toto* by the said trust-dis and settlement, dated 4th March 1867."

If, therefore, the want of an express clause of revocation in the deed would have been fatal to the heir's challenge on the head of deathbed myself unable to apprehend the argument by which it is supposed deathbed cases are inapplicable here.

I am aware that it is said, and said correctly, that some of the noble including Lord Eldon, in the course of their observations in the case of Craufurd, expressed a difficulty in distinguishing between a case of imp a case of express revocation, and that Lord Eldon said repeatedly that if case had come before him in 1775 he could not have affirmed the ju and, from these observations, the inference is deduced that the princi lished by the case of Rowan, and cases which have followed upon it, c to be extended.

But it appears to me that to apply the doctrine of Rowan's case to th is not an extension but a legitimate application of the principle of tha to which Lord Eldon said in 1806,—"Whatever I might have been di decide in such a case as that of Rowan v. Alexander in 1775 I shoul of the last men in the world, in 1806, to disturb that decided case, in it appears to be a case of implied revocation"—(2 Bligh, Ap., 681). A he said,—"That case must now be held to stand upon this principle, testator did not mean the former deed to be revoked unless the second found to be good. But the same principle will not apply to a case o revocation"—(ib. p. 687).

The principle thus emphatically laid down by Lord Eldon, and stat Bell as not now to be shaken, applicable to the revocation implied in a deed, appears to me, as I have already indicated, to be necessarily, if not a applicable to the revocation implied in a null deed,—null at least as re heritage, which is all that the heir does or can claim. If this be so necessary to consider whether, if the principle had not been so estab would have recommended itself to one's acceptance or not.

But it is right to bear in mind that the question decided in Rowan's only referred to incidentally, and was not argued to the noble Lords i case. A narrow majority in this Court had decided, in Coutts' case, t where there was an express revocation, it could not be held to have tended that the revocation should operate if the deed in which it occ reduced by the heir. And that this result was arrived at by men whose were and are entitled to respect was attested by Lord Eldon himself, —"I think I never saw a more honourable specimen of judicial ab occurred in the discussion of this case when they formed the opinion this second appeal arises. They re-considered this case in all the point in which it had been taken up," &c.—(2 Bligh, Ap., p. 681). It took t of Lords some seven years and upwards, after the first hearing, to make minds to reverse that judgment, and the observations made by them, f time, during that long period, were not in every instance so obvio founded as their ultimate judgment must be held to be, by which the di between express and implied revocations was solemnly fixed.

For instance, on 11th July 1799 the Lord Chancellor, Rosslyn, after ex his high admiration of our Scottish law of deathbed (since abolished), says he had "always looked up to as of great excellence" (2 Bligh, Ap., goes on to say,—"It appears that the judgment of the Court below m proceeded on a fallacy. The deed in favour of Mr Coutts, being exec deathbed, was a nullity; the deed in favour of Sir Hugh was also a because it was revoked both expressly and by implication. But the C some singular way, by splicing these two nullities together, which take were of no effect, formed a deed carrying off the estate from the heir, against a positive law"—(ibid, p. 663). Now, I need not observe to yo ships that there were not two nullities to splice; for the deathbed d

ot a nullity, although the heir had the privilege of challenging it if
lship then observes upon the doctrine of approbate and reprobate :—
is false reasoning. The Court cannot say to the heir-at-law, under
do you claim? It is enough for her to say, God and nature have
ir-at-law; shew me by what deed my right is cut off"—(ibid, p. 664).
e Lord Eldon came to observe upon the case in August 1803 the
nsion under which these last remarks had been made had been cor-
d his Lordship then observed :—"It has been correctly explained to
word heir is understood in Scotland in a different sense from what
country. In Scotland an heir may be a person pointed out by the
of former settlements of an estate. In this country the heir takes
lescent; and the person taking by a destination is considered as a
-as a person not taking in the quality of heir. Mrs Howieson was
destined to the succession by the settlement of the estates prior to
contended that the deed of 1771 was made a nullity by the deed of
that the deed of 1793 also was a nullity, being executed upon death-
hat you could not (in the phrase of the noble and learned Lord who
this House considered this case), by splicing two nullities together,
id conveyance of the estate to Mr Coutts"—(ib. p. 668, top).
rd Eldon, while it had been pointed out to him that in the very case
House the heir suing was an heir not made by "God and nature,"
deed under which she claimed, still remained under the misappre-
t a deathbed deed was a nullity which the Court below had spliced
er nullity.
these instances merely as indicating that while I entertain the most
espect for the noble Lords who dealt with the case of Coutts, and
for Lord Eldon, whose deliberate judgment I should deem it heresy
mpugn, yet I do not feel compelled to accept their or his incidental
on Rowan's case, which was not argued to them, as equally conclu-
judgment on the case. It humbly appears to me that, in speaking
revocation, they, at no time, assigned any satisfactory reason why
operate equally whether the new deed takes effect or not, and, in-
it is not clear that they are uniformly referring to deeds which did
fect. For instance, Lord Chancellor Rosslyn, speaking of Rowan's
—"The Court of Session have made a distinction between an express
and an implied one, which I confess I do not feel. If a person
sposition of his estate, and locks it up in his repositories, and at the
ten years makes another disposition of the same estate, I should be
that the former deed was revoked, and that the posterior one must
"—(ib. p. 662). Now, I do not think the Judges in Rowan's case
dissented from that observation. The posterior deed would certainly,
supposed, have taken effect, and on that supposition, of course *cadit*

nciple of Rowan's case came afterwards to be reconsidered, both in
and in the House of Lords, in the case of the Duke of Roxburgh v.
13th December 1816, F. C., affirmed on appeal 25th May 1820 (2
., 619, and 1 Ross's Leading Cases, p. 659). In that case the Duke
ed a settlement of his estate in 1790 in favour of his sisters, reserv-
to alter. In 1803 and 1804 he executed a trust-deed and deed of
s, settling his estates in a manner inconsistent with the deed of 1790,
t any express clause of revocation. The heir-male of the previous
brought a reduction of the trust-deed and deed of instructions, as
a deathbed, and at the same time founded on these deeds as an implied
of the deed of 1790. Lord Alloway, Ordinary, found, "that if the
leed in question were set aside, the deed of 1790, which is not ex-
oked by the deathbed deed, must exclude the succession of the heirs
and therefore that the pursuer, the heir of entail, had no interest to
at reduction.
llies, in giving his opinion in favour of the interlocutor, observed :—

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"If there had been an express revocation the case must have been ruled Coutts v. Craufurd, but being an implied revocation it is ruled by Rowa Alexander. That case settled that species of question. *Stare decisis* is a material in matters of such nicety. In that light Lord Eldon viewed t decision in Coutts's case. Are we now to go back upon it? But furthe Rowan's case were now open for decision, I should be for deciding it in same way. I think it a sound notion that the implied revocation is conditio if the new settlement take effect, and otherwise not"—(1 Ross, p. 665).

The interlocutor of the Lord Ordinary was adhered to by the Court, an reclaiming petition was afterwards refused. Upon appeal the judgment affirmed (25th May 1820), Lord Eldon, who was still Chancellor, observing "As to the question of implied revocation, if we are to act on the maxim *stare decisis* the judgment cannot be disturbed. The deed *in liege* pou reserves a power of revocation; by making another disposition under authority of the power it must be supposed that the disponer intended to something effectual; and it cannot be implied that by the exercise of the po he meant to revoke it"—(2 Bligh, Ap., 654, and 1 Ross, 665).

Here it will be observed that while Lord Eldon refers to the point as decid he also enunciates the principle on which Rowan's case proceeded, in te which carry conviction of its soundness, and this as a principle not confine deathbed cases, but of general application, which emboldens me to think it improbable that if Lord Eldon had had to hear and decide Rowan's case as d berately as he heard and decided the case of Coutts the result might have bee affirmance. He hesitated for years before deciding that even an express revoca would do in a deed which failed in its purpose, and it would have been an and natural transition from that state of mind to have come to the conclu that where the clauses from which the revocation is implied are swept away implication from them is necessarily swept away also.

But the principle of Rowan's case is not only, in its nature, applicable to a cases as well as to deathbed cases, but it has been judicially so recognised given effect to. The case of Dundas v. Dundas (1 Ross, 667), is importan two respects, 1st, as recording the opinion of Judges of great eminence, were no parties to the decision in Rowan's case—particularly of Lord Braxf —in favour of the principle of that decision; and 2d, as shewing that nei in this Court nor in the House of Lords has the principle been confine deathbed cases.

In 1768 Sir Laurence Dundas had executed an entail of his whole Sc estates, both those which he had, in his son's marriage articles, destined to son in liferent and the heirs-male of the marriage in fee, and those he had sequently purchased, reserving power to revoke or alter. In 1779 Sir Laur executed an English will, bearing,—"I do give, devise, and bequeath unto dear son, Thomas Dundas, all my real estate in England, Ireland, and Scotl as also in the island of Dominica in the West Indies, and elsewhere, not inclu in the settlement made on his marriage, and all my personal property, of w nature and kind soever; and I do hereby revoke all former and other wills me heretofore made, and constitute my dear son my sole executor." On death of Sir Laurence his son claimed the fee of the estates (except those destin by the marriage articles), on the footing that the will revoked the entail of 17 both expressly and by implication. There were thus two questions—1 whether the word "wills" comprehended the entail? and 2d, supposing it not, whether the will of 1779 revoked the entail of 1768 by implication?

At the advising Lord Braxfield observed as to this last point,—"Virt revocation would not do, because that depends on the validity of the last dee And again,—"If it stood on implied revocation it would not do. Second settlement must be good in order to extinguish the first." On the same point Lo Henderland said,—"Bequest is fee-simple. This is not good by law of Scotla and not an implied revocation"—(1 Ross, Leading Cases, Land Rights, 672-3

On the question as to the meaning of the word "wills," a majority held t word to be so used as to comprehend the entail, and consequently that it w expressly revoked. The judgment was reversed on appeal, Lord Thurlow

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ving,—"A testament is not good by the law of Scotland to convey land; t, supposing it were, the will here in question would not be sufficient even in gland to revoke the deed formerly made. The deed of entail, although pressly revocable, declares that it shall stand good, unless taken away by a d under his hand. The natural way of doing this was by recalling the in- ument, and saying explicitly 'I revoke the deed.' We can only adopt an plied revocation *ex necessitate*. We cannot raise conjectures out of the deed lf. No doubt we must take his own meaning of the words; but the expres- n 'other wills' means other instruments of a similar nature—other testa- entary acts—not special settlements of a particular estate"—(1 Ross, 674).

This case, it will be observed, had nothing to do with the law of deathbed. n English will was executed according to the law of the place where it was de. It was good to convey personal estate wherever situated, and validly pointed an executor. It bore, likewise, expressly to give to the son all the ter's real estate in Scotland, so far as not included in the son's marriage tlement. But the words of express revocation being inapplicable to the entail, d the attempt to convey the heritable estate being a failure—just as it is in the sent case—it was held that the prior deed was not revoked by implication, hich was just, in other words, holding that the implied revocation (which in lf was clear enough) was to be construed as conditional—if the new deed uld take effect.

The case of Henderson v. Wilson and Melvilles, decided in the House of ds in March 1802 (1 Ross, 594), is also important as a case in which the trine of implied revocation was discussed and dealt with as a doctrine not fined to cases of deathbed, and in which the result was, as in Dundas's case, t, although the terms of the latter deed were quite incompatible with the ms of the prior deed, there was held to be no implied revocation, because the w deed was inept for its purpose. The first deed in that case was a deed of tail, dated in 1757, in the form of a procuratory of resignation, duly tested cording to the law of Scotland. The second deed was a deed of entail in the ne form, of the same lands, dated in 1763, varying the destination, but thenticated not according to the Scots law but according to the law of England, here it was executed. The second deed, although inconsistent with the first, s held not to revoke the first deed by implication. No doubt there is this ference between the case of Henderson and the case of Dundas, that in Dun- s's case the English will was a good instrument to convey the personal estate luded in it, whereas in Henderson's case, as the procuratory of resignation lated solely to the heritable estate, it was not good for any purpose. The cond procuratory could not, however, be more inept as to the heritable estate an the second deed is here—the want of a dispositive clause being as clearly a lility as a defect in the testing-clause. The Court, on 25th June 1795, found t the destination of the estate fell to be governed by the deed of 1757. rwards, in January, and again in February 1797, they found that the deed 1763, being executed according to the *lex loci*, contained a sufficient declara- n of the granter's will to vary the destination in the deed of 1757. The ct of the judgment of the House of Lords upon appeal was virtually to return the judgment of the Court below of 25th June 1795, Lord Chancellor Thur- w observing as to the deed of 1763,—"Then it is said to be a revocation. t how can a void deed be a revocation? The operation of a void settlement s be no more to revoke than to convey."

In the case of Leith v. Leith's Trustees, 6th June 1848 (10 D. 1137, and 1 s, 691), Sir George Leith had, in 1835, executed a *mortis causa* trust-deed d settlement of his whole property, heritable and moveable, for payment of annuity to his widow, and division of the free residue among his sons in cer- n proportions. In July 1841 Sir George executed, in Scotland, a holograph ll, altering the proportions in which his heritable and personal estates were be divided among his family. In December of the same year, being then in gland, he executed a second will in the English form, which, after revoking ll former and other wills, codicils, and testamentary dispositions," bore to be settlement of his whole estate, real and personal, wherever situated,—expressed

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a special desire that his houses in Melville Street, Edinburgh, and in H burgh, should be held for behoof of his wife in liferent, and his son Alex in fee,—bequeathed certain legacies to his wife, besides an annuity of the amount as formerly, and directed that the residue, whether real or person cluding certain Scotch heritable securities of large amount, should go to hi Alexander and George, in the proportion of two-thirds to the former an third to the latter.

The question at issue was, whether the English will revoked the Scotch deed. The effect of that revocation would have been that all the Scotch age, including the heritable securities, would have gone to the heir-at-law, English will was clearly inhabile as a conveyance of the Scotch heritage. heir-at-law pleaded, 1st, that the will contained an express and effectual of revocation; 2d, that the contents of the will necessarily implied revoc as "by that deed the testator disposes of his whole property, heritabl moveable, exactly as if his former settlements had been cancelled or throw the fire"—(1 Ross, 695).

On the other hand, it was maintained that there was no effectual revoc and it was specially pleaded, 1st, that a Scotch conveyance of heritage cou be revoked by a foreign instrument, which, although authenticated accord the law of the place where it was made, was not authenticated accordi the law of Scotland; 2d, that the words of the revoking clause did not apply to and comprehend the trust-disposition.

By a majority of the whole Judges it was held that the instrument was to have revoked the trust-disposition had its terms been explicit, but th words of the revoking clause did not apply to it, and that the one deed d effectually revoke the other.

It is obvious to remark upon this case of Leith, 1st, that the terms of may be called the dispositive clause of the English will were broad enou comprehend the whole Scotch heritage, and that the reason why it was n ried by the will was simply that the deed was not in the form required l Scotch law for that purpose; and 2d, that if an inept conveyance, in the deed, of the heritage conveyed by the prior deed, operates as an implied r tion of the prior deed, the majority who held the foreign instrument hal revoke must also have held that there was in that case revocation; and ye view, although stated for the heir, was not entertained or given effect to b Judges.

These three last cases had no relation to the law of deathbed; and fro review of the authorities I arrive at the conclusion that the principle of Ro case was neither in its own nature peculiar to deathbed deeds, nor has i been understood or dealt with as being so. Lord Fullerton (than whom we had no abler Judge) expounded the principle in Leith's case as one of g application to testamentary deeds, and none of his brethren controverted he said upon that point, although an opposite view might have been suf to warrant an opposite result to that which was arrived at. His Lordship "Revocation may be of two kinds. One when, without any express re the former deed, the granter executes another essentially inconsistent with for instance, conveying to a particular disponee heritage which he had by a deed conveyed to a different party. The effect of this, which is some termed an implied revocation, will, of course, depend on the efficiency o second conveyance; and in the case of Scotch heritage, if this second d defective in any of the forms requisite to support a disposition of heritage b law of Scotland, the first deed will remain effectual. Without embarrassing selves with the authorities of the civil law on this point I think we may hold that, by the law of Scotland, a revocation of this kind is not effectu less the deed from which it is implied be effectual to convey the subject of veyance to the new disponee. The disponer, though intending to prefe second disponee to the first, is not held absolutely to extinguish the right first disponee, and so to let in the heir-at-law in the event of the second failing of effect. In cases of this kind, then, the efficacy of the second d a revocation must depend on its efficacy as a conveyance, and in this se

said that a revocation, in order to be effectual, requires to be executed a way as to be capable of affecting Scotch heritage."

opinion was delivered in a case which was not the case of a deathbed Every word of it is literally applicable to the case now before us. If it been regarded as a sound opinion the decision in Leith's case ought to en the reverse of what it was.

us now look back for a little to the two deeds of 1866 and 1867, and see r there is anything in the nature or terms of these deeds to exclude the bility of the principle which, I think, I have shewn to be firmly estab- in our law and practice.

ough the deed of 1866 were to be regarded as an *inter vivos* deed which mediate effect, I do not think that that would affect the result, although t affect the mode of stating and considering the question. The only pro- onveyed or attempted to be conveyed by both deeds was the property of e. The only party who could have pretended to found upon it as an *vos* deed was the husband, and as to him it was a *donatio inter virum et* , revocable by the wife at her pleasure. Let the nature of the deed of e what it may, she had full power, without the aid of any conventional tion, and without the consent of her husband, to execute the deed of 1867. ould have been the case although that deed had been a delivered deed. ere was no delivery. As an *inter vivos* deed, delivery was essential to its into operation. The deed was not a mutual deed in any legal or even le sense of the term. It bears, indeed, to have been granted "with joint ; and assent, for certain good and onerous causes and considerations." law cannot infer from these vague and general words any onerous con- on to have been given by the husband to the wife, where none is speci- The husband was a mere consenter to the deed. He conveyed nothing to e, and it is out of the question to hold the deed either to have been or to be a mutual deed which required no delivery.

, as I understand, the foundation of the opinion just delivered by the ustice-Clerk that the effect of this deed of 1866 was at once to divest the one-half of her heritable estate, and to invest the husband in the fee of lf, with an irrevocable right, in the event of his survivorship, to the fee ther half. Surely, if that was so, it was a deed which required delivery. e of a wife stripping herself of her heritable estate to the value of some 0, or, as the case might be, to double that value, in favour of the hus- not the easiest conceivable case for establishing delivery. Even judi- ification on oath of such a deed, for which no consideration had been would not presume delivery to the husband—(Lady Bathgate v. Cochrane, 1685, M. 17,004 and 6077). A husband may be presumed custodier wife, but the wife cannot be presumed custodier for the husband of a us *inter vivos* deed, in the husband's favour, flowing from herself. Here no averment whatever of delivery. It is not even said that the deed from her hand to his, or that it was not found in her own repositories at th. As Lord Fullerton said in Leith's case,—"While the deed is retained party himself it confers no right of any kind,—it is the evidence of no right kind. It has no existence of any kind except in relation to the party him- d in regard to him it is just as much part of his moveable property as if er or parchment had never been written upon"—(1 Ross, pp. 714-15).

ink we may dismiss this view, therefore, of an immediate divestiture of e to the extent of creating a *pro indiviso* fee, and a right of survivorship l that is founded on it, as wanting its very foundation, even if it would se have aided the heir's plea of revocation, which I think it would not.

ever it may affect the argument, I cannot doubt that the deed of 1866 its terms, a *mortis causa* deed, and revocable by Mrs Kirkpatrick, in its as well as upon the ground of donation. The dispositive clause is neces- n the present tense, as by our law and practice every such clause, whether *is causa* or *inter vivos* deeds, must be. But what it conveys is "All and the property, means, debts, and estates, heritable and moveable, real and l, presently belonging to me, or which may belong to me, the said Mrs

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Jean Glas, otherwise Kirkpatrick, at the time of my death." The conveyance is "to and in favour of us, the said John Kirkpatrick and Mrs Jean Glas or Kirkpatrick, and the survivor of us, whom failing," the trustees therein named, and the survivors or survivor, "and the heir of such survivor, in trust for the uses, ends, and purposes after-mentioned, viz. in the first place, that the said trustees shall pay and make over to our eight daughters," who are then named, in certain specified proportions, the proceeds of the property, means, and estate thereby disponed and assigned, and the whole rents and interest thereof, under deduction of the expenses of management: "And (second) that the said trustees, so soon as they can do so advantageously, of which they shall be the sole judges, shall sell and dispose of the whole estate, property, and effects, heritable and moveable, hereby conveyed," and pay over the proceeds to the daughters in the specified proportions.

Then there comes an express clause of revocation of previous deeds, which the experienced conveyancers who prepared all the deeds knew quite well how to express when the parties wished it. "And I hereby, with consent foresaid, revoke the disposition executed by me and the said John Kirkpatrick, my husband, on the 18th October 1830, and two additions or codicils thereto, dated respectively the 7th January 1856 and 2d April 1863. And I also, with consent foresaid, revoke the disposition executed by me and my said husband on the 1st day of May 1863." This is followed by a reservation of power to the spouses jointly, or to the survivor of them, to alter or revoke, and to sell or dispose of the whole subjects, heritable and moveable, at pleasure. There is no clause dispensing with delivery; but that, although a usual clause of style, is not essential to the effect of a *mortis causa* deed found in the granter's repositories at death, as has long been decided—(Stark v. Kincaid, 11th Dec. 1679, M. 17,002; Cannon v. Gordon, July 1687, 2 Brown's Sup. 108; Young v. Wauchop's Next of Kin, 5th February 1695, 4 Brown's Sup. 25; Porterfield v. Stewart, 15th May 1821, 1 S. and D. 9—N. E. 6). The clause may possibly have been omitted in the present instance just to avoid even the semblance of an immediate divestiture in favour of the husband, either of one-half or the whole of the property which then belonged or might belong to his wife at her death. The scheme of the deed was to give the husband the power of altering if he was the survivor, but to settle the distribution among the family if he either did not survive, or, surviving, did not alter. The eventual rights thus conferred on the husband did not make the deed the less a *mortis causa* settlement of Mrs Kirkpatrick's whole heritable and moveable estate, then belonging or which might belong to her at her death, which are the ordinary words of style of all such settlements.

Accordingly, when we come to the deed of 1867 we find that it commences in the very terms of a deed which had not been preceded by any *inter vivos* deed by the wife which had already taken effect. It does not bear to convey or distribute any property or estate belonging to the spouses jointly. It bears to be granted by the wife with the consent of her husband, in order to regulate the "management and distribution of the means and estate of me, the said Mrs Jean Kirkpatrick, after my death." It then bears to give, grant, assign, convey, and make over to the trustees therein named,—who are not altogether the same with the trustees in the first deed,—"all and sundry the property, means, debts, and estates, heritable and moveable, real and personal, presently belonging or which shall belong to me, the said Mrs Jean Glas or Kirkpatrick, at the time of my death," in trust, 1st and 2d, for payment of debts, expenses, and burdens; 3d, "that the said trustees shall make payment to the said John Kirkpatrick, my husband, during all the days of his life after my decease, in case he shall survive me, of the whole rents and income of the heritable estate, and of the interest or annual proceeds of the moveable means and estate hereby conveyed;" 4th, of an annuity of £15 a-year to a servant (Alison Sheriff), if in the service at the death of the survivor of the spouses; 5th, of a legacy of £200 to another servant (Margaret Galloway) on the same condition, and of such other legacies as Mrs Kirkpatrick might leave by writing under her hand, formal or informal; 6th, on the death of the survivor of the spouses to dispone to the four eldest

rs therein named, equally, share and share alike, or the survivors or sur- them, the whole lands and heritages thereby conveyed, under burden nuity of £100 yearly to each of the four younger daughters, also therein "and which annuity shall be made a real burden upon the lands so dis- ' and also under burden of payment to the pursuer, John Kirkpatrick, ould survive his wife, of an annuity of £100; declaring that if the lands itages were sold during the lifetime of the spouses or survivor of them, much should be sold by the trustees as not to leave sufficient security annuities, then corresponding annuities should be purchased, and which s should be accepted in full of all claims, and if any of these annuitants their legal rights then their annuities should be held as revoked. This ther bore—"Reserving always full power to me at any time of my life, n on deathbed, by myself alone, to add to, alter, or revoke these presents, ı whole or in part, and to sell, burden, or dispose of the whole subjects, e and moveable, hereby conveyed, or any part thereof, at pleasure: And ıse with the delivery hereof: And I consent to registration," &c.

here we have as distinct a case as could well occur of a mother convey- *mortis causa* deed, in 1866, the whole means and estate which should o her at her death, for the benefit of her husband and family, and within : eight months thereafter, while the state of the family was precisely the formerly, varying the distribution among the beneficiaries by the *mortis* ed of 1867, which, by an unexpected and unintentional blunder or cleri- sion of the writer of the deed, has totally failed in its purpose as regards itable estate worth £50,000, and substantially failed in its purposes er. All the nine children who were alive at the date of the first deed ve at the date of the second deed. Neither death nor marriage had in- l in the family. The wife must have known that although everything ; in the husband's power by the first deed if he happened to be the sur- is great age, which, although not stated in the record, we cannot help rsonally aware of, made his survivance very problematical, and excluded, rents, any probability of a second family, or of his desiring to do other- an to acquiesce in or vary the distribution among the existing family, re his own children. The question is, whether this is a case in which ıter of the second deed, notwithstanding that she has purposely left out)king clause she had inserted in her former deed, must be held to have d two separate and distinct acts of the mind—first, to revoke absolutely ll events the provisions she had previously made for her husband and and second, to prefer the heir-at-law, whom she was cutting off with a ıd contingent annuity, to her eight other children, among whom, although ly, she was still proposing to distribute her estate. It might have turned . the second deed had been executed on deathbed, and if that contingency urred it is undoubted that Rowan's case would have been directly applic- .t would be very anomalous if a different principle were applicable in the tances which have actually occurred, and I have heard no intelligible stated why this should be so. The result would not only be to bring in ; but to produce substantial intestacy. It is not stated in the record s Kirkpatrick had any personal estate exclusive of the *jus mariti* of her l; but in answer to my question it was said at the bar that there might)0 in that position. Supposing this to be so, it is obvious that, after ıg for the annuity of £15 a-year to one servant, the legacy of £200 to , and expenses, there can be little or nothing left. Except upon the that her heritable estate was effectually conveyed by her deed of 1867, kpatrick would never have divided and distributed her means and estate id by that deed at all. We have no means of knowing what would have r will as to the personal estate if the heritable estate had not been in-

Without the heritable estate, or its value, the deed is not her will to ct whatever. The whole distribution is necessarily a failure, and the on of the former deed is therefore proposed to be implied from a new hich substantially has no effect at all.

ıst not be lost sight of throughout that the question relates to the inten-

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tion of Mrs Kirkpatrick, the granter of the deed, who had everything in her power. Did she mean that if the deed of 1867 proved a failure there was to be no distribution whatever of her estate among her family? The intention of the husband has very little to do with the matter, except upon the untenable footing that he had become, by the former deed, irrevocably vested with the fee of one-half of his wife's means and estate in her lifetime, and right to the fee of the whole if he happened to be the survivor.

Even in that view no plea of personal bar, founded on the husband's consent to the new deed, can affect the question whether the wife's implied revocation is to be construed as conditional on the new deed taking effect. And this leads me to repeat, what I suggested in the course of the argument, that I do not think we have before us all the parties interested even in the general discussion —and still less in a question with the husband's disponees,—if anything is to be held to turn either upon personal bar or upon mutual agreement between the spouses under the deed of 1867. The trustees under both deeds are called as defenders, but no appearance has been made for the trustees under the deed of 1866, and it does not appear that any of them have accepted. The only parties judicially defending the action are the two accepting trustees under the deed of 1867, viz., Miss Annabella Kirkpatrick, the eldest daughter, and Sir James Alexander who can neither act nor plead without her concurrence, although he might, no doubt, bring the trust to a dead-lock by dissenting from her views. Now, the four eldest daughters have an interest in maintaining their father's deed of 1868, adversely to the interests of the four younger daughters, as beneficiaries under the deed of 1866. If, then, their father were to be held excluded —as I understand some of your Lordships think he was,—from claiming under the deed of 1866, in respect of his consent to the deed of 1867, an important question would arise between him and the four younger daughters, as beneficiaries under the deed of 1866, whether any plea of that kind could go beyond discharging his own interest under the primary destination, to him, in the deed, leaving the trust and trust purposes, to which that destination was introductory, in full force. The father may, possibly, have agreed to give up his own place in that destination, or barred himself from taking advantage of it by becoming a party to the deed of 1867. But I cannot at present see how this could evacuate the substitution, or conditional institution, in favour of the trustees, of whom he was not even one, or defeat any other rights under the deed of 1866 than his own.

Apart from that, however, which cannot be decided except in an action in which the four younger daughters shall be duly represented, I am of opinion that, although the powers of the deed of 1867, if they had taken effect, would no doubt have superseded the provisions of the deed of 1866, with which they are throughout incompatible, the legal and true construction of the deed of 1866 is that this was only to be the result if this latter deed took effect. I should have thought this the sound construction if the question had been open; but I think it has not been open for nearly a century, and that the whole cases on the subject, during that period, go to fix a principle peculiarly applicable to this case, reasonable in itself, and which it would be perilous to depart from.

Lord Benholme.—If there be anything certain at all in this case it is that during the later years of the lives of Mr and Mrs Kirkpatrick their *enixa voluntas* was to disinherit their son, and to give their heritable property to their daughters. I do not mean to say that intention is the only matter to be considered here, or indeed the chief matter. What has been effectually done, if anything has been done, ought to rule our decision. But if we come to consider the question of revocation, especially of implied revocation, I cannot throw out of view so clear, so consistent, so determined an intention as that of this husband and wife. I do not mean to inquire into the motives, or rather the justice, of that determination. I do not think we have anything to do with that. But I am clear as to the fact that it was their main intention,—I would almost say, their only object,—in the deeds which they executed towards the end of *their* life, to bring about that result. In the deed of 1866 that object is pro-

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r by a substitution subjoined to the conveyance to the husband and wife survivor. The intention is distinctly expressed, although in somewhat terms, in the deed of 1867. The daughters are not preferred in the ık as in the former deed; there was a change of intention as to the to be given to each of the daughters; but as to the son there was no n whatever. I am quite clear that the second deed, as the law of Scotıd at the time when it came into operation, is ineffectual to convey that ; but I am also satisfied that the lady never knew of the defect, and lverted to it during her life; for, had she done so, can it be doubted would have just made another deed containing the word "dispone"? as certain as possible. I am equally clear that the husband had disthe omission after his wife's death, and that his only object in executing l deed, which is more especially under reduction, was to supply the defect ırmer deed, and to carry out effectually the intention of both the parties leed. That was the object of it. I think it must have been executed ısband under a strong conviction of his obligation to supply the unıal defect in the deed that his wife and he had executed the year before. he held himself bound to do so. I think that in honour he was bound ; and I think that by the deed of 1866 he was entitled and enabled to The deed of 1867 is ineffectual to convey the heritage. Had it been to convey the heritage that would have constituted in itself, if not a ɔn, a supersession of the former deed. It is a maxim well known in the law, and established in our law, that a second will, rightly made, *rite* puts an end to the first. It seems to me to be an equally clear maxim the second deed is null and void as to the subject of conveyance it can ı effect, in that way, against the first deed. Its power of revocation session depends on its own efficacy; and if it be supposed inefficient to it can neither revoke nor supersede. I speak of the case where the ontains no clause of revocation, and nothing amounting to a substantive on of the intention of the party to revoke the first deed,—where all that aid is, that the second deed, had it been effectual, would have put an end rst,—the conclusion being that, if it is not effectual, it cannot have that

Deas has gone over the authorities upon this point in such detail that I would be inexcusable on my part to resume that discussion. To my ad the ground in law of the effect which a second deed, well executed, n any former deed relative to the same subject, is quite clear. I think inction between an express revocation and an implied revocation is equally law. In the present case I should have been very glad indeed could I t my finger upon a single clause in the second deed intimating a revocathe first deed. I should have been very glad to think that the lady had second thought of her duty towards her son, and had intended to revoke inherison of him which had marked her former deeds. I am sorry to nnot find that, or anything approaching to an express revocation. And, I think the able argument which we had from the bar resolved into this, nust be held to constitute an implied revocation,—implied not from its icacy as a conveyance, for that is given up, but from something else in l. A good deal was said upon the suggestion that there might be moveperty effectually conveyed by the second deed. What has that to do ıe heritable property? Nothing whatever. Nor can I discover any e argument from which implied revocation can be inferred. The hope- of the argument in favour of implied revocation was impressed on my nd by the footing on which the Lord Justice-Clerk, in his able opinion, put the idea of revocation. It was the clause of reservation in the deed upon which he especially founded. Now, let me read the clause of ion which is supposed to revoke the deed of 1866, for so it must be put: ving always full power to me at any time of my life, and even on death- myself alone, to add to, alter, or revoke these presents, either in r in part." Now, this is a clause empowering the lady to revoke the at she was executing; but how can that be supposed to have anything

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to do with the revocation of the deed of 1866? She goes on:—"And burden, or dispose of the whole subjects, heritable and moveable, here veyed, or any part thereof, at pleasure." This is plainly an addition reservation as to revoking the deed of 1867, and in another form reser power to herself, notwithstanding that deed, to burden these estates. I never did burden them; and what is the effect of reserving a power if it exercised? Now, here is a clause of reservation upon which nothing i It may ascertain the powers of the lady, especially in reference to the d was then executing; but if these powers are never in any respect ex which it is clear they were not, can they be held to constitute a revocati former deed which is not mentioned at all? At this late period of the d hardly able, and I am certainly not willing, to detain your Lordships length, but it appears to me that this is a case in which there is not plausible argument in favour of implied revocation. It would operate c to the intention and the wishes of both parents. The conclusion arrive the pursuers is this, that the lady died intestate; for that is the resu notwithstanding the * entire voluntas* expressed in the deed of 1866 in fa her husband, in the first place, and ultimately in favour of her daught spite of the second deed in favour of the daughters, with a reservation in of her husband for his liferent; and in spite of the husband's deed i execution of his wife's intentions, which had been defeated by the unl nullity of her second deed; in spite of all these deeds, in which both concurred in the most express manner in disinheriting the son and ins the daughters, your Lordships are asked to hold that her intention was to the first deed, and consequently to cause the husband's deed to be useless fo pose in which both concurred. I am humbly of opinion that the Lord Or interlocutor ought to be altered, and the defenders assoilzied from the re

Lord Neaves.—1. The first question in this case is whether the deed contains an effectual disposition of heritage. I am of opinion that it d The want of the word "dispone" seems to me to be fatal to it in that I hold that under the former law it was definitively fixed by dicta, de and practice that the word was essentially necessary to such a disposition law is now changed, but it needed the intervention of the Legislature t such a conveyance as this valid.

2. The next question is whether, after the execution of that deed, the 1867, the previous deed of 1866 still subsisted as a disposition of heritag question is one of nicety and difficulty; but I am of opinion that the ance in the deed of 1866 did not survive the execution of the deed of 18 was wholly revoked or superseded by that deed.

The question seems to involve two inquiries,—1st, what was the nature deed of 1866; 2d, what acts or writings will revoke or supersede a pre-e deed of that kind.

(1) The deed of 1866 is rather anomalous. I consider it myself as pa *inter vivos* deed, intended to take immediate effect, as regards existing pr of Mrs Kirkpatrick. It is certainly not in the usual form of a *mortis* deed. According to the law of Scotland as it then existed every deed c ing heritage was in the form of a *de præsenti* conveyance; and it was chie the subordinate clauses that its operation was shewn to be prospective n Those clauses were mainly a reservation of liferent and a dispensation wi livery. No such clauses exist here; and there is the special peculiarity th deed is in favour of both the spouses and the survivor. Now, although possible that testators may have granted deeds that were absurd in this respec natural presumption seems to be that such a deed of the granter to himself o self is to take immediate effect, and is not to be suspended till the granter's d

At the same time I do not think that although the deed of 1866 were h be *mortis causa* this would make any essential difference in the case.

It is clear either way that the deed of 1866 was revocable by the join sent of the two spouses. This is expressly declared in it. But, in fact, pendently of any declaration to that effect, the deed was revocable by th

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s Kirkpatrick by her own act alone, as being a donation *inter virum et wem*, which is always revocable by our law.

Further, it is clear that by the deed of 1866 any right conferred on Mr Kirk- rick, whether *inter vivos* or *mortis causa*, was not of the nature of a trust t, but was a right of fee, a joint fee during the joint lives of the spouses, l a sole fee in the event of his survivance. The question now is, if that right joint or sole fee continued to exist after the execution of the deed of 1867.

2) The question thus raised, whether, namely, the right of fee bestowed n Mr Kirkpatrick by the deed of 1866 was revoked, surrendered, or super- ed by the deed of 1867, involves the consideration of the principles applic- e to the extinction of such rights.

t seems clear that the rules of law or conveyancing applicable to the creation onstitution of heritable rights do not necessarily apply to their revocation or inction. This matter was fully discussed in the case of Leith, 10 Dunlop, 4; and it was there held by a majority of the Judges that a good conveyance Scotch heritage might if revocable be validly revoked, even as regards that ange, by a will executed in England in the English form, though it was also d there that revocation was not intended by the English deed, and therefore not take place.

The general doctrine there promulgated was that revocations of revocable ts do not require the same technical language as deeds of disposition, or in- d any technical language at all, but that their purpose is effected if it be ly declared. It must, of course, be declared in a deed that is adequate to ess the testator's intention and to shew his will. A deed, therefore, that wholly improbative, that was not the testator's deed at all, would be equal o deed, and would have no effect.

Here, however, this cannot be said. The deed of 1867 is quite a good and ative deed to speak the mind of the testator. In so far as anything could ne by her mere will this deed does it. It fails, indeed, on one point, viz., the conveyance of her heritage, as to which her will is clearly disclosed, but the denied her the power of disposing of her heritage by will. That inability, wer, will not prevent the Court from seeing what her will was, and giving ect so far as they can do so.

t seems to follow, from what has above been said, that if a testator says ly, in negative words, "I no longer wish my former deed to take effect," is enough to revoke it. This would seem to reduce the matter here to simple inquiry,—Did the deceased continue to will that the deed of 1866 ld take effect, or did she change her mind, and sufficiently indicate that nge?

t it is said that there is no express revocation of the prior deed, and conse- ly it is argued that the revocation, being merely implied, is contingent, and the first deed can only cease to operate if the second conveyance takes t. An implied revocation, it is contended, has in it an implied condition that testator's manifest will to discard the first settlement is not to be carried out the new conveyance comes into operation.

greatly doubt the soundness of this view, and I consider that the transfer- of it to cases like the present from cases of deathbed is not a legitimate of reasoning. There is a great difference between the two situations. In of deathbed the deed objected to is not null, but merely reducible at the instance. There the dispositive clause of the deed is, *ex hypothesi*, not adequate to express the will of the deceased, but adequate also to carry out will by a good feudal conveyance but for the extraneous circumstance that ill of the disease of which he died. That ground of challenge can only ried out by the reduction of the deed, and if the only revocation of a pre- deed is contained in and by virtue of the dispositive clause of the new the heir, by the very act of reducing that clause, would reduce the only ation which the deed contains, and would thus set up the prior deed by of his own reduction of the essential part of the later one. This state of s, therefore, destroys his interest in the reduction he is attempting. But the heir needs no reduction. The later deed stands as a clear expression

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of the testator's intention, as a complete expression of will, and its only defect is that the will is not a habile mode of effecting the alienation of heritage. It may be, and it is, quite effectual as a declaration of will, and the Court are bound to give effect in that way as far as they can do so, and may no longer be bound to uphold a previous settlement which the testator did not ultimately wish to carry out; nor is it easy to see that they are entitled to import into the deed by implication a condition which the testator has not expressed, and which may be quite adverse to his wishes.

I am not satisfied that any cases have been decided which have extended the doctrine of deathbed to a case like the present. There seem to me to be specialties in all cases founded on that view which do not exist here.

But, further, the argument of the defenders here involves a postulate which I think, cannot be conceded to them. This is that the deed of 1867 contains no other expression of intention except what is implied in the new conveyance. It appears to me that this is not the case. If we compare the deed of 1867 with that of 1867 it will be found, I think, that there are substantive parts of the later deed which expressly interfere with and destroy the operation of the prior one. Some of these have been noticed by the Lord-Justice Clerk, and I shall now only dwell upon those indications that have particularly affected my own mind. By the prior deed the spouses were, in the first instance, made joint fiars, and the survivor the sole fiar of the property, and in accordance with that view is the clause of reservation, which is in these terms:—"Reserving always full power to me, at any time of my life, and even on deathbed, with consent of my said husband, and to us both with joint consent and assent to the survivor of us, to add to, alter, or revoke these presents, either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure." But in the deed of 1867 the rights of the parties are put on an essentially different footing. The new clause of reservation,—"Reserving always full power to me, at any time of my life, and even on deathbed, by myself alone, to add to, alter, or revoke these presents, either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure." Now, it appears to me that the effect of this change is very important and enters deeply into the present case. Under the first deed the husband and was recognised as getting a *jus disponendi*, at first jointly and afterwards solely; and it is needless to say that that *jus disponendi* is of the very essence of the right of property or fee. But by the later deed that *jus disponendi* which had been given to the husband is manifestly taken away and is vested solely in the wife, and this not merely to the effect of giving her power to alter the settlement, or to deal with the property *mortis causa*, but also to "sell, burden, or dispose of the subjects at pleasure." It appears to me that, after the execution of that deed, it is impossible to hold that any right of property remained in the husband, either present or prospective. The sole and absolute *jus disponendi* and concomitant right of property reverted to the wife, from whom it had come as much as if the deed of 1866 had never been executed. It follows from this view that at Mrs Kirkpatrick's death there was no fee remaining in her husband, no joint fee that he could exercise, or which could expand into a full right of fee by his survivance. Her heritable property, therefore, did not pass to her husband, whose rights had been evacuated, surrendered, or resumed, so that the husband formed a part of her inheritance to be taken up by any valid deed executed by her after 1866, if such existed, or by her heir-at-law if no such deed existed. Looking to the state of matters as at Mrs Kirkpatrick's death it seems difficult the question to suppose that her husband could take up the property under the deed of 1866. It is not pretended that he could do so for his own behoof as absolute fiar. It seemed admitted that he was under some restraint in this respect. But if he could not so take up the estate it must have been because his right of property had been entirely superseded, for the deed of 1866, according to its terms, made him sole and absolute fiar upon his wife's death. He was never a trustee, and if his right of absolute fee ceased or was extinguished

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r to begin he had no other character in which he could claim the heritage ll.

here is an aspect of the deed of 1867 which deserves special attention. That l was executed with the consent and concurrence of Mr Kirkpatrick, and it inly was intended by him as a surrender of all his rights under the former l. It was, moreover, an effectual surrender in so far as regarded the whole able succession, and I am afraid there was a strong motive for the measure dopted, and a purpose which might be of great importance to the interests, least to the wishes, of these parties. There seems to have been a prospect s Kirkpatrick's heritable property being sold on advantageous terms, as it wards was; and if that had occurred while the deed of 1866 subsisted the of those subjects might have come into Mr Kirkpatrick's person either to xtent of one-half or even to the entire amount. If that sum so falling to him e deed of 1866 could not have been timeously changed in its form, a right pitim would have arisen on the part of his children which would not at all suited the apparent views of the parents. The deed of 1867 averted that and was undoubtedly effectual to that extent. Legitim is not due out of a r's moveable succession, and by the deed of 1867 the parties took care that rt of any moveables, including any price for the mother's heritage, could to the father.

the deed of 1866 had remained unaffected at Mrs Kirkpatrick's death it is that her estates, heritable and moveable, would have belonged wholly to husband, and would have been liable for his debts and deeds; and if he had e bankrupt they might have been attached by his creditors. This con- lly cannot be the case now as regards the fee of her moveable estate. But the fee of her heritage have remained liable for his debts after the deed 67, upon the ground that there was no effectual new conveyance of that ge, although the deed contains a clear declaration that the wife alone was in the *jus disponendi* of her whole property? I think not; but if not, must proceed on the footing that the conveyance of the heritage to the hus- had been recalled or surrendered, and consequently that he was no longer which is the character in which he grants the deed of 1868. If he had not haracter he could not grant that deed, and the defenders have no conveyance y kind to this heritable estate.

is is the main question here at issue. Was Mr Kirkpatrick, after the exe- n of the deed of 1867 by himself and his wife, entitled to fall back on the of 1866, and take up the heritable estate as if he was fiar? That is the ter in which he did so, and it is on his title in that character that the lders are obliged to found.

e true history and position of the case seems to me to be this:—The heri- e question was originally vested solely in Mrs Kirkpatrick by a title in her rson. By the deed of 1866 she changed that state of things for a time, nferred on her husband a joint, and eventually a total, right of fee. But deed of 1867 she undid that arrangement, and declared, with his own t, that he should have no control over the property, but that she alone titled to dispose of it. This brought matters back to their original condi- nd her full right to the property revived, as vested in her by her primary If she had at the same time validly conveyed away the heritage to new s that would have been effectual; but as she did not do so, the property in her *hereditas jacens*, as if neither the deed of 1866 nor the deed of had ever been granted, and her heir-at-law must take it out as connecting lf with his mother and her original title.

ave said that I consider it of little importance in the case whether the of 1866 be considered as mainly an *inter vivos* or wholly a *mortis causa* If it be wholly a *mortis causa* deed, as the defenders seem inclined to ain, it is all the more easily revoked or superseded by any declaration s to its main objects. Other questions of nicety too would arise, not able to the defenders; for a *mortis causa* deed is not presumed to be ed in the granter's lifetime, and it is doubtful if it would have become a ed deed as regards heritage merely by the wife's death, where there is not

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the usual clause dispensing with delivery, nor any reservation of liferent. The deed, as a mere *mortis causa* deed, would become extremely anomalous, and very difficult to sustain.

In narrating the circumstances of the case I have already noticed the power which the wife had to revoke the deed of 1866 as having been a donation, and independent of her husband's will and consent. But the deed of 1867 excludes question on this head, as it is granted with the husband's full consent, and if clauses amount to a renunciation or resumption of the powers or rights which had been gifted to him by the previous deed it seems impossible for him interfere further, or to exert any control over the property beyond at least legal right of courtesy, which is a mere liferent. It seems out of the question that after the terms of the latter deed he should put himself forward as a under the donation contained in the prior one. The second deed, by its declarations, restores the *status quo* which existed before the first deed of was granted, and so much so that even the liferents given by this deed of are defeasible by the ample powers reserved and restored to the wife.

The more I consider the special clause referred to the more I feel convinced that it is a substantive and immediately operative recall and extinction of rights conferred on the husband by the deed of 1866. It is not merely a reservation, but a declaration of right, emanating from the wife, who had power as wife to revoke any previous gift, and moreover expressly consented to by husband, even if he had had power to oppose it. If by the deed of 1867 it is declared or recognised by both husband and wife that the wife alone, and herself alone, is now to have power to "sell, burden, or dispose of the subjects," heritable as well as moveable, it seems to me impossible to deny Mrs Kirkpatrick was thus constituted, or reconstituted, sole fiar, and it was possible that another person could be even joint fiar, or could have any right of disposition. I cannot conceive how there can be two persons that independent rights of burdening or disposing of a heritable subject. If the can sell, burden, or dispose of the whole or any part of her heritage by alone, at her own pleasure, it seems clear that the husband has no power or to do the same thing to any extent; and this is all the clearer when we consider that the feudal right and title were originally in the wife. The encroachment on the wife's right introduced by the deed of 1866 could clearly have been done away with without any definite technical language and form, provided the of the parties were expressed, and I cannot imagine a clearer expression of will, both of wife and husband, that the husband should no longer have power over the fee of the estate. This was plainly intended, and it seems to clearly expressed both by the general scope and purpose of the deed and specially by the explicit clause I have referred to.

It only remains for me to notice the attempt to support the defence on authority of Richmond v. Wilson, 3 Macph. 95. That case was essentially ferent from the present, in respect that the original conveyance was a trust veyance, and when that is the case it is always competent for the testator declare the purposes of the trust by any deed expressive of his will. Here original conveyance in the deed of 1866 was not a trust but a conveyance to husband in absolute fee, and a right of that kind cannot be converted into trust right without a new conveyance. The conveyance in trust in the deed is only a substitution or secondary deed, and did not come into operation. The husband by his survivance would have become the fiar, and thus excluded the trustees. The renunciation or resumption of his *jus disponendi* accrescing the wife, and prevented that result, but did not make way for the trustees under the first deed. The case of Richmond therefore has no application.

I am therefore for adhering to the interlocutor under review.

LORD ARDMILLAN.—On the first question raised in regard to the validity the dispositive clause in the deed of 1867 I do not think it necessary to anything. I concur in the opinion that, at the date of this deed, and at the of the death of Mrs Kirkpatrick, the word "dispone" was indispensable dispositive clause purporting to convey heritage.

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considering the next question which arises I assume that the deed of 1867 the ground which I have mentioned, and which has been already explained, actual as a conveyance of heritage. But it is in all other respects a good , duly signed and attested, authentic and complete in all respects as a clear ssion of will on the part of the granter and her husband, and as validly ying and distributing personal estate.

is now important to ascertain the true position and effect of this deed of in relation to the other deeds in process, viz., the deed of 18th June 1866 the deed of Mr Kirkpatrick of 26th June 1868.

he first of these deeds, that of 1866, bears to be granted by Mrs Kirkpatrick, advice and consent of her husband, and with joint consent and assent, for s and considerations which are not explained, but which are stated to be l and onerous." By that deed Mrs Kirkpatrick, with such consent, dis- s and conveys to her husband and herself, and the survivor, whom failing, stain trustees, her whole property, real and personal, then belonging to her, hich might belong to her at the time of her death. It is not necessary again te the particular terms or purposes of the trust, except to say that the pur- the only son and heir-at-law, was not provided for. A previous disposi- nd settlement, in April 1863, and another in May 1863, were revoked. e is a clause of reservation in this deed of 1866 in the following terms:— erving always full power to me, at any time of my life, and even on death- with consent of my said husband, and to us both with joint consent and , and to the survivor of us, to add to, alter, or revoke these presents, either ole or in part, and to sell, burden, or dispose of the whole subjects, herit- nd moveable, hereby conveyed, or any part thereof, at pleasure." It is im- t to observe that by this clause Mrs Kirkpatrick does not reserve power oke the deed at her own hand, and without consent of her husband, or to dispose of any part of the subjects without his consent. The only power cation or disposal which is reserved is to both spouses with joint consent, the survivor. It is obvious that if, in a subsequent deed, there shall be a tion of power to Mrs Kirkpatrick, acting alone and without her husband's t, to revoke their settlement, or to sell or dispose of the subjects, that e a most important alteration, and quite inconsistent with the deed of

character of the deed of 1866 is, I think, somewhat different in regard to t part of the deed, wherein the whole estate, heritable and moveable, is ed directly to the two spouses, and the survivor of them, and in regard to cond part of the deed, in which a trust is created, and trust purposes ed, and trust administration and distribution directed. In one sense the ay be called a *mortis causa* deed, by which I mean that the property ed comprehends the whole estate at the date of Mrs Kirkpatrick's death; e trustees have no powers or duties before that date. But, in another a person can scarcely make a last will in his own favour, and certainly the y purpose and effect of the deed is direct disposition and conveyance in of the two spouses and the survivor; and it is only failing both spouses, ther words, after the death of the survivor of the spouses,—that the trust, e provisions to the daughters in certain proportions, comes into existence, any right or interest in the trust-estate can arise.

disposed to think that, as matter of conveyancing, Mr Kirkpatrick had unct fee with his wife during the subsistence of the marriage, and an ent fee in his own person after the decease of his wife. This right in him t of primary disponee under the deed of 1866; and the trust, charged all the trust interests, was substituted to the two spouses and the survivor. heritable subjects were the property of Mrs Kirkpatrick a question of vocation of the conveyance in 1866, as of a *donatio inter virum et uxorem*, have been raised. It is not necessary to question it. She never did it as a donation. The defenders' case is that it never was revoked. and on the deed of 1868 executed by Mr Kirkpatrick after his wife's and they maintain that deed by Mr Kirkpatrick to be effectual. Apart t species of revocation as of a gift by the wife, the only revocation to

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which Mr Kirkpatrick's right and interest was liable under the deed o was a revocation by both spouses with mutual consent, or by his wife survived him, which she did not.

So standing the rights of the spouses under the deed of 1866, we ha to consider the deed of 1867, subtracting from it the clause purporting vey the heritage. It is enough to say of this deed of 1867 that its mea not doubtful. It certainly seems to have been meant to be a complet mentary deed, and the only expression of the will of the maker. The tion of the first deed appears to be contemplated in the second deed at commencement. The very words of the clause in the deed of 1866, r power to revoke, are set forth in the opening of the deed of 1867, whi to be granted by Mrs Kirkpatrick with consent of her husband, and b with joint consent and assent, in order to regulate the management and tion of the means and estate of Mrs Kirkpatrick." Plainly the regul the whole succession was intended. Plainly the exercise of the joint p revocation was intended. Plainly the substitution of the deed of 1867 deed of 1866 is what was intended. Of this I think there can be n Then observe, as a marked difference between the two deeds, that no fee, whether conjunct during the marriage, or arising on survivorship, i deed of 1867 given to Mr Kirkpatrick. No right to the personal given to him except in liferent and through the medium of the trust. of trustees, differing in some respects from those under the former deed pointed; and while the first trustees had been substituted to the spous second trustees are made the primary disponees, and are directed to pa husband the income of the whole estate during his survivorship of l In the first deed he had a right of fee direct and primary coming in b trust. By the second deed he had only a liferent annuity on survivo be paid by the new trustees. But, further, the purposes of the trust distribution of the estate, more particularly the personal estate (for the estate was not validly conveyed), are quite different under the deed of 1 what they had been under the deed of 1866. The will of the parties the deeds had changed. I need not explain these points of differen have been pointed out by your Lordships, and there is no doubt about th Then there is provided, as a burden on the heritable estate, an annuity a-year to the pursuer, John Kirkpatrick, the only son of the family, an annuity is attached the very singular condition,—certainly a severe cor should say a cruel condition,—that it shall commence only from and death of his own wife. By this deed, executed by the parents who sho guarded their only son against a temptation to evil, these parents con him an interest in the death of his own wife. I have heard no expla defence of this singular stipulation. But at least it is not surprising heir should seek to vindicate his rights, and to escape from the unnatu tion in which the deed of 1867 placed him. It is not possible to r two deeds without being satisfied that they were not intended to form of writings constituting one settlement. In every important respect th Each professes to be a general settlement. They cannot stand togeth *ensa voluntas* of the maker of both deeds is expressed in the last dee is clearly different from what it was as expressed in the first deed. I impossible to read the deed of 1867 as an addition or supplement to the 1866, even after subtracting from the later deed the inept clause purp convey heritage.

But then the deed of 1867 contains a clause of reservation very differ that which was in the deed of 1866,—"Reserving always full power t any time of my life, and even on deathbed, by myself alone, to add to, revoke these presents, either in whole or in part;" nor is that all. It p —"And to sell, burden, or dispose of the whole subjects, heritable an able, hereby conveyed, or any part thereof, at pleasure." This is a mos tant alteration; and I concur in the remarks made by the Lord Justice- its meaning and effect. Observe, there has been no attempt to revoke of 1866 on the footing of donation; and these defenders, trustees who

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deed of 1868 by Mr Kirkpatrick, repudiate any such intersponsal revoca- Revocation in any form, or for any purpose, is fatal to their case. They ld have no case at all if the heritable estate had reverted to the wife; for has not disposed of it, and the pursuer is her heir-at-law. But what was in the deed of 1867 was to convert Mr Kirkpatrick's right into a mere for a liferent from the new trustees, and to make even that claim de- ent on the sole pleasure of his wife. This alteration is quite inconsistent the deed of 1866, and equally inconsistent with the idea of a series of suc- ve testamentary writings to be read together as a settlement. It is clear to at you cannot use the one deed to work out the purposes of the other deed, you cannot use the one trust to administer the estate set forth in the other . Thus the case of Richmond is not in point. There is nothing whatever ggest that the granters of the deed of 1867 intended to keep alive and keep ce the deed of 1866. Mr Kirkpatrick assented to the deed of 1867. He ribed it not only as expressing his consent to his wife's deed, but as record- is will and intention, "for himself, his own right and interest," in regulat- e management and distribution of the whole estate which he concurs with wife in describing, and disposing of, as her estate,—her estate in 1867. is everything to suggest, and indeed to make it clear, that the parties t the new deed to be a general settlement of the whole estate, and to stand ce of the old deed.

in the deed of 1867 there had been an express revocation of the deed of , a revocation to which Mr Kirkpatrick was himself a party, I think it clear that on the death of the wife he could not have made up his title to e of the estate, as under the deed of 1866. The heir of the mother would succeeded to the fee of the estate. But if the revocation be clearly im- that is sufficient. In such a case as this it is not necessary that it be ex- . The point raised is precisely the same as would have been raised if Mr patrick had, on the death of his wife, claimed the fee of the estate under eed of 1866. His right to execute the deed of 1868 depends on his right e fee of the subjects after his wife's death. If he had not the fee the deed 868 is void as flowing *a non habente potestatem*. The defenders have no except on the assumption that Mr Kirkpatrick had in 1868 the fee of the , and could then dispose of it, and did effectually dispose of it, after his 's death. Such disposal, I think, he could not, and did not, make.

oth of these two deeds purport to be deeds disposing of the universal estate rs Kirkpatrick; and it is settled law that, in such circumstances, the second operates as a revocation of the first. If the second deed were not signed, s not tested,—so that it was not legally signed,—or if the maker of the was in a position in which the law forbids the expression of his will in re- to heritage, as in the case of deathbed, then it might be argued that there ot two deeds. But here it is not so. There are two deeds, and both are ntic, and both deal with the *universitas* of the estate. The will of the r remains as finally expressed in the last deed. In the case of Sibbald's tees v. Greig, 13th January 1871, this point in regard to the last of a series stamentary deeds was carefully considered, and the decision is clearly an ority apt and weighty in support of the proposition which I have now d. The maxims of the civil law, when rightly understood, are, in my ion, to the same effect. The words "*Tunc autem testamentum rumpitur si posterius rite factum est*" have been quoted to us as implying that, in r to sustain revocation, the second deed must be effectual as a conveyance. hink not. The expression "*rite factum est*" does not, I think, mean effec- lly done, but regularly, formally, correctly done. It is so understood, I k, in our own law. The presumption that "*omnia rite acta sunt*" is not a mption that the thing done is valid in regard to effect. It may not be so. ay be too late. It may be by the wrong party, or against the wrong party. presumption is merely that the procedure is regular and formal,—done duly in the usual manner. This is, I think, the meaning of the word "*rite*" such a question, and in so far as the maxim of the civil law may be held cable.

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The question whether there was revocation of the first deed wh second deed was executed is a question of intention. The implication tention to revoke arises, not from the antagonism of results, but from t tagonism of will. The incompatibility of the first deed with the will ex in the second—the will, be it observed, of both parties, the husband as the wife,—raises the implication of intention to revoke. In this case t deed did not express the last will,—the final and deliberate mind of t poner. It was only her deed conditionally, and it conferred no right under condition. That condition was that the granter and her husband survivor, did not revoke it. Revocation by them was in their own powe question is, did they so will it? I do not again resume the explanation reasons on which I think it clear that, by the deed of 1867, Mrs Kirk expressed her will, and Mr Kirkpatrick concurred in the expression of h that the deed of 1866 should not stand. I feel very strongly the force Solicitor-General's remark, that to set up the deed of 1866 now as a con of the fee to Mr Kirkpatrick would be to defeat the will of Mrs Kirk It may be that she had no will to give the real estate to her son and he the heir's title stands not upon will. His right emerges when a contr posal fails. There can be no disinherison without a conveyance to anothe surviving husband could not have been permitted to withdraw his renu of his own right, and his concurrence in his wife's deed as expressed i If he could not then have maintained his right to the fee of his wife' then these trustees cannot resist the pursuer's case, for the deed of 18 not convey the subjects, and the trustees cannot maintain the deed of 1 their right under the deed of 1868, which is under reduction. That 1868 was granted by one having no power to grant it, unless Mr Kirk himself could have claimed the fee immediately on the death of his wife.

I have considered all the authorities referred to, and have carefully s to the comment on them in the very powerful opinion of Lord Deas. B not able to concur in the view which he has taken; and I have come conclusion that, except in so far as reliance is placed on the decisions in deathbed, there is no authority to support the defenders' contention; an of opinion that the decisions in the cases of deathbed,—a chapter of law now closed by statute,—though very interesting, are not applicable question now before us. A deed is here necessary to exclude the heir; deed of 1866 is the only deed which can exclude him. But the analogy law of deathbed supplies no argument to support the deed of 1866. case has the prior deed been sustained in a case of deathbed. It is th bed deed which stands when the heir is shut out. On this point I co entirely in the opinion which has been given by the Lord Justice-Cl by Lord Neaves that I have nothing to add. On the whole cause, I opinion that the pursuer, the only son and the heir-at-law, is entitled to s

Lord Jerviswoode.—This interlocutor was pronounced by me, and conscious when I pronounced it, and am conscious still, of the very gre culty and delicacy which attend the decision of the case; but on the v remain of the opinion which I formerly held, and I am contented to refe views expressed by the Judges who have come to the same result.

Lord President.—There are two questions which have been argue which I shall say nothing, except merely to indicate my concurrence wi whole of your Lordships. I think the disposition of 1867 is ineffectual vey heritage; and I think that it cannot be read as constituting, along wi deed of 1866, the settlement of Mrs Kirkpatrick; nor can it be read as s of instructions addressed to the trustees under the prior deed. But the tant question remains behind. Mr John Kirkpatrick comes here to vi his rights as heir-at-law of his mother, against a very determined attempt inherit him. I agree with Lord Benholme that nothing can be clearer th obstinate intention to disinherit the heir; but to that I attach not the sl importance. The only question is, whether those who set themselves to have succeeded in doing it in the only way that the law can recognise

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r, at the time of his mother's death (she being infeft in the estate), was itled to be served in special to her, unless there could be produced a deed ich effectually conveyed that estate to some other person; for that is the y deed of disinheritance that the law of Scotland knows. Now, the first d that is appealed to is the deed of 1867; and the answer of the heir-at-law —that deed does not convey the estate. If it had been a deed executed upon thbed it would have conveyed the estate, and it would in one sense have ctually conveyed the estate, and therefore it would have been a deed of disritance according to the law of Scotland. But just because it was a d of disinheritance, and at the same time was executed on deathbed, it uld have been liable to challenge by the heir in the exercise of the peculiar rilege given to him by the law. In such cases, if the deed executed upon thbed contained a mere conveyance of the heritable estate, and contained ther clauses, and no other expression of the mind or will of the maker, then heir-at-law would not be entitled to set aside the deed, if there was in existe a prior deed also conveying the estate, although it might be not to the same son. That rule is well fixed; but I am of opinion, with those of your Lordps who are in favour of the interlocutor, that that rule has no application to present case. The heir here requires to reduce nothing in so far as the deed 867 is concerned, and indeed he requires to reduce nothing at all that was behind by Mrs Kirkpatrick, or that had any existence at the date of her th. His answer to the deed of 1867 is that it does not convey the estate, therefore does not exclude him. But the reason why he says it does not ey the estate is not that it is a null deed, for to many effects it is a valid d, and a deed that must receive effect. Of that I shall have more to say after; but what I wish to observe in the meantime is, that it is not the obion of the heir to this deed that it does not represent the mind of the maker, it is not duly tested, and therefore is not to be taken as an expression of her l. The objection is simply that in its form and structure it is not capable of eying that part of the deceased's estate to which the heir lays claim. There- I think that other class of cases, of which Henderson v. Wilson is the most rtant example, has in like manner no application to the present case, because all depend upon the principle embodied in Lord Thurlow's question, How s null deed be a revocation?

We come next to consider the substance and effect of the deed of 1866; and if be a subsisting deed left by Mrs Kirkpatrick to regulate her succession, or if it deed which took effect during Mrs Kirkpatrick's life, and stood unrevoked at death, then unquestionably the heir-at-law is excluded. I am not sure that it ential to the argument on either side to determine whether it is a deed *inter* or a deed *mortis causa*. But for the sake of clearness I think it is desirable we should address our minds to that question, and see what was the effect of the when it existed, and what would have been the effect of the deed if no other had been subsequently made. Now, the first part of the dispositive clause con- the entire estate of Mrs Kirkpatrick, heritable and moveable, to herself and husband in conjunct fee, and to the survivor, and I do not apprehend there be any difficulty in the construction of such words of conveyance. I have not d it suggested that they can mean any but one thing, viz., that the parties are made disponees under that deed in the first instance,—the husband and who are also the makers of the deed,—become joint disponees, and that the ivor of them takes the entire fee upon the predecease of the other. Now, the survivor can take the entire fee upon the predecease of the spouse, in equence of a conjunct fee having been vested in them, if no conjunct fee was vested in them, I do not quite see. It seems to me that the clause is unligible if it is not intended to have effect during the lifetime of the two ses. It can have no meaning and no practical effect. Whether there is anyg else in the deed that prevents that part of the dispositive clause from reing effect is another matter, but the clause itself is plainly in its expression meaning a clause that ought to receive effect as soon as the disposition is vered, and during the lifetime of the two spouses. But then it is said that deed after all is not intended to have that effect, but is only a *mortis causa*

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deed, and that the effect of it is to give the fee of the estate to the sur then to give effect to the subsequent destination failing the survivor. see any evidence of that intention in the deed. I am of opinion that effects and in a certain event this deed would operate to regulate the to the estate, and in that sense it is a *mortis causa* deed. If Mr K turned out to be, as he was, the survivor of the two spouses, and did no the substitution, the effect of the deed would be, after his death, to trustees therein named heirs of provision in trust for the daughters,— would be a deed regulating the succession. But it would not be a dee ing the succession until that event occurred,—until Mr Kirkpatrick o vivor of the spouses died and left the destination to take effect. In so fore as the spouses were concerned, it was, in my opinion, a deed *inter* so far as the ultimate destination was concerned it would, if allowed b vivor to take effect, have operated as a deed *mortis causa*. But it se thought that even supposing this is the proper construction of the fir the dispositive clause, the deed could have no effect without delivery, it was not delivered. Now, I am disposed to concur in the opinion by the Lord Justice-Clerk, that a deed of this kind, not a mutual dee do not understand his Lordship to have suggested that it was a mutu but a joint deed executed by the spouses in favour of themselves, an themselves joint disponees, may be held to be a delivered deed, especi it is left in the custody of the husband, and disposes of the wife's esta that that was the condition of matters is fairly presumable. My brother I suggests that if this matter of the delivery of the deed was of momen to have been averred and proved on the part of the pursuer that it was while there is no statement of that kind on the record. It would ha very strange thing for the pursuer to have undertaken any such proof o made any such averment, his contention being that that deed is not a deed, but was revoked by a subsequent deed, and whether it was del not is therefore a matter of indifference to him. I make the observat the probability of its being in such a position as to operate as a delive only for the purpose of making more clear my construction of that fir the dispositive clause. Now, this being the nature of the deed, and t of alteration being expressed in the terms which have been so frequentl to, reserving to the spouses during their joint lives and to the survivo to alter, the position in which the parties stood after its execution app to be this,—Mrs Kirkpatrick undoubtedly had a power to revoke the donation *inter virum et uxorem*. I think that cannot admit of doubt. had also a power, either jointly with her husband or by herself alone i vived, to alter the deed without exercising her right to revoke it as a and these are two totally different things. Such was the position of t when they changed their minds as to the mode in which this estate settled, and proceeded to make the deed of 1867. Now, I think they deed of 1867 in exercise of the power reserved to them in the deed of think they are very careful to shew that that is so,—that Mrs Kirk not revoking a donation which she made to her husband, but that spouses, with joint consent and assent, in the very terms of the reservati end of the previous deed, proceed to make a new one. The plan of deed is quite obvious. The estate of Mrs Kirkpatrick was almost enti able, but if it had been converted into moveable, and had become death the absolute property of her husband, and he had failed to conve not had an opportunity of again converting it into heritage, the obj spouses in making both the deeds would have been defeated, and legitim would have been opened up to all the children. This second made, among other purposes, for the purpose of cutting off such claims that was the only purpose, or whether it was the chief purpose, I undertake to say, but it was one of the purposes that the spouses had i making this deed. In order to attain that object it was indispensable Mr Kirkpatrick of the fee that was given to him in the previous deed. not be done without that. They therefore proceed to deal with this

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he estate of Mrs Kirkpatrick alone, and in the expression of the inductive cause f the deed of 1867 we have this statement, that it is in order "to regulate the nagement and distribution of the means and estate of me, the said Mrs Jean Kirkpatrick, after my death." That is the declared object, and the only lared object, of the deed under the hands of both the spouses. Now, that is tally inconsistent with the existence of a fee in the husband,—either a joint fee ing with his wife, or a fee in the event of his surviving her. If the deed of 866 is to subsist, the estate is not the estate of Mrs Kirkpatrick. It is an tate already disposed of, and disposed of in such a way that from the date of execution of the previous deed it ceased to be her estate. The deed pro- s to convey both heritage and moveables, and being ineffectual as a convey- ce of heritage, my brother Lord Deas seems to think that it is a very unim- rtant deed in its effect altogether,—that the conveyance of moveables is practi- lly inoperative, because there was really very little moveable estate left by Mrs irkpatrick, and he seems also to have imagined that such moveables as she did ve were not bestowed upon her daughters. But that is a mistake, for the veable estate is by very express words directed to be given to certain of the ghters. But what is of far more importance to observe is, that the convey- ce of the moveable estate, if the Clyde Trustees had by compulsory sale taken land, would have been the only operative part of the deed, and if the Clyde stees had taken a portion of the land then both the heads of the conveyance uld have been important, both the conveyance of the heritable estate and the veyance of the moveable estate. In short, the deed is not more important the eyes of those who made it, and might have been less important in their e, in respect of the conveyance of heritage than in respect of the conveyance moveables. At all events it is perfectly clear that it does subsist as a con- yance of moveables, and is effectual; and it subsists not only as a convey- ce of moveables, but it subsists also as a very strong and distinct expression the mind and intention of the parties as to the regulation of Mrs Kirk- rick's succession, and the condition in which her estate is to remain during r survivance and down to the day of her death, because the effect of the deed, art altogether from the conveyance of moveables, is in my opinion to operate the one hand a renunciation by Mr Kirkpatrick of the right of fee given to m under the deed of 1866, and a restoration of Mrs Kirkpatrick to her full ht of fee in that estate, and all that, I apprehend, can be operated by a decla- tion of purpose without the necessity of dispositive words. I put this ques- on as a test of Mr Kirkpatrick's position under this second deed. Suppose at the heir had not interfered, but that Mr Kirkpatrick had come forward er his wife's death and said, "This is not a good conveyance of the heritable tate, and consequently the deed of 1866 stands in force as regards the heritable tate, and I claim the right of fee adversely to my daughters," could he have ne that? He certainly could if the deed of 1866 subsists. If the deed of 866 is not destroyed by the deed of 1867 that was his right. But can any- dy be heard to maintain that after this arrangement with his wife for the gulation of her succession, and after he had given up his right as fiar under the ed of 1866, and restored her to the full right and management of her own tate, he could still at her death claim under the deed which was so superseded? apprehend that is impossible. And that appears to me to be a crucial test, cause this defect of the deed of 1867 is not a defect available to the heir only, in the case of deathbed. It is a defect available to everybody having interest; nd if Mr Kirkpatrick had a fee under the deed of 1866, and that fee was not stroyed by the deed of 1867, he could have claimed that fee adversely to his wn children. But I think that he would have been barred most effectually by hat to which he agreed under the deed of 1867, and that he would have made hat claim in vain. The clause of reservation to which reference has been made n the deed of 1867 is one of very great importance, but I take it not by itself but in connection with the whole of the rest of this deed, as shewing very clearly hat Mr Kirkpatrick gave up his right of fee, and consented to be reduced to hat position which the law would have assigned to him at any rate as regards he heritable estate, viz., to have a liferent by courtesy. I say this reservation

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at the end of the deed is most important when taken in connection with all the other clauses of the deed, indicating that purpose and desire. But the clause of reservation itself, as it is called, though it is a great deal more than a clause of reservation, does in so many words distinctly declare that from that time forward Mrs Kirkpatrick is full and unlimited fiar of the estate. It does not give her a faculty. That is not the nature of the thing at all. It is a reservation to her of that which naturally belongs to her, viz., the full property and right of disposal of the estate. And supposing that she, not revoking the deed of 1866, not asserting her original right as fiar of the estate before any deeds were executed at all, but reciting this clause of reservation at the end of the deed of 1867, and professing to act upon that and that alone, had conveyed the estate either gratuitously or onerously, could any one have competed with her disponee's title? If she had sold it would the purchaser not have had a good title in competition with Mr Kirkprtrick? If she had given it gratuitously, would the gratuitous disponee not have been entitled to it in competition with Mr Kirkpatrick? Now, if that is so, how is it possible that there could still subsist, notwithstanding of that right and power in Mrs Kirkpatrick, a present right of joint fee, and a prospective right of sole fee in her husband? The two things are utterly inconsistent. They cannot stand together. And yet the whole of this deed, except that part of the dispositive clause which professes to convey heritage, is a subsisting and valid deed expressive of the wishes, desires, and intentions of the two spouses. For these reasons I come to the conclusion that the deed of 1867 operates as a revocation of the deed of 1866, and I am not sure that I should be quite content to say that it implies a revocation of the deed of 1866. At all events, I do not say that at all in the same sense in which a revocation is implied from a mere new conveyance. The case is very different from that. This revocation depends not on the new conveyance, but on the express desire,—the explanation of the arrangement which is made between the spouses for the disposal of Mrs Kirkpatrick's estate after death. Their whole intention and purpose as expressed in this deed are so inconsistent with the subsistence of the previous deed that if it does not amount to an express revocation it is at all events an implication of a very different and a much stronger kind than that which arises from the mere execution of a new conveyance. For these reasons I concur with the majority of your Lordships in holding that the interlocutor ought to be adhered to.

THE COURT adhered to the interlocutor of the Lord Ordinary.

ALEX. HOWE, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

No. 97.
Mar. 20, 1873.
Bridges v. Lord Saltoun.

The Rev. ALEXANDER HENRY BRIDGES, Pursuer.—*Watson—Mackintosh.*
LORD SALTOUN, Defender.—*Balfour—W. F. Hunter.*

Property—Servitude—River.—Held that a riparian proprietor, who had, by possession for more than forty years, acquired a right of diverting water from a stream for the use of his mill, was not bound to continue the exercise of this right; but that if he abandoned it, and restored the water to its original channel, he was bound to do so in such a manner as not to expose the servient tenement to injury.

1ST DIVISION.
Lord Gifford.
M.

THE Reverend Mr Bridges was proprietor of the lands of Ardlaw, and Lord Saltoun was proprietor of the lands of Tyrie, both in the county of Aberdeen. The march between their lands was the burn of Tyrie. At some period not precisely known, but prior to 1798, a lade was formed for the purpose of diverting water from the burn in order to supply a mill on Lord Saltoun's property, and the water had continued to flow through that lade until the operations to be afterwards mentioned. There was a weir across the burn at the intake of the lade (at the point afterwards referred to as B). After passing the mill, the water returned to the burn either by a watercourse used when the mill was going, or by another used when the mill was not going. There was no sluice upon the lade at the

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ke, but there was one upon it 500 yards therefrom. When the ce was shut the water sometimes overflowed, and found its way to the n at a point (D[1]) nearer to the intake than the two regular outlets of lade (E and F). The intake of the lade was opposite to the lands of law, but all these three outlets of the water into the burn were below e lands—the main outlets (E and F) considerably below them. In sequence of the diversion of the water by the lade very little water ed in the course of the burn, except when the sluices were closed the mill was not working.

n 1871 the water of the burn ceased to be used for the mill, and, with ew of preventing it flowing in the mill-lade, part of the weir which been built at the intake was removed, and the lade was closed. the land on the Ardlaw side was lower than that on the Tyrie side, result of these operations was that the water overflowed part of the ls of Ardlaw, and the drainage on the Ardlaw side was also completely eded.

fr Bridges caused the weir to be rebuilt, and Lord Saltoun, with the v of relieving the lands of Ardlaw of the overflow, cut a new channel llel to the burn from the intake to the nearest of the three outlets, ; and having done so, filled up the old lade, and placed the old sluice ediately below the intake. Mr Bridges was not satisfied with these rations, for, as there was little fall at the outlet of the new channel which was situated below the lands of Ardlaw, the effect of the water g returned there was to cause it to regurge or come back on the lands Ardlaw at the point D[1].

n these circumstances Mr Bridges raised this action of declarator and rdict against Lord Saltoun. The summons concluded that it "should found and declared that the defender had and has no right to shut up bstruct the watercourse or mill-lade taken off from the burn of Tyrie, point in said burn where it forms the boundary between the lands of law and Tyrie, respectively belonging to the pursuer and the defender, thence proceeding through the defender's said lands to the Nether l of Tyrie, and thence proceeding through the defender's said lands l it joins the burn of Tyrie at a point below the pursuer's lands of law, or to do anything whereby the flow of water throughout the le course of the said watercourse or mill-lade may be in any way im- d or obstructed;" and that it "should be found and declared that operations of the defender upon the said watercourse and mill-lade, the diversion of the water thereof by him, are and were illegal and arrantable;" and that "the defender should be decerned and ordained rwith to restore the said watercourse or mill-lade to its former state, t least to restore or open up the same, so that the water may flow as ly as before along the whole course thereof, and that at the sight of a of skill to be appointed by" the Court; and that upon matters being ored to their original state, the defender should be interdicted "from ring the water now taken, or that was in use to be taken into the mill-lade from the said burn, to be returned thereto at any other nt than that at which it has from time immemorial, and prior to said illegal operations, been returned, and from interfering with the er of the burn of Tyrie, or with said burn itself, so as to make the said er flow, in the course of that burn, over the intake, and between that nt and the point where the way-lead from the Nether Mill used to the said course, to any greater extent than it flowed prior to the said nder's illegal operations;" or that, at all events, the defender should nterdicted "from altering the place at which the water now taken, or was in use to be taken, into the said mill-lade from the said burn,

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has from time immemorial, or prior to the said illegal operations, been returned thereto, and interfering with the said water to the effect foresaid, until he shall, at his own expense, have taken all necessary precautions, at the sight of a person to be appointed by" the Court, "to protect the lands of the pursuer from injury."

In the second article of his condescendence the pursuer stated—"The boundary between the lands of Ardlaw and the lands of Tyrie is a burn. This burn, which is now called the burn of Tyrie, and which contains a large body of water, had, prior to the sale of the lands of Easter and Wester Tyrie in 1798, been diverted from its natural course, and was carried through the lands by means of various artificial channels. One of these artificial channels was formed and used as a lade for supplying the Nether Mill of Tyrie, which is situated on the lands of Tyrie belonging to the defender."

The pursuer pleaded;—(1) The defender's operations being illegal, and to the pursuer's injury and damage, the pursuer is entitled to obtain decree to that effect, and ordaining the defender to restore matters to their original position. (2) The defender is not entitled to disturb the state of matters in regard to the water of the burn of Tyrie, which have existed from time immemorial, or at all events since the estates of Ardlaw and Tyrie have been held by different proprietors. (3) The defender is not entitled to return the water taken by him from the burn of Tyrie to the said burn at any point opposite to the pursuer's lands, or different from that at which the same has hitherto been returned. (4) The defender is not entitled to disuse the said mill-lade without at least taking all necessary precautions against injury arising to the pursuer's lands. (5) Matters having been restored to their original position, the pursuer is entitled to protect his property from the risk of injury by obtaining decree interdicting the defender in all time coming from returning the water taken into the mill-lade to the burn at any point opposite the pursuer's lands or different from the point at which the said water has hitherto been returned, and from interfering with the water of the said burn. (6) At all events, the pursuer is entitled to obtain such interdict until all necessary precautions are adopted by the defender, at his own expense, for preventing injury to the pursuer's property.

The defender pleaded;—(2) The defender was entitled to shut up the said mill-lade, in respect that the same was exclusively within his own lands, and had been made and used, as well as controlled, exclusively by the proprietor of these lands. (3) At all events, the defender was entitled to shut up the said lade upon providing the substitute channel, whereby the water is conveyed in a line parallel to the burn, and restored to the burn at a point below that at which the pursuer is proprietor of any lands. (4) The action cannot be maintained, in respect that the operations complained of have not caused and will not cause injury or damage to the pursuer or his lands.

The Lord Ordinary allowed a proof, and after this had been taken he, on 24th December 1872, pronounced this interlocutor:—"Finds in point of fact, 1st, That for more than forty years preceding the present action, and preceding the operations to which the present action refers, the burn of Tyrie formed the boundary between the lands of Ardlaw, belonging to the pursuer, and the lands of Tyrie, belonging to the defender; 2d, That for more than forty years preceding the present action and the operations foresaid part of the water of the said burn of Tyrie has been in use to be diverted from the main course of the said burn into a mill-lade constructed through the defender's lands for supplying the Nether Mill of Tyrie, on the lands of Tyrie, belonging to the defender; 3d, That during the period

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aid, the water, or part thereof, was diverted from the main channel e said burn into the said lade by means of a weir constructed across nain bed of the burn, and by means of which weir or intake the water diverted into the lade; 4th, That during said period there was no e upon the said lade, at the head of the lade, or at the intake, but during the whole period there was a sluice on the lade near the mill, about 500 yards from the intake, which sluice was used at the plea- of the defender's tenant of the mill; and 5th, That when this sluice shut, the water flowing down the said lade, so far as not dammed by the sluice, escaped by a back ditch, and rejoined the burn at a t immediately above the bridge over the said burn, and some distance r the pursuer's lands of Ardlaw: Finds in point of law that the der is entitled to discontinue, if he pleases, the use of the said mill- and is not bound to uphold or keep up the same for the purpose of ting from the burn the water which for the last forty years the lade been in use to receive: Farther, finds that the defender, without pre- e to his legal pleas, has made through his own lands a new cut, com- cing at the said burn at the intake, where the defender's said original commenced, and ending at the said burn at a point considerably r the lowest point of the Ardlaw march, and that for the purpose of ving from the burn, and carrying past the pursuer's lands, the same tity of water as was formerly in use to be taken by the said mill-; and finds, that although the old sluice of the said mill-lade has been d upon the said new cut, yet, before the raising of the present action, efender offered to remove the said sluice, and to receive into the said cut as much or as little water as the pursuer might desire: Finds in ; of law, and without prejudice to the finding in law above written, the defender cannot be required to do more than he has done, and d to do, before the present action was raised: Therefore assoilzies efender from the whole conclusions of the action as laid, and decerns, ving always to the pursuer to have the sluice removed from the new n terms of the defender's offer, if the pursuer shall wish this to be : Finds the defender entitled to expenses," &c.*

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* NOTE.—It rather appears from the evidence of some of the skilled wit- s in this case, as well as from the correspondence, that the whole dispute een the parties, as well as the whole of the somewhat complicated and s litigation, might have been avoided by an amicable arrangement, and by paratively small outlay expended in deepening and rendering equable the nel of the Tyrie Burn where it forms the march between the pursuer and efender, and for a little way further down. So far as the Lord Ordinary udge, this would have been an improvement to both parties, and it certainly l have been accomplished at much less expense than either party has in- d in the present litigation.

The parties, however, failed in effecting any amicable arrangement, and each em now stands on his *summum jus*, or his strict and highest legal right; although regretting that the litigation was not avoided, the Lord Ordinary ndeavoured to decide the case according to the strictest principles of law, out considering, and, indeed, without inquiring which party was to blame he failure to effect an amicable settlement.

The case raises points of considerable difficulty both in law and in fact. It his striking peculiarity, that it is a complaint by a riparian proprietor against l owner on the opposite bank, complaining, not that the miller is taking much water, or at too high a level, which are the usual challenges, but that miller is not taking enough water, or not taking so much as he used to take, that he is restoring it at too high a point. These are unusual complaints, gh it is quite possible in certain cases that they may be well founded in

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LORD PRESIDENT.—This case has become altered in the course of ment.

" The first question in point of fact is, which is the main or proper the Tyrie Burn, and which is the lade, or are the two channels both both artificial lades? These questions lie at the root of the dispute, and in one aspect of the case their decision may be avoided, yet the gene the case cannot be satisfactorily applied without answering these que point of fact.

" The Lord Ordinary has thought it his duty to exhaust the case by both in fact and in law, instead of resting his judgment, as perhaps I have done, upon the sufficiency of the works and tenders made by the

" Now, the Lord Ordinary thinks, looking to the whole evidence a whole circumstances, that it is sufficiently proved that the main chann Tyrie Burn is in the line of the march between the pursuer's lands o and the defender's lands of Tyrie. In short, the Tyrie Burn is th between the two properties, and the channel diverting some of the wa Nether Mill of Tyrie is not the main channel, or a main channel of t but is merely a mill-lade.

" The Lord Ordinary thinks this is the result of the evidence as The old maps, the old witnesses whose evidence was taken *in retentis*, t of the ground, and the manner in which the mill water was used, tre ultimately disposed of, all point to this result. No doubt both chann a certain extent artificial. The old burn of Tyrie seems originally to ha out in the flat and marshy ground, and wandered somewhat irregul pool to pool. But long since it was straighted and confined, and be march burn, which it now is. This early operation, as well as the construction of the mill-lade, are beyond living memory, but enough tions remain to enable us to say, with some confidence,—'This is forming the march, and this, which runs exclusively through the l lands of Tyrie, is a mere mill-lade for the use of Tyrie Mills.' To no one circumstance, omitting others, the weir, the use of which is to d water, is built across the main channel, and, by itself, indicates whi burn and which is the lade. A weir or dam-dyke is never erected acr lade, but only across a stream or burn from which water is to be divert use of it is to stop and raise the water, in order to send it down the and as the weir has existed for more than forty years the Lord Ordina it is by itself almost conclusive of the question which is the burn and the lade. In connection with the other evidence the Lord Ordinar much doubt on this matter of fact, which is very important in referen present case.

" In the next place, however, it seems equally clear that during t prescriptive period there was no sluice on the mill-lade at its upper en of junction with the burn, and the result of this is that the mill-lade could receive, but must receive, and must have received, all the water directly diverted or stopped into it by the weir. It may be noticed i that in the evidence the word 'intake' is somewhat improperly applie of the witnesses to the weir. The intake, strictly speaking, is not the the opening of the lade, which takes in the water, and where an int is usually placed.

" The fact that there was no intake sluice in this case is an unusual might found some kind of right in the pursuer, for if there had been sluice at the weir always in use, or always capable of being used, and b which the miller might at his pleasure have sent the whole water ove and prevented any from coming down the mill-lade, there would ha remained any question in the present case.

[1] *Authorities cited.*—Blantyre v. Dunn, Jan. 28, 1848, 10 D. 509; zie v. Woddrop, Jan. 24, 1854, 16 D. 381.

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he original contention of the pursuer was that the defender was not entitled hut up the lade upon any condition whatever. The pursuer's ground for this

But although there was no sluice at the intake there was a sluice on the lade a good way further down, about 500 yards from the intake, and within ry short distance of the mill itself, and the Lord Ordinary thinks it suffi-ly proved in evidence that this sluice was always in use, or capable of being , and was at the entire command of the miller, the defender's tenant. This ery important fact, for by that sluice, at A^2 on the plan No. 61 of process, whole water in the mill-lade could be stopped, and dammed back at the r's pleasure (that is, at the defender's pleasure), and the miller often did so. e is a dispute whether this sluice could dam the water back beyond the e, but this is not very material, for it seems proved that when the sluice at as shut, the water, if not dammed back to the intake, escaped over the bank e mill-lade, which acted as a sort of waste or spill-water, and the water so ing being the whole surplus water of the lade, flowed down a back ditch, rejoined the main burn above the bridge at the point D^1 on the plan No. f process. This is extremely material, for D^1 is the point where the de-er's new, or substitute cut aftermentioned, rejoins the burn, and it seems to roved in evidence that while the lade was in use the defender's miller t at his pleasure, by shutting the sluice at A^2, have made the whole surplus nts of the lade flow back to the burn at D^1.

t may be noticed, in passing, that the fact of the complete shut-off sluice at well as the spill-water sluice close to the mill, speak volumes as to the being a proper mill-lade, and not a natural channel of the burn.

Matters stood thus from time immemorial, or at least for more than forty . Recently, however, the defender has given up his mill at Nether Tyrie, having no farther use for the mill-lade he became desirous of filling it up improving his land. The question is, is he entitled to do so; and if so, on conditions.

After a great deal of communing, the defender, in order to avoid question, ved to make a new cut, leaving the burn at the old weir at B, and rejoining burn at D^1, which is more than 200 feet lower down than the defender's rty, intending this new cut to carry the same quantity of water that the ade had done, and in order to shew or to secure this, the defender caused ld sluice—the identical structure which had formerly been on the old lade ², to be placed on the new cut but a great deal further up, and near the a. The defender offered, however, long before the present action was l, to take into and send down the new cut 'as much or as little water as ridges (the pursuer) may desire,' and again he offered 'not only to take the new cut whatever quantity of water he (the pursuer) may desire, but o remove the sluice at present at the head of the cut altogether.'

Now, the Lord Ordinary is of opinion that the offers made by the defender reasonable, and were all that the pursuer could either in law or in reason nd. The whole water taken by the old mill-lade might undoubtedly at any by shutting the sluice at A^2, have been returned to the sluice at D^1, and s exactly what is done by the new cut. And if there was any doubt about luice passing more or less water in its new position than it did formerly could be more reasonable than the defender's offer to take it away altogether, o send down the new cut just as much or just as little water as the pursuer t please.

f the Lord Ordinary is right in the view now suggested there would be ph to settle the case without going to the somewhat nice question of law a lies beyond.

But the question of law is really raised by the summons, and the Lord ary does not think that in fairness he is entitled to avoid it, and he feels elled to negative the conclusions of the action.

f, in point of fact, the march is the main course of the Tyrie Burn, and the rough the defender's lands to the mill of Tyrie is a mere mill-lade, then ght is very near the recognised right or servitude of aquæhaustus. The

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was, that the lade was the natural channel of the burn, and that the burn was a mere ditch. But this is not at all a reasonable or tenable ground, looking to article 2 of the condescendence for the pursuer.

This mill-lade has existed from time immemorial, and the right of diverting the water from the burn was acquired, like all rights of that kind, by agreement or by prescription. It is a servitude in which the mill is the dominant tenement and the estate of Ardlaw is the servient tenement. It is a servitude well known to the law, but a servitude which the dominant tenement is not bound to continue to exercise when it becomes unnecessary to do so. But a servitude of this kind cannot be abandoned unless the works for doing so are so executed as to be innoxious to the servient tenement. This is clearly laid down in the cases of Blantyre v. Dunn, and Mackenzie v. Woddrop. Ardlaw must not be exposed to any disadvantage to which it has not been exposed past the memory of man. If the effect of the defender's operations is not to expose Ardlaw to injury or risk of injury it is not necessary for him to do anything, but if it is the case that Ardlaw is so exposed then the defender is bound to take all proper precautions.

These are the principles on which I found my judgment.

What are the facts?

The water in the lade was diverted from the burn at the point marked B on the plan, and it then came down through the lands of Tyrie until it reached the mill. At the mill there were two courses, by either of which the diverted water could be returned to the main channel of the burn; one of these was that which joined the main channel at F, and it is the course the water took when the mill was working. The other course is that which enters the main channel at E, and it was the proper bye-water of the mill by means of which the water went into the main channel when the mill was not used. These channels were both of them necessary for the proper working of the mill.

But it is said that there was another channel which entered the burn at the letter D[1], and as it appears to me to be very important in its bearing upon the decision of the case I will consider the facts as laid before us.

The evidence is not very direct, but there is one witness who had the best means of knowing about the matter. That is the witness Andrew Bruce, who was tenant of the mill, and whose father and grandfather were tenants before him.

His evidence is to the effect that there is no such thing as a water-course

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defender and his mill of Tyrie are the dominant tenement, the stream or the lands interested in it are the servient. In such a case the servient tenement can hardly, without circumstances which do not occur here, compel the dominant tenement, to exercise its right, that is, to take water whether it will or not, that is, to use and maintain the lade though the mill have disappeared. A servitude is a burden on the servient tenement, and a right *mere facultatis* in the dominant. There is no instance in any of the known servitudes, whether of way, of aqueduct, of water, of light, or of support, of compelling the dominant tenement to exercise a right which it wishes to relinquish. This would be reversing the relation of the properties, and the only alternative is to suppose that the pursuer as owner of Ardlaw, has acquired a servitude or some kind of right over the lands of Tyrie. It might be suggested that while Tyrie had a right of aquæ haustus from the stream, Ardlaw had a right of aquæductus, or of sending the same water through the lands of Tyrie. But this is really untenable. Ardlaw has no mill to serve, and he would probably shrink from the burden which the dominant owner must bear of upholding the dam-dykes and aqueducts.

"It is needless to enter farther into the details of the case. The dispute as to the backwater at Bodychell Mill, the question how, and how far the lower corner of the lands of Ardlaw is flooded or prevented from being drained, the action and effect of the Glashiemyre Burn, are all matters on which there is a good deal of contradictory evidence. In some aspects of the case these matters of fact may be material, but the Lord Ordinary prefers to rest his judgment on the broad general grounds which he has above shortly indicated."

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between the sluice and the point D[1]. When the sluice was put in the object was to dam back the water for the use of the mill. It was not unnatural that the water should run over the dam. And what became of it then? It ran into the field beside the dam, and of course ultimately fell into the nearest ditch and ran into the burn. This was the fault of the miller, but it was not his object to do so. He had no interest to do so, and it was not his common practice to do so.

The defender states that the sluice at the head of the new cut, which he has substituted for the old water-course, will be kept open to its full extent or removed altogether, the effect of which is to throw the whole water into the cut, and so remove all ground of complaint in regard to regorging of the water above that point. But then the effect of the water being returned to the burn at D[1] will cause it to regorge or come back upon the lands of Ardlaw at the point D. If this cut had been carried down to E or F that would not have been the case, and that would have been in accordance with the real state of possession for the prescriptive period.

There is a peculiarity in regard to the levels of the ground at the point D. There is a fall below D[1], and very little fall at D.

The hardship complained of by the pursuer, viz., the regorging of the water upon his lands at D, could easily have been removed by deepening the channel of the burn at that point.

But there are other ways of removing the regorging; one of these is to carry the cut down to F.

It is much to be regretted that this cut should have been made by the defender in his own hand without having got an assurance from the pursuer that he would be satisfied with it. It was that taking the matter into his own hands that chiefly prevented this difficulty from being removed by agreement of parties. During the whole correspondence that passed between the agents for the parties before the case came into Court, and even after the summons had been prepared, the pursuer offered to bear a portion of expense of making the alterations proposed by him to remedy the evil complained of, viz., to deepen the burn below the point D, as is shewn by his letters.

That was a most reasonable proposal, and if the parties had come to an agreement upon that the whole expense of this litigation would have been avoided.

We are now in a position to make this proposal be carried out by finding that the right of the defender to shut up the lade can only be exercised on condition of his keeping the pursuer free from any damage.

It has been argued by the defender that the pursuer has not suffered any loss, & that is a very weak argument. The defender is bound so to conduct his works as not to expose the pursuer to any disadvantage to which he was not exposed before the alterations.

I therefore cannot concur with the Lord Ordinary. His findings are,—"Finds in point of law that the defender is entitled to discontinue, if he pleases, the use of the said mill-lade, and is not bound to uphold or keep up the same for the purpose of diverting from the burn the water which for the last forty years the mill has been in use to receive." I think that finding is bad law. The defender is bound to construct his works so as not to hurt the pursuer. But the Lord Ordinary finds further, "that the defender, without prejudice to his legal pleas, has made through his own lands a new cut commencing at the said burn at the place where the defender's said original lade commenced, and ending at the said burn at a point considerably below the lowest point of the Ardlaw march, and that for the purpose of receiving from the burn and carrying past the pursuer's lands the same quantity of water as was formerly in use to be taken by the said mill-lade, and finds that, although the old sluice of the said mill-lade has been placed upon the said new cut, yet, before the raising of the present action, the defender offered to remove the said sluice and to receive into the said new cut as much or as little water as the pursuer might desire: Finds in point of law, and without prejudice to the finding in law above written, that the defender cannot be required to do more than he has done and offered to do before the present action was raised." I think, on the contrary, that he can be required to do more than he has done or offered to do, and that is to continue the cut to

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the point F, or to deepen the burn between D and E. He must als the sluice at B.

LORD DEAS.—In so far as your Lordship has stated the import of t and the substance of the correspondence I concur, and will not go over ground.

Upon the question of law involved I also concur. I think that Lor was quite entitled at any time to do away with the mill-lade, and to di using the water; but although he was so entitled, I agree with your that, after the years of prescription had run, he could not legally re water to the burn without making sure that no injury should ensue to of Ardlaw. That, the proof shews, he has not sufficiently done. I do i it necessary in such a case as this for the proprietor of Ardlaw to prov and absolutely that real damage has been sustained. I think he is enti protected against any greater risk of future damage by floods and overfl he was formerly exposed to. The pursuer seems prepared to be sa either the new cut be continued to E, or the burn between D[1] and E c and I think Lord Saltoun is bound to do one or other of these two thi

LORD ARDMILLAN.—I concur in the observations made by your Lor the proof in this case, and on the law applicable to that proof. The w was taken off from the stream and used for far more than the prescripti for Lord Saltoun's mill, and during that time there was growing a pr right on the part of the proprietor or the estate of Ardlaw—a right to to be relieved of that water if the relief was a benefit to the estate. with your Lordships that Lord Saltoun is entitled to give up the us water, which he no longer requires, but he is not entitled to do so al Assuming that he is entitled to give it up and return it to the stream must not injure his neighbour by so returning the water, as to flood or injure the lands of Ardlaw. It is clear to my mind that the defenda tions throw on the lands of Ardlaw a burden and disadvantage from wh have been free for upwards of forty years. This is an injury which the is not entitled to inflict.

LORD JERVISWOODE concurred.

THE following interlocutor was pronounced:—"Recall the locutor: Find that the mill-lade which has been recently by the defender has existed for time immemorial, and l effect of diverting the greater part of the water of the Tyr at a point where that burn forms the boundary between th of the pursuer and those of the defender, and returning t diverted water to the main channel of the burn at a poin it runs through the estate of the defender: Find that the d is entitled to shut up the said lade, but only on the conditi the operations executed for that purpose shall not in an injuriously affect the lands of the pursuer, or expose t greater risk of flooding than they were exposed to while th lade existed: Find that the manner in which the water is re ducted and returned to the burn is calculated to expose, an expose, the pursuer to flooding of his lands, to which he w exposed while the said mill-lade existed: Find that the d is bound, as the condition of his being allowed to keep t mill-lade closed, to protect the pursuer against such flo his lands, and that by keeping the mouth of the additional constructed by the defender open and without a sluice point marked B on the plan No. 61 of process, and also ei extending the said additional channel down to the points E on the said plan, or by deepening the main channel

Tyrie Burn between the points marked D and F on the said plan, so as to increase the fall between the points marked D and D^1 on the said plan; and whichever of these two last-mentioned operations the defender elects to execute, appoint the said operations to be executed at the sight and to the satisfaction of James Forbes Beattie, land-surveyor and engineer, Aberdeen, and appoint the said James Forbes Beattie to report the execution of said operations when completed; reserving in the meantime all questions of expenses."

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Bridges v. Lord Saltoun.

STUART & CHEYNE, W.S.—W. & J. COOK, W.S.—Agents.

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Leith, Hull, and Hamburg Steam-Packet Co. v. Lord Advocate.

E LEITH, HULL, AND HAMBURG STEAM-PACKET COMPANY, Pursuers.—*Watson—Lancaster.*
HE LORD ADVOCATE (for the Board of Trade and Commissioners and Board of Customs), Defenders.—*Sol.-Gen. Clark—Rutherfurd.*

hip-Measurement—Merchant Shipping Act, 1854 (17 *and* 18 *Vict. c.* 104), 21, *subsec.* 4—*Hurricane Deck—Permanent closed-in space.*—A steamship constructed with a bridge extending across the vessel and connected with bulwarks on either side, and below the bridge at its centre there was a small d house. A hurricane deck or covering was subsequently added, extending the forecastle to the bridge. The space below this covering was not entirely d in, there being a passage on either side of the round house, and no means losing these passages in. It being proved that this hurricane deck did not nt the shipment of seas, and that the working of the ship was almost ely conducted on the main deck, *held* (by Lord Gifford) that the space below hurricane deck was not "a closed-in space on the upper deck available for or stores, or for the berthing or accommodation of passengers or crew," in the meaning of subsection 4 of section 21 of the Merchant Shipping Act, , and therefore did not fall to be included in the measurement of the ship.

Outer-House. Lord Gifford.

HIS action was brought by the Leith, Hull, and Hamburg Steamcet Company against the Lord Advocate, as representing the Board rade and the Commissioners and Board of Customs. The summons luded that it "should be found and declared, by decree of the Lords ur Council and Session, as to the said steamship 'Danzig,' belonging he pursuers, that the space measuring or equivalent to 84·78 tons, ained between the ordinary upper deck and the hurricane deck or ring extending over part of the said upper deck, and which extends the after-end of the forecastle to the after-end of the bridge, does form a break, or a poop, or permanent closed-in space available for or stores, or for the berthing or accommodation of passengers or r, or space which can be lawfully included in the ship's register ton- within the meaning of the Merchant Shipping Act, 1854; and it ht and should be found and declared that, under the Merchant Shipping , 1854, no part of such space can be lawfully included in the register nage of the ship," and to have the defenders ordained to remeasure the

he pursuers pleaded;—(1) The pursuers are entitled to have the nship "Danzig" remeasured, in conformity with the provisions of the chant Shipping Act, 1854. (2) The defenders having insisted on suring the said ship in violation of section 26, and on a principle not tioned by the said Act, the pursuers are entitled to decree as coned for.

he defenders pleaded;—The declaratory conclusions of the summons

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being inconsistent with the provisions of the Merchant Shipp 1854, and in particular with the rules provided by that Act for ment of tonnage, the defenders are entitled to absolvitor, with ex

By interlocutor, dated the 14th November 1871, the Lord before answer, remitted to Mr Thomas H. Eastlake, Lloyd's Leith, to examine the steamship "Danzig," and to report as to and condition of her main deck, and of the erections, struct coverings thereon, so far as the same related to the question measurement for the registered tonnage of the said steamsh interlocutor being reclaimed against, was affirmed on 2d Decemb

Mr Eastlake reported, *inter alia*, that the working of the ship ducted on the main deck, the fittings thereof being the same as the erection of the structure above, with the exceptions that a a steam winch had been removed to the top of the covering. T ing did not prevent the shipment of beam seas abaft its after although it was thick enough for an awning deck it was too t spar deck.

The Lord Ordinary, on 30th January 1872, pronounced this int adding the subjoined note:—"Having heard parties' procurators, ar considered the closed record, the report by Thomas H. Eastlake, objections thereto, and whole process, repels the objections state defenders to Mr Eastlake's report, in so far as said objections are to specific statements contained in said report upon matters of fac to the structure of the ship in question, or of erections or thereon: *Quoad ultra* finds that the said objections do not rend sary or expedient any further remit to Mr Eastlake or to a reporter, and refuses the defenders' motion for such further remi and declares in favour of the pursuers in terms of the whole de conclusions of the summons, and decerns: And in reference to the conclusion of the action, finds that the pursuers' steamship ought to be remeasured in terms of the preceding declaratory j and in terms of the Merchant Shipping Act, 1854, and Acts an lations relative thereto, and, if necessary, appoints the case to be for further procedure in reference to said remeasurement: Finds suers entitled to expenses, and remits the account thereof, wher to the Auditor to tax and report."

"NOTE.—The Lord Ordinary is fully sensible of the very wide an importance of the question raised in the present action. He feels that sion will not only affect the pursuers and the particular ship now in largely diminishing the dues and burdens payable on said ship and th of trading with the vessel, but will also govern the cases of other ships constructed, and not only so, but will affect the plan and structure of s which may hereafter be built. The question may even influence bene injuriously the safety and sea-going qualities of steam vessels, and thus it touches the highest interests of life and property.

"The Lord Ordinary feels bound, however, to a great extent to disre considerations, and to confine himself to the fair and sound constructi statutory provisions contained in the Merchant Shipping Act of 1854, relative Acts and Regulations. If these statutory provisions, fairly applied, are injurious to shipping interests, and, still more, if they p encourage a dangerous or unseaworthy construction of vessel, the reme the Legislature and not with the Court.

"At the same time it gives the Lord Ordinary satisfaction to think far as he can understand the matter, the judgment now pronounced, doubtedly favourable to ships constructed like the 'Danzig,' will n danger either to passengers or to cargo. It appears to the Lord Ord a ship with deck coverings like those with which the 'Danzig' is fitt

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...reby rendered unsafe, but that the coverings contribute to its safety in heavy ...s; provided always (and this is a proviso which applies to all ships whatever) ...t it be not overloaded, and that its cargo is not improperly distributed.

"The leading provision which is made the subject of construction in the pre...t action is the 4th subsection of the 21st clause of the Merchant Shipping ...t, 1854 (17 and 18 Vict. cap. 104). The opening words of the subsection ...vide for the measurement of certain spaces on or above the upper deck of the ...sel. In the present action there is no question relating to spaces below the ...per or weather deck. The words of the Act are,—'If there be a break, a ...op, or any other permanent closed-in space on the upper deck available for ...go or stores, or for the berthing or accommodation of passengers or crew, the ...nage of such space shall be ascertained as follows.' The rules for measure...nt are then given.

"The words above quoted do not seem to be affected by any regulations made ...issued under the authority of the Act. It appears that such regulations exist, ...ugh they are not mentioned on record.

"The steamship 'Danzig' has a poop or closed-in space on the after part of ...e upper deck. It has also a forecastle or closed-in space for the crew con...ted on the upper deck at the bow of the vessel. There are also certain ...k-houses amidships for the accommodation of the officers, and for other pur...s. Regarding all these there is no question. They are all measured in the ...nage, or, as it might with more accuracy be called, the roomage of the ship, ...hundred cubic feet of space being called a ton.

"As the ship was originally constructed, there were, and there are still, a ...dge and a hurricane deck, both of which constitute partial coverings of the ...per or weather deck of the vessel; but the spaces under the bridge and under ...e hurricane deck, so far as not enclosed into deck-houses, was not measured, ...d, as the ship was originally made, it was admitted would not be measurable ...der the statute. So stood the ship when finally measured in 1866, her tonnage ...s being at 466·65 tons.

"In 1870 a round house was built for steerage passengers, and this being ...asured added about 20 tons, making the whole tonnage 480·48 tons, but still ...attempt was made to measure the covered spaces under the bridge and hurri...e deck. In the beginning of 1871 the pursuers constructed an additional ...ering over the upper deck of the vessel, extending from the after-end of the ...castle, and joining with the front edge of the bridge. The Custom-house ...horities immediately claimed that this made the whole space so covered a ...ed-in space in the sense of the statute, and that it fell to be measured and ...ded to the tonnage. After some communings this was ultimately done, and ...e added tonnage came to no less than 84·78 tons. It is of this addition that ...e pursuers complain, and to try the question the present action has been ...ught.

"In the Lord Ordinary's view the question depends on the words of the ...tute, and on a comparison of the statutory words with the actual condition ...d structure of the vessel. He found it necessary to make a remit to Lloyd's ...veyor to ascertain some disputed matters of fact relating to structure; but he ...sed to allow a proof at large, which would have embraced a great many ...tters. The interlocutor of remit was affirmed of this date (2d December ...71).

"The reporter, Mr Eastlake, has made a very clear and distinct report, which, ...th the model in process and with the admissions on record, seem to embrace ...l the elements necessary for judgment. The defenders have objected to Mr ...stlake's report, and they asked a new remit to him or to some one else. The ...rd Ordinary has refused this motion. The objections resolve themselves into ...o classes. First, Those which allege that Mr Eastlake has reported wrongly ...n matters of fact within his own observation as to the structure of the vessel. ...e Lord Ordinary sees no ground for this class of objections, and he repels ...m. The second class of objections is that Mr Eastlake has omitted to report ...on a great variety of matters specified. The Lord Ordinary has carefully gone ...er all these matters, and he thinks that they may either be assumed as fairly

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within the knowledge of the Court, or that they are immaterial to the q at issue. No new remit therefore seems necessary.

"After the best consideration which the Lord Ordinary can give, h opinion that the space under the new covering which has been constru the 'Danzig' is not in the sense of the statute 'a break, a poop, or an permanent closed-in space on the upper deck, available for cargo or store the berthing or accommodation of passengers or crew.' His grounds f opinion are shortly the following:—

"(1) The space in question is not a 'break' or 'poop.' Of course it i 'poop,' but there was originally some question whether it might not be a ' though the word is not reported upon by Mr Eastlake. It seems clear, h that a break is an interruption or termination in structure of the deck, the deck remains unbroken from poop or forecastle, it was not ultimate tended that that word applies.

"(2) The space is not 'a permanent closed-in space.' In one sen covering may be said to be 'permanent,' for it is not intended to be re and access is given through it by a hatchway; but then the space is not fair sense 'closed-in.' The space is not shut off from the deck as a round or deck house is; but though covered it is just part of the weather d before. Leaving out of view for the present the water-ports, mooring mooring-bits, and scuppers, all of which open under the covering, it is su to observe that the space is not at all closed in aft, and that there are no for closing it aft. No doubt the round house on the deck is at the aft the covered space, but on either side of the round house there is left 7 inches of clear deck leading under the covering, and these spaces are open. In short, the covered space, though closed more or less on three is open on the fourth side—that it is open aft—and this seems enough vent it from being, in the sense of the statute, a 'closed-in space.' It i that the words must be reasonably construed, and the Lord Ordinary wou have touched the decision of the surveyors if there had been a mere prete leaving openings to evade the statute. He thinks, however, that this can contended, and that there is in the present case a clear distinction betw covered or sheltered space and a 'closed-in space.'

"(3) In another sense the space in question is not closed in, beca remains really part of the main deck of the vessel, which is at least some needed for the working or management of the ship. The water-ports open this space, and though they may be closed more or less tightly (even tallow be used to make the door fit sweetly and closely), they cannot be made, a not intended to be made, water-tight. The mooring-bits and mooring-pip under the covering, and although they are only used when the ship is n in harbour, or at moorings, they are really on the weather deck. The sca open into the space in question, and they must always be left open, for ho tight the ports and mooring-pipes may be made water will always flow for example, from aft or beam seas—and must have a way of escape. (the pumps is worked under the covering, and although the defenders in objections say it is only a small pump, it is not the less one of the ordinary appliances. In short, notwithstanding the covering, the deck under it re deck as before, although necessarily the sails are worked from the top covering.

"(4) It is admitted by the minute in process that the space under the which was not measured before is now included in the 84·78 tons. It wa ceded that this is wrong, but the concession can hardly stop there, for the under the bridge opening only aft is quite as much 'closed in' as the space the new covering, which opens aft in precisely the same way.

"(5) The Lord Ordinary concedes at once that the case might be qui ferent if additional coverings were put abaft the bridge and abaft the hum deck, connecting the whole with the roof of the poop. The front of the would then close in the aft end, and thus close in the whole space from for to poop, and supply what is wanting now, a closing of the end or fourth If this were done there would be room for maintaining that an entire new

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l been constructed, whether it be called a spar deck or an awning deck; and sibly it would not be enough merely to leave scuppers and mooring-bits as y were originally, to exclude the space below from being considered as one the 'tween decks of the ship. Indeed, ultimately the question might come be one of degree, and when such a question arises the Court will not lightly erfere with the judgment of the official surveyor. The present case, however, not run up to any such point.

'(6) The space in question is not, in the sense of the statute, available for go. The word 'cargo,' it is thought, does not mean deck cargo, for deck go is cargo carried on deck, and spaces for deck cargo, in cases where such go is lawful, are not to be measured. There is nothing in itself illegal in rying some kinds of cargo on deck, with proper and usual precautions, hough certain rights arise in regard to risk and liability with deck cargo ferent from ordinary cargoes. Indeed some things must always be carried on k, either from their size or structure or from their dangerous qualities. Now, ems clear that the space in question is not available for perishable cargo. Eastlake's report explains this, and it is plain that every aft or beam sea ped would, by the motion of the vessel, be sent washing the whole length the deck. It is true deck cargo will be carried better under the covering, and more comfortably and more safely, than without it; but this is not enough ake the space measurable. The same result might be attained in a lesser ee by heightening the bulwarks, without a covering at all; but this would make a space above deck measurable as tonnage. The place will always in stormy weather more or less a wet place. Beam seas will always wash e, and even the dipping of the bows in rough weather will send water in by scuppers and ports.

(7) The space in question is not 'available for berthing or accommodation assengers or crew.' A berth means generally, or at least often, a sleeping e, and that must be, or should be, reasonably dry. Passengers under the rings would plainly not have dry berths of it. Though partially sheltered, would to all intents and purposes be deck passengers, just like the cattle; badly as crews are sometimes accommodated it can hardly be said that under covering they would in any sense be lodged or berthed.

Without going into further details, and specially reserving other cases where mpts may possibly be made to evade the fair meaning of the statute, the l Ordinary thinks that in the present case the pursuers' demand is well ded, and should be given effect to. Fairly looked at, and reasonably used, covering does not enable the ship to carry more tonnage—using the word in sense of cargo—than before, but only to carry its former complements better easier; and it is to be hoped that a comparative freedom from ordinary for- l seas will not tempt the owners to load to a deeper load-line than they ld otherwise have done.

The Lord Ordinary has only given decree in terms of the declaratory con- ions. If his judgment is acquiesced in or affirmed no further difficulty will ; but if it should, any question of detail may yet be disposed of under the tory conclusions. If the pursuers are right, they seem to be entitled to ases."

THE Lord Ordinary's judgment was acquiesced in.

WEBSTER & WILL, S.S.C.—W. J. SANDS, W.S.—Agents.

SUMMER SESSION.

No. 99.

May 13, 1873.

White v. M'Ewen's Trustees.

JOHN C. WHITE, Suspender.—*Scott.*
JAMES M'EWEN'S TRUSTEES, Respondents.—*Watson—Balfour.*

Decree—Correction of Clerical Error—Judge.—Observations on the incompetency of an inferior Judge, *ex proprio motu*, correcting an error in an interlocutor after it had been issued and seen by the parties.

2D DIVISION. Lord Mure. I.

THIS was a suspension of a decree pronounced by the Dean of Guild Glasgow, on the ground that in one of the previous interlocutors in the process a clerical error—using the word "respondent" instead of "pursuer" had been incompetently and unwarrantably corrected by the Clerk Court and the Dean of Guild after the interlocutor had been signed the Dean of Guild and seen by the parties.

The Lord Ordinary refused the suspension, on the ground that interlocutor sought to be suspended did not bear any reference to, was not necessarily dependent on, the interlocutor which had been rected. On the question of the competency of the correction the L Ordinary (Mure), in his note, said :—"The interlocutor of 22d vember 1870 . . . had been altered after it had been signed issued officially, by substituting the word 'respondents' for 'p suer' in that part of it which deals with the question of expen Because, although this alteration upon the interlocutor of the 22d November was one which, having regard to the decisions in the ca of Duguid, June 3, 1824, 3 S. 396; Wright, December 6, 1832, 11 180; Kerr, December 17, 1835, 14 S. 180; and Walker, June 11, 18 20 D. 1102, may be said to fall within the category of what are cal clerical errors, which have in the Court of Session been corrected *recenti* in presence of the parties, the Lord Ordinary is not aware of authority for holding that such an alteration may be made upon an in locutor, after it has been signed and issued, at the Judge's own h outwith the presence of parties, and without any formal motion ha been made to that effect; and were any such practice to be sanctione the inferior Courts it might, he conceives, tend to create a preju against the administration of justice in those Courts in material resp For the alteration of an interlocutor after it has been signed and is is at all times a very delicate matter, and has in the ordinary case b supposed to be competent only *ex nobili officio* to the Supreme Court the Court of Session, accordingly, the Lord Ordinary is authorised alter interlocutors, but only 'of consent of both parties,' and that minute duly signed by both parties (Act of Sederunt, July 1828, sec. And although it is made competent by the 20th section of the Act and 17 Vict., c. 80, for Sheriffs 'to correct any mere clerical error' befo the proceedings were transmitted to the Court of review, but not late than seven days from the date of that judgment, that Act does not appl to Burgh Courts. So that if the alteration in the present case had be made within seven days from the date of the interlocutor, which is the opinion of the Lord Ordinary not proved, the proceedings in questi could not, it is thought, have been supported by the provisions of th statute, especially in a case where the interlocutor had been official issued; and it is pretty plain, from the evidence of the Dean of Gui that he signed the alteration in the belief that the interlocutor was st under his control, and that he would not have signed it had he kno

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the interlocutor had been already issued. It was, therefore, in the l Ordinary's view, an irregular proceeding to alter an interlocutor." he suspender reclaimed.[1]

RD JUSTICE-CLERK.—It is in vain to disguise the fact that the correction of nterlocutor of the 22d November was irregular. Such a short-hand mode of ing a judgment cannot be sanctioned. If an error has occurred it can only rrected *de recenti*, and in presence of the parties. It is a different matter effect it has on this suspension. I agree in the result at which the Lord nary has arrived.

RD COWAN.—I concur that the correction was irregularly and incompetently

RD BENHOLME.—The first interlocutor was vitiated; but, taking the worst of it, and holding it *pro non scripto*, I do not think that it concerned an rtant or irretrievable matter; and, though the irregularity cannot be de- d, the suspension must be refused.

RD NEAVES.—I am quite of the same opinion. It was most irregular and per to make this alteration, and it is a great pity it was attempted. But, , that interlocutor decided nothing; it was not necessary to correct it for purpose of putting things right; and as the interlocutor on which the e proceeds is in itself complete, and is not incompetent, I agree that the sus- ion should be refused.

THE COURT adhered, with expenses, subject to modification.

RHIND & LINDSAY, W.S.—GRAHAM & JOHNSTON, W.S.—Agents.

No. 100.

May 14, 1873.
Kennedy v. Taylor.

1ST DIVISION.
Lord Gifford.
M.

EUPHEMIA CAMERON KENNEDY, Reclaimer.—*M'Laren.*
JOHN PATERSON TAYLOR AND OTHERS, Respondents.—*Pattison.*

ocess—Reclaiming Note—Leave of Lord Ordinary—Court of Session 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 53 *and* 54.—In an action of iplepoinding the Lord Ordinary pronounced an interlocutor exhaust- ll the questions of law between the different claimants, settling the s of the fund *in medio* (the amount of which had not been ascer- d) to which they were respectively entitled, appointing the case to nrolled for further procedure, and finding no expenses due to or by of the competing claimants.

ennedy having reclaimed, Taylor and others objected that the reclaim- note was incompetent, on the ground that the leave of the Lord Ordi- had not been obtained.

he reclaimer maintained that the interlocutor reclaimed against was which disposed "of the competition between the parties in a pro- of competition,"[2] in the sense of sec. 53 of the above Act.*

THE COURT held that the reclaiming note was incompetent.

A. HASTIE, S.S.C.—M'EWEN & CARMENT, W.S.—J. & W. C. MURRAY, W.S.—Agents.

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16 and 17 Vict. c. 8, sec. 80; Act of Seder., 1839, sec. 63; Miller v. Lind- June 8, 1850, 12 D. 964; Fell v. Lyon, Feb. 16, 1830, 8 S. 543; Palmer tewart, Jan. 28, 1832, 10 S. 252; Kerr v. Bremner, Dec. 17, 1835, 14 S. ; Gilmour, Feb. 7, 1839, 1 D. 467; Gray v. Young, Nov. 22, 1839, 2 .28.

Fraser v. Fraser, Jan. 30, 1872, *ante*, vol. x., p. 420; Lamond's Trustees v. er, May 14, 1872, *ante*, vol. x., p. 692.

Sec. 53.—"It shall be held that the whole cause has been decided in the e-House when an interlocutor has been pronounced by the Lord Ordinary

No. 101.

May 16, 1873.
Balfour v. Simpson.

JAMES BALFOUR AND OTHERS, Pursuers and Respondents.—*J. A. Reid.*
ALEXANDER SIMPSON, Defender and Appellant.—*Rhind.*

Reference to Oath—Extrinsic and Intrinsic—Bill of Exchange—Discharge.—In an action on a prescribed bill the defender, on a reference to his oath, deponed that he had received the money and had paid interest for some years, that he offered repayment of the principal sum, but that the creditor told him he did not want it, and that he was to keep it for his own use. The debtor paid no interest after that time, but the bill was not given to him or destroyed. *Held* that the oath was affirmative of the reference, in so far as regarded the capital sum.

2D DIVISION. Sheriff of Aberdeenshire. R.

ON 1st July 1861 Simpson borrowed £140 from George Ironside, and accepted a bill for that amount. He paid interest regularly until 1st July 1866. Since then no interest was paid. Ironside died in January 18[illegible]. The bill was indorsed in these terms:—"Pay to James Balfour and Mrs Jane Balfour for behoof of the family of the late Wm. Balfour. GEORGE IRONSIDE." It did not appear when this indorsement was written. In 1872 the indorsees raised this action against Simpson, concluding for payment of the sum in the bill, with interest from 1st July 1866. They produced the bill. The defender pleaded the sexennial prescription. The pursuers referred to his oath. He deponed,—"The bill is addressed to me, signed by me. I received the amount of £140 mentioned in it from George Ironside. I paid interest on it for five years, up till 1st July 1866. I paid it at 4 per cent; and to Ironside I have repaid no part of the £140. After I paid the interest in 1866 I offered him repayment of the principal sum, but he told me that he did not want it—that I had done a good deal for his comfort, more than his own sons had done, and that he wanted to make me a present of it. Ironside said positively when I offered him the money back in 1866 that he did'nt want it, and that I was to keep it for my own use. The indorsement on the bill is neither written nor signed by Ironside. I know Ironside's handwriting."

The Sheriff-substitute allowed the pursuers a proof that the bill was indorsed to them by Ironside.

The defender appealed to the Sheriff (Guthrie Smith) who found the oath affirmative of the reference, and decerned in terms of the conclusions of the summons.*

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which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for."

* "NOTE.—The defender admits the receipt of £140, the sum sued for, the granting of the bill, and the regular payment of interest to the lender, Mr Ironside, down to 1st July 1866, conform to the markings on the back of the instrument.

"But he says he took the money on the assurance that payment would probably never be asked unless Mr Ironside came to need it himself, and that when he tendered payment in 1866 he was told to keep it. Mr Ironside, however, did not give up the bill, which would have been the right way of making him a present of the debt, and he seems subsequently to have changed his mind, because he left it indorsed 'Pay to James Balfour and Mrs Jane Balfour for behoof of the family of the late Wm. Balfour.' (Signed) 'GEORGE IRONSIDE.'

"It is quite clear that, on the defender's own shewing, nothing passed between him and Mr Ironside at the time when the money was advanced which entitled him to consider it as a gift. On the contrary, whatever good-natured assurances

nder appealed, and argued that the oath was negative of the f resting owing.[1]
suers replied.[2]

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OURT pronounced this interlocutor:—"Hold the oath as regards capital sum sued for affirmative, and to that extent affirm the gment appealed from: Find no interest due prior to the date of i action: Find the defender liable in the principal sum sued for, h interest from the date of the summons, and decern, the purs always obtaining before extract the concurrence of the trustees executors of the late George Ironside to the discharge: Find appellants liable in two-thirds of the expenses in both Courts: nit to the Auditor to tax and report."

A. & J. Bruce, W.S.—William Officer, S.S.C.—Agents.

S Dick Lauder, Bart., Pursuer.—*Sol-Gen. Clark—R. Johnstone.*
Daniel Shiels, Defender.—*Marshall—Jameson.*

No. 102.
May 17, 1873.
Lauder v. Shiels.

and Vassal—Writ of Confirmation—Statute 31 *and* 32 *Vict. c.* 101 *Land Consolidation Act*, 1868), *secs.* 10, 98, 100—*Private Act*, 6 *xxviii.*—By a private Act of Parliament the proprietor of an entailed power, under certain conditions, to feu the estate, the Act providing nditions should be inserted in all subsequent investitures, and that nitting to do so should incur an irritancy. *Held* (*diss.* Lord Deas, nt of Lord Mure) that notwithstanding the provisions of the 10th, 00th sections of the Titles to Land Consolidation Act, 1868, a feuar tled to object to a writ of confirmation which deviated from the statuy the insertion of a clause declaring that the writ was granted under ns specified in the Act of Parliament.

s an action of declarator of non-entry, irritancy, and removing at e of Sir Thomas N. Dick Lauder, heir of entail in possession tes of Grange, against Daniel Shiels, Edinburgh, who was feuar n portion of the entailed estates.

1st Division. Lord Mure M.

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s may have expressed, he took care to assure himself as far as stamped L. Nay, for his further safety he insisted on an additional name ured besides that of the defender, and interest was regularly paid 66.

nstitution of the debt being thus established, it is well settled that an *to* arrangement for discharging the debtor otherwise than by payment to his oath, and must be proved *aliunde*. But the defender is unable does not swear, that there was ever any agreement on the subject. o have had an easy creditor. But as he retained possession of the prehended that no mere promise never to insist on payment could fect of either annulling the instrument or extinguishing the relation nd creditor which it created.

fender, in the last place, impugns the genuineness of the indorsation. believes it is forged. If so, he should have averred it specifically in s. He would have then been allowed to prove it, and had he succ discussion of any further question in the case would have been super- e record is however entirely silent on the subject, and seeing that ry is alleged the *onus* of proof falls on the party making the allegation o the Sheriff that at this late stage of the case it would be wholly unto require the pursuers to shew by evidence that the suspicions of the e unfounded."

ith v. Cuthbertson, Jan. 18, 1866, *ante*, iv. 295; Forester v. Lord e, 1742, M. 13,215; Grant v. Grant's Creditors, 1793, M. 13,221.

. Allison, March 10, 1841, 3 D. 874.

No. 102.

May 17, 1873.
Lauder v. Shiels.

By the Act 6 Geo. IV., c. xxviii., entituled "An Act to enable Sir Thomas Dick Lauder, Baronet, and the heirs of entail succeeding to him in the estate of Grange, to grant feus thereof upon certain terms and conditions," Thomas Dick Lauder and the heirs of entail succeeding to him and in possession of the estate were authorised to grant feus upon the conditions therein set forth.

Section 4 of the Act provided that every charter or contract by which a feu-right in the said lands was granted should contain the following clauses:—(1) A clause declaring it to be incompetent for the vassal to assign the precepts of sasine contained in the feu-charters or feu-contracts; (2) a clause declaring it unlawful to interject any mid-superior; (3) a clause providing that the feu-duties and casualties should be paid to the heir of entail in possession entitled to receive the rents for the time being; (4) a clause providing that the conveyances and infeftments should be made out, taken, and extended by the agent of the heir of entail.

Then followed a declaration that any sale or conveyance inconsistent with these conditions should be null and void; and then there was a provision:—"All which clauses, and the conditions, declarations, and provisions thereof, with this present clause or provision respecting the same, shall be repeated in the instrument or instruments of sasine to follow upon such feu-charter or feu-charters, or feu-contract or feu-contracts, and the same shall also be repeated in all the after conveyances, transmissions, charters, and investitures of the said feu or feus, other than such feu-charter or feu-charters, feu-contract or feu-contracts, and the sasines, conveyances, transmissions, charters, and investiture of any such feu or feus, shall not only be void and null, but the said Sir Thomas Dick Lauder, and every other heir of entail in possession of the said entailed lands and estates omitting to insert the same in the original feu-charter or feu-charters, feu-contract or feu-contracts, or omitting to repeat the same in the subsequent charters or other investitures granted by him of them, of such feu or feus, shall thereupon, for himself or herself only, incur an irritancy, as in a case of contravention of the said entail; and in the like manner, the said vassal or vassals, or other person or persons in the right of the said feu or feus, contravening any of the conditions, declarations, and provisions above expressed, or omitting to insert the said clauses in any instrument or instruments of sasine to be taken of the said feu or feus, or in any of the transmissions or conveyances thereof, such sasines, transmissions, and conveyances shall not only be void and null, but such vassal or vassals, or other person or persons in right of the said feu or feus, shall forfeit and lose all right and title thereto, and the same shall belong to the said Sir Thomas Dick Lauder, or the heir of entail in possession as said is, in the same manner as if such feu or feus had never been granted."

In 1865 Sir John Dick Lauder feued a portion of the estate to Donald Mackay, by whom it was disponed to William Alexander Aikman, who in turn conveyed it to the defender. In the conveyances of the subjects and also in the infeftments of Messrs Mackay and Aikman, the provisions of the Act of Parliament were observed. The defender, however, refused to take a writ of confirmation containing a reference to the Act of Parliament, and in terms similar to the writ of confirmation of the disposition by Mr Mackay to Mr Aikman.

The defender consented to a clause being inserted in the writ to the following effect:—"With and under the whole provisions and conditions contained in the said feu-contract, dated and recorded as aforesaid," but refused to allow any reference to the Act of Parliament, holding that

r sections 10, 98, and 100 of the Titles to Land Consolidation Act, No. 102.
, any such reference was incompetent.
e pursuer pleaded;—(1) Under and in terms of the Act of Parlia- May 17, 1873.
foresaid the pursuer is required to repeat or refer to the provisions Lauder v. Shiels.
of in all charters or other investitures granted by him of the feus
ued by virtue of the powers contained in said Act. (2) Under and
ms of the provisions contained in the feu-contract and other deeds
scended on, and of the said Act of Parliament, the defender is
l to enter with the pursuer within three months after his purchase
e subjects libelled; and he having failed duly to enter within the
l specified, has contravened the terms of said feu-contract and other
mentioned, and Acts of Parliament foresaid, and incurred the irri-
therein specified, and forfeited and lost all right and title to said
sts. (3) In the circumstances above condescended on the pursuer
itled to decree of declarator and removing in terms of the conclu-
of the summons.
e defender pleaded;—(1) As the special reference to the pursuer's
e Act of Parliament in the writ offered to the defender, and to
h the defender objected, was unnecessary if the feu was originally
ed, and is still held under its burdens and conditions, and illegal if
rdens and conditions had not been previously imposed on the feu,
efender's objections to the writ offered were good, and he should be
ssed from this action, with expenses. (2) In view of the defender's
ns he is in any view entitled to have this action sisted until he
ve such writ as the Court may fix that he is bound to accept, and
after, and on payment of feu-duties, casualties, and fees, as offered,
ill be entitled to absolvitor with expenses.
e Lord Ordinary pronounced the following interlocutors:—
h February 1873.— . . . . "Finds that, in the special circumstances of
ase, the pursuer is entitled to have the conditions and declarations
r which the feu in question was granted, which are prescribed by the
te Act of Parliament founded on, referred to as conditions of this
stitute, *ex facie* of the writ of confirmation to be granted by him, and
either in some such terms as those contained in the declaration at
nd of the draft writ of confirmation, ... and proposed to be deleted
e defender, or by inserting a reference to that Act of Parliament, as
as to the original feu-contract, at the marginal addition proposed to
serted in the draft writ by the defender, in lieu of the above decla-
n." *

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* NOTE.—If the Lord Ordinary was now called upon to decide whether the
er, by granting a writ of confirmation in the precise form given in schedule
the Titles to Land Consolidation Act, 1868, and without mention of or
nce to the conditions and declarations of the private Act of Parliament,
r which alone the estate is authorised to be feued, would thereby commit
ritancy of the entail in respect of his non-compliance with the provisions of
rivate Act, he would be disposed to hold that no such irritancy had been
nitted, provided the whole clauses, burdens, and conditions prescribed by
rivate Act were validly referred to, in terms of the 10th section of the Act
868, in the deed or instrument confirmed by the writ of confirmation. This,
wever, in the view the Lord Ordinary takes of the case, would not be an alto-
r satisfactory solution of the question raised between the parties, because
opinion entertained, or even any judgment pronounced by the Lord Ordi-
as to the validity of the reference contained in the deed to be confirmed,
d not, he conceives, be *res judicata* in a question with an heir of entail
nging the validity of the reference, or seeking to have an irritancy de-
d in respect of the omission to comply with the requirements of the private

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1st March 1873.— .... Approves of the draft writ of confirma the form of the writ of confirmation to be granted in favour of fender, and sists process for ten days that the defender may co an entry to the subjects in question by writ of confirmation in t the said form." *

Act. In these circumstances it appears to the Lord Ordinary that any able proposal made on the part of an entailed proprietor, who is only au to feu under the provisions of a private Act which is not specially repe the Act of 1868, to have the conditions of the private Act referred t writ by which the vassal's title is to be completed, so as thereby t the risk of after challenge, is one which may be given effect to, provi proposed reference will not be prejudicial to the rights and interests of sal, and is not expressly prohibited by the provisions of the statute unde the writ of confirmation is to be expede.

"In the present case it is not alleged in the record, and it was not s on the part of the defender at the debate, that his rights would in any be prejudiced, or that any injury would be sustained by him by the inse the writ of confirmation of the words proposed by the pursuer, which stantially the same as those inserted in the writ by which the title of entered vassal was confirmed in January 1868, so that the solution of t tion here raised appears to the Lord Ordinary to depend upon whet addition of any such reference as that here proposed is prohibited by t solidation Act of 1868; and although the point is not free from diffic Lord Ordinary is not satisfied that the Act of 1868 contains any such bition.

"The clauses on which the question mainly depends are sections 98 a They are, however, not distinct upon the subject; and as the main objec Act was merely to consolidate the clauses in the earlier statutes, under was not considered incompetent to refer to such conditions in a writ of mation, as the titles in the present case shew, it would, the Lord Ordin ceives, require some very express prohibition to the effect that the superi in no circumstances be entitled or allowed to alter the form of the wr insert a reference to burdens, or to the conditions of a private Act of Par to exclude such a reference if reasonable in itself and necessary in the superior takes of the obligation prescribed by the private Act to prot from challenge at the instance of any of the heirs of entail, on the grou he had committed a contravention of the entail.

"Now, the Lord Ordinary does not think that either of these sectio necessarily be read as containing a prohibition against any such alteration sections, on the contrary, rather appear to him, by implication at least, t of reasonable alterations being made on the examples given in the sc Because, although by section 98 it is made competent for a superior, an taken bound in one view to confirm a conveyance in one or other of th forms given in the Act, he is not taken bound to do so in the precise w those forms, but only as nearly as may be in the forms given. While 100 expressly authorises such necessary alterations to be made on th given as the denomination or nature of the particular charter or writ quire, and with reference to real burdens and conditions all that it pro that 'it shall not be necessary' in writs of confirmation or resignation t or refer to burdens or conditions, if the same are inserted in, or validly to, in terms of the 10th section of the Act, in the deed or conveyance o the writ is to be engrossed. But, as the Lord Ordinary reads these sec is nowhere declared to be incompetent or illegal to insert a reference conditions; and it therefore appears to him that in this case a referenc to the conditions of the private Act may be allowed."

* "NOTE.—The Lord Ordinary has adopted the general outline of t of writ proposed by the pursuer, in preference to that with the margin tions proposed by the defender, because the former appears to him to be

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The defender's writ of confirmation, approved of by the Lord Ordinary, contained the following clause:—"Declaring that these presents are granted by me, as commissioner foresaid, always with and under the obligations, conditions, declarations, and provisions specified and prescribed in an Act of Parliament dated the 22d day of June 1825, entituled 'An Act to enable Sir Thomas Dick Lauder, Baronet, and the heirs of entail succeeding to him in the estate of Grange, to grant feus thereof upon certain terms and conditions,' and in the said feu-contract recorded as aforesaid on 6th November 1865."

The defender reclaimed.

At advising,—

LORD PRESIDENT.—Sir Thomas Dick Lauder, as heir of entail in possession of the estate of Grange, is empowered to grant feus by a private Act of Parliament, notwithstanding the fetters of the entail. But he can do so only upon condition of complying with all the provisions and limitations contained in the Act. These are very numerous and very important; and one of them is—"All which obligations, and the conditions, declarations, and provisions thereof, with this present clause or provision respecting the same, shall be repeated in the instrument or instruments of sasine to follow upon such feu-charter or feu-charters, or feu-contract or feu-contracts, and the same shall also be repeated in all charters and other conveyances, transmissions, charters, and investitures of the said feu or feus." There is a further provision that if this duty be omitted on the part of the heir in possession he shall incur a forfeiture. Prior to the passing of the conveyancing statutes every charter of confirmation must have contained within itself the whole provisions and declarations of this private Act. One of these statutes has a very important and useful provision, that in place of repeating such clauses and provisions in deeds it is sufficient to refer to them as contained in some prior title to the subjects recorded in the appropriate register of sasines. This was introduced in 10 and 11 Vict. cap. 48, sec. 5, and repeated in the 10th section of the Titles to Land Consolidation Act of 1868. It is not matter of doubt that, in a charter or writ of confirmation granted by Sir Thomas Dick Lauder, it is sufficient to make reference to the provisions of the private Act, as contained in some prior recorded instrument. But a further question arises, whether sections 98 and 100 of the Act of 1868 do not dispense with even any reference to the provisions of the private Act in the writ of confirmation. For certain purposes, I think, it is provided by these two sections, taken together, that, where the deed to be confirmed contains clauses or real burdens appointed to be inserted in the investitures, or refers to them in the manner provided by the 10th section, it is not necessary to repeat or refer to them in the writ of confirmation endorsed on the deed. Though this is not necessary in the ordinary case there may be a question whether the obligation imposed on Sir Thomas Dick Lauder by the private Act is not still incumbent on him. I am not prepared to form an opinion on this question, and it is not expedient to do so, for no judgment which we could pronounce in this action would decide the question as between Sir Thomas Dick Lauder and a substitute heir of entail

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conformity with the form given in the Titles to Land Consolidation Act, 1868, down to the words, 'and with the said Sir Thomas Dick Lauder's own rights;' and he has restricted the additional declaration to the words 'obligations, conditions, declarations, and provisions,' because these words appear to him sufficient to cover everything which the private Act prescribes; and it is with reference to the statutory requirements alone of that Act that the pursuer maintained the necessity, as a matter of safety, of making an addition to the form of writ given in the general Act. In this view of the matter the line at the end of the declaration beginning with the words, 'and in the said feu-contract,' &c., might have been omitted; but as the defender, in the form proposed by him as noted in one of the marginal additions, did not object to some such reference to the original feu-contract, he has allowed these words to remain."

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bringing a declarator of irritancy in respect of the omission to comply w provisions of the private Act. All that I find it necessary to decide i there may be a risk in his granting a writ of confirmation without sue ence to the Act of 1825. If so, I cannot say that it is unreasonable on t of the superior to propose to introduce such a clause. Opinions may diff the amount of such risk, but surely, if there is any risk, the vassal cannot to the introduction of such a clause, unless it can be shewn to be prejudi him, or expose him to any risk. It is not shewn that there is any risk vassal here. The expense of confirmation is not to be increased, and, in the vassal has no sort of interest to object. The only thing he can say the insertion of such a clause tends to lengthen the deed, and so is not compliance with the Act of Parliament. But I think this is untenable face of the good reason which the superior has for its insertion.

I need hardly add that, unless the superior had a good reason, I shou allow him to do so. Any unnecessary lengthening of the deed would be tion of an Act which aims at simplicity in conveyancing. I should be di to watch very strictly any attempt to amplify a form prescribed by s But this is a very special case, and as I find nothing to prohibit the inser the clause I am for adhering to the interlocutor of the Lord Ordinary.

Lord Deas.—The statute provides two short forms for granting confir one in schedule D and the other in schedule V. It is the second w here proposed to be adopted. Under the form in schedule D there is ence to conditions, provisions, and limitations. But under the form in sc V, No. 1, there is no mention of conditions, provisions, and limitations but merely a reference to the charter, and a statement that the confirma granted in so far as consistent with the charter and with the superio rights. The writ of confirmation approved of by the Lord Ordinary is q accordance with the form V, No. 1, until you come to the words "and de that these presents are granted," &c. All that goes before is framed principle laid down by the statute that a reference to the feu-charter or c includes a reference to all the obligations and conditions therein con Had the writ then finished with the words "and the statute therein menti I do not think there would have been any objection to the reference so m the private Act. But the moment you introduce such a clause as is intr here, commencing with the words "and declaring that these presen granted," &c., you are out of the form prescribed by the statute. You h longer the sanction of the Act for the form of the writ, and unless the ration is made complete according to the requirements of the common l variation is equally dangerous for both parties; if possible, more so for th rior than the vassal. I am not for sanctioning a variation from the sta form calculated to raise the inference that the parties are not trusting to t of Parliament, but to the enumeration of particular prohibitions, condition while that enumeration is not made complete. My objection to the pr clause is not based upon the views urged for the vassal, but because I dangerous equally to superiors and vassals to countenance such a departu the statutory form, where the statute and not the common law is mean relied on.

Lord Ardmillan.—It is of importance to remember that the purpo which this statute was passed was that of regulating procedure, and of greater simplicity, expedition, and economy in conveyancing, and not f purpose of impairing the patrimonial rights of either party. We ough construe the Act as to provide the remedy which it was intended to confe

When the statute confers a right or benefit on the vassal we ought so it as, in that matter, to promote the vassal's legitimate interest. Wh statute gives to the superior a right to substitute a reference to prior deeds of inserting the words *ad longum*, that is a provision in favour of the s which ought to be construed by the Court so as to protect his rights, if t room for such construction.

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I think that the superior was bound to give the vassal a writ of confirmation of the kind and style of schedule V. I read the words "but only in so far as consistent with" as the characteristic words of the schedule. The proposal to introduce the words "declaring that," &c., into the writ is not in conformity with the Act. The words would be out of place. I would suggest that the words should be "with and under the condition that," &c. I think that this addition would make the wording of the deed more in accordance with the schedule, and more consistent with the simplicity desirable in deeds of this kind.

I have no doubt that the superior cannot be compelled to grant a writ which might put his own right to the estate in peril. He is not bound to run that risk. On the other hand, no harm can be done to the vassal by the adoption of such form of expression as I have suggested. I therefore think that we should adhere to the interlocutor of the Lord Ordinary.

LORD JERVISWOODE concurred with the Lord President and Lord Ardmillan.

THE COURT adhered to the Lord Ordinary's interlocutor.

SCOTT, BRUCE, & GLOVER, W.S.—LINDSAY MACKERSY, W.S.—Agents.

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Duke of Argyll v. Campbell.

HIS GRACE THE DUKE OF ARGYLL, Pursuer.—*Rutherfurd.*
REV. JOHN CAMPBELL, Defender.—*Duncan.*

Proving the Tenor—Teinds.—A report of the sub-commissioners appointed to the valuation of the stock and teind of the lands within the presbytery of Argyll, dated in 1629, had been repeatedly given effect to in approbations and ratifications. Part of the original document had become illegible apparently from damp, and part appeared to have been worn away. A copy of the entire document, supposed to be made about 1720, was preserved in the teind office, but the writer was not known. From this copy, which was not in all respects a faithful transcript, the deficiencies in the original could be supplied. In an action of proving the tenor of a portion of that part of the report which had been destroyed, *held* (1) that in the circumstances no special *casus amissionis* need be averred, and (2) that the tenor had been sufficiently instructed by the proceedings in the localities, &c., together with the copy produced.

2D DIVISION. Ld. Mackenzie. Teind-Clerk.

THIS was an action by the Duke of Argyll, proprietor of the lands of Kellachane and others in the parish of Kilninver, now united to the parish of Kilmelford, in the county of Argyll, for the purpose of proving the tenor of the report of a valuation of the presbytery of Argyll by the sub-commissioners of teinds, dated in 1629, in so far as it regarded these lands. The Earl of Breadalbane, as patron of the parish of Kilninver, and others, were called as defenders, but the Reverend Colin Campbell, minister of the united parishes of Kilninver and Kilmelford, alone appeared.

The pursuer averred;—" (Cond. 3.) The said report or valuation of the said sub-commissioners of teinds is in the custody of the keeper of teind records, but it has been partially destroyed, mutilated, and defaced by exposure to handling, and from the tear and wear to which it has been subjected in course of time. The paper upon which it was written is very durable, and bears traces of having been injured by damp. More particularly that part of the document upon which the valuation of the pursuer's said lands was written is in a very tattered condition. The valuation of the pursuer's said lands was written very near the end of the report, and the document exhibits marks of having been folded or rolled in such manner that the concluding pages must have been upon the outside, and consequently most exposed to injury. So far as can be ascertained, the said report has always been kept among the records of

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the High Commission, and within the memory of man it has never been in any other condition than that in which it now is. (Cond. 5.) There is in the custody of the keeper of teind records an old copy of said valuation of the sub-commissioners. The precise date at which said copy was made is not known, but the pursuer believes and avers that it was about the time of the proceedings referred to in the process of augmentation, &c., of 1758."

The defender averred;—"1. The said alleged report of the sub-commissioners of the presbytery of Argyll does not appear or bear to be, and is not, a completed or concluded report. It is an unauthenticated document. It terminates abruptly, without any docquet, and is not subscribed by a quorum or by any of the persons mentioned at the outset of the document, as the sub-commissioners appointed to make and report to the High Commissioners a valuation of the lands and teinds therein referred to. At the foot of some of the pages occurs the signature 'Geo. Campbell;' but no such person is mentioned at the outset of the alleged report. Numerous pages of the said 'report' are entirely unsigned. 2. The history of this alleged report, which is extensively and throughout mutilated and vitiated *in essentialibus*, is entirely unknown. In particular it is not known when or whence the document came into the teind office, or by whom it was brought thither. It is further unknown when or how the said alleged report came to be in its present dilapidated and fragmentary condition, and the pursuer has not made any definite or satisfactory averment on this subject. 3. The history of the 'old copy' of the alleged report is also unknown. This 'old copy' does not bear to be, and is not alleged to have been, made by judicial authority or under judicial examination, control, or supervision of any kind. 5. Not merely, however, is the accuracy of the 'old copy' of the alleged report on which the pursuer founds not admitted; it is further, as the defender avers, demonstrably incorrect and inaccurate in various respects. 6. Among other errors and inaccuracies in the 'old copy' are the two following:—In the text of that part of the 'old copy' which refers to the parish of Kilmelford, the parsonage teinds of the lands of Kendmoir and others are stated at 'twa three' bolls oatmeal. This word '*twentie*' is deleted, and in lieu of it the word '*threttie*' is written in a different hand in the 'old copy.' Again in that portion of the 'old copy' relating to the parish of Kilninver, and immediately after the lands of that name, occur these words 'omitted here as below,' and at the foot of the page is this passage 'and his lands of Barrindromane, of rent 12 bolls meal, four bolls bear of parsonage teind, four , and for the vicarage £4 money.'"

The defender pleaded;—(1) The pursuer has not made any relevant and sufficient averments of the occasion or cause of the loss or mutilation of the said alleged report, or of that part of it to which the conclusions for proving the tenor relate. (2) As the said alleged report is not duly authenticated, and is *ex facie* an incomplete and unfinished document, it is not one which can competently be made the subject of a proving of the tenor. (3) The pursuer has not condescended on any adminicles relevant or sufficient to instruct the tenor of the writ sought to be set up, and if such adminicles exist.

The adminicles of evidence founded on by the pursuer were—(1) the principal report; (2) the "old copy"; (3) proceedings in the processes of augmentation, modification, and locality of 1758 and 1795, in both of which the report was sustained by interlocutors of Court as sufficient for ascertaining the rental of the lands in the united parishes, including the pursuer's lands; and (4) several decreets of approbation of other old valuations in the same report.

d Ordinary (Mackenzie) made great avizandum to the Second No. 103.

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f was led before the Lord Justice-Clerk. Mr Alexander per of the teind records, deponed—"The original document, so ve examined it, does not bear in any part of it to be signed by a the sub-commissioners; but a signature occurs on every alternate ıe original document, which I believe to be that of Robert of Glenfalloch, the first of the sub-commissioners. That signature one face of every sheet, and on the other facing it is the signa- ɔrge Campbell, which I believe to be that of the clerk. He is ıned in the preamble; but at the bottom of the preamble, on ıge of the valuation, there is the signature 'R. Campbell of ı, moderatour;' and on the opposite page 'Geo. Campbell, ik, clark to the wa [here there is a blank, part of the writing ırently rubbed out] to the presbeterie of Argyle.' There is no the original that I have seen, but the latter part of the report ktract now. There is not so much of the original extant now in the old copy. (Q.) Was any search made for any report of ımmissioners of 1629? (A.) We have no documents in the e now to my knowledge, except the volume of sub-commis- ports and this. There is a copy of another valuation of n also in the office, but it is not an original document. I ıch search. There was no other source where a search could

Shaw deponed—"I have examined a great deal of old writing, had occasion to become acquainted with the handwriting of eriods, and to note its characteristics. Being shewn the old ited by the teind clerk, titled 'Valuation of the Presbetrey of pones, I was asked to examine that document with the view ıing the date at which it had been written, and I have done so. l it with some other writings, but I judged of it mostly from ı. I had no doubt as to its period when I looked at it. It judgment written at the time when the old hand began to ıd the new hand commenced, which would be about 1715-20. it is impossible to assign an exact date to it, but I should ; was written at some time from 1720 to 1760. I have no n that subject. It has not the characteristics of the writ- o 1720. (Q.) Has it the characteristics of the writing sub- 1760? (A.) It has the characteristic that it is in the le, but that is all. (Q.) But it has not the particular charac- the period subsequent to 1760? (A.) No. (Q.) And that on why you assign it to the particular period you have men- A.) Yes."

ɜuer argued;—(1) He was not bound to prove a special *casus* The document was a public document in the hands of a tionary.[1] (2) The tenor was proved.[2]

ɜnder argued;—The tenor had not been proved. No search ıade for a true and authentic original valuation.

OURT pronounced this interlocutor:—"Sustain the adminicles:

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ie, 1811, 1 Connell, 300.

r. 1, 54; Richmond v. Officers of State, July 2, 1869, *ante*, vol. vii., wal, 1713, 5 Brown's Sup., 98; Dickson on Evidence, sec. 1299; tate v. Earl of Breadalbane, 1770, M. 14,796—F. C. Scss. Papers,

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Find the tenor of the sub-valuation sufficiently established evidence adduced, and decern and declare in terms of the sions of the summons."

ALEX. HOWE, W.S.—M'NEILL & SIME, W.S.—Agents.

No. 104.

May 20, 1873. Macdonald & Co. v. Highland Railway Co.

MACDONALD AND COMPANY, Pursuers and Appellants.—*Watson—Mackintosh.*

THE HIGHLAND RAILWAY COMPANY, Defenders and Respondent *Sol.-Gen. Clark—Lancaster.*

Reparation — Damages — Perishable Goods — Railway Company.- marked perishable were delivered to a railway company, whose custo to forward those so marked in preference to others. The truck in wh were was not marked perishable, and was taken off the train along wit in order to lighten it, while goods not of a perishable nature were fo In an action brought against the company for damage incurred in con of the detention of the goods, *held* that the company had failed to the goods with reasonable expedition, in respect, according to ordinary perishable goods were sent on preferably to goods not perishable, wh the occasion in question, goods not perishable had been sent on in pref the pursuers' goods, and that the company were liable for the damag by the delay.

1st DIVISION. Sheriff of Inverness-shire. I.

MACDONALD AND COMPANY, confectioners, Inverness, sent goo perishable nature, and marked "perishable," "immediate," by th land Railway to Dingwall and Strome Ferry, and thence per ste Broadford, in Skye. The goods were delivered to the railway c on 30th September 1870, and were forwarded by the 5.30 A.M. t the following morning, reaching Dingwall in time to proceed by t forenoon train to Strome Ferry. Although the goods were marked able," the truck in which they were was not so marked, and wa Dingwall along with other trucks, in order to lighten the train, not reaching Strome Ferry until too late for the steamer of t Goods not of a perishable nature had been forwarded by the tr consequence of this delay the goods were too late for the celebr the coming of age of Lord Macdonald, for which they had been s they were much spoiled otherwise by the detention. It was the of the company to give a preference to goods of a perishable char

Macdonald and Company brought this action against the railw pany for damages on account of the detention.

They pleaded ;—(1) The defenders having, by their negligence wise, failed to deliver the goods contracted to be conveyed by th due and ordinary despatch to their destination, were liable in all damage thereby incurred.

The defenders pleaded ;—(2) There having been no fault or n the part of the defenders, and no undue or unavoidable delay, th to be assoilzied.

After a proof, the Sheriff-substitute (Blair) found for the pursu the Sheriff (Ivory) altered, and assoilzied the defenders.

The pursuers appealed, and argued that there had been negligc

The defenders argued ;—Unless there was express contract t not liable. They had forwarded the truck in the usual course and without undue delay.[1]

[1] Finlay v. North British Railway Co., July 8, 1870, *ante*, vol. vii

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RD JUSTICE-CLERK.—The contract with the railway company in this case an ordinary contract of carriage. The goods, which were perishable articles, to be conveyed from Inverness to Broadford by the first train on the 1st ctober, if that were reasonably practicable. The nature of the goods was osed, and that laid on the company a further obligation, in accordance with usual practice, as well as with reasonable dealing, to give these goods a rence over articles not perishable, should the train be unable to convey all oods sent for carriage. The goods were not so sent on, but the truck con- g them was detained at Dingwall, and the articles it contained were thus ged when it ultimately arrived, while it is proved that trucks containing odities not perishable were sent on. I think in these circumstances the any are liable. It is not properly a case of special contract, but one of an ary contract for the carriage of perishable articles, and the question is, her, in the knowledge of their nature, the company failed to convey them reasonable expedition. Being of opinion that they did so fail, I think the ers of the action must prevail.

RD COWAN.—This must be looked upon in the light of a general contract, h the company come under to all persons sending goods of the quality and e manner which the pursuers did. Whenever perishable goods are put into hands marked "perishable" they come under an obligation to forward them mably. This is an obligation which they incur in consequence of their ordi- and understood mode of conducting their business. This is clearly estab- l by the proof to be their practice, and on this the public were entitled to The pursuers did so; their goods were marked perishable, and yet they not forwarded, but left behind, while other trucks of goods were forwarded e first train, and hence the damage. I think the pursuers are entitled to er.

RD BENHOLME and LORD NEAVES concurred.

THIS interlocutor was pronounced:—"Find that the appellants, on the 30th day of September 1870, delivered to the servants of the respondents at Inverness the goods referred to in the first conclusion of the summons, and that the respondents undertook to convey the same with reasonable expedition to Broadford in the Isle of Skye: Find that these goods were perishable, and were so marked when delivered to the respondents: Find that the respondents did not forward these goods to Broadford in ordinary course by the first train to Strome, but allowed the truck containing them to be detained at Dingwall, and sent them forward next day: Find that in so doing the respondents neglected and failed to forward the goods with reasonable expedition, in respect, according to ordinary practice, perishable goods are sent on preferably to goods not perishable, whereas goods not perishable were, on the occasion libelled, sent on in preference to those of the appellants: Find that, in consequence of the detention of the goods, the appellants have suffered damage to the extent of £11, 3s. 6d.: Therefore sustain the appeal: Recall the judgment appealed from: Find the respondents liable in the sum of £11, 3s. 6d.," &c.

MORTON, NEILSON, & SMART, W.S.—H. & A. INGLIS, W.S.—Agents.

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May 23, 1873. Duke of Argyll v. Dalgleish's Trustees.

THE DUKE OF ARGYLL, Pursuer.—*Sol.-Gen. Clark—Mackay.*
HARRY YOUNG AND OTHERS (Dalgleish's Trustees), Defenders.—*Marsh —Keir.*

Superior and Vassal—Mid-superiority.—A, who was mid-superior of cert lands, conveyed the mid-superiority to B, the proprietor of the *dominium u* by a disposition containing an *a me* manner of holding, and B was in thereon. Thereafter A granted to B another disposition of the mid-superior bearing to be in supplement of the former disposition, and containing an *a vel de me* manner of holding, and B was infeft on this also. The over-supe granted a deed confirming both these dispositions, and the infeftments follow upon them. *Held* that the two dispositions were to be read together as conveyance of the mid-superiority, and were both confirmed as one estate.

Charter of Confirmation—Error in date of Sasine confirmed.—In a cha of confirmation an instrument of sasine was described correctly by its date, an error was made in stating the date of recording. *Held* that as the ins was sufficiently identified otherwise the error in the date of recording did invalidate the confirmation of the instrument.

Instrument of Resignation ad remanentiam—Designation of Procurator. Question, Whether in an instrument of resignation *ad remanentiam* the p curator must be designed.

1ST DIVISION. Ld. Mackenzie. B.

THIS was an action of declarator of non-entry, &c., at the instance the Duke of Argyll against Harry Young, Esq., and others, the trustees the late James Dalgleish, Esq. of Westgrange and Ardnamurchan, W who died in 1870.

The titles to the lands in question were thus set out in the Lord Ord nary's note :—" By feu-disposition, dated 21st September 1696, Archib Duke of Argyll conveyed the lands and barony of Ardnamurchan Alexander Campbell of Lochnell in liferent, and to Duncan Campb his eldest son, in fee, for payment of 500 merks yearly of feu-duty, a for certain services of hosting, hunting, and warding. Infeftment w taken by these persons on this deed.

" By contract of sub-feu, dated 12th October 1722, the said Dunc Campbell sub-feued the said lands and barony to Alexander Murray f payment of 6000 merks of feu-duty, and also for payment to the Duke Argyll, the over-superior, of the foresaid sum of 500 merks, and for rel of all services due by him to the Duke as over-superior. Infeftment w taken by Alexander Murray, and the *dominium utile* of the said lands a barony, after passing through several hands, descended to the now decea Sir James Milles Riddell as heir of entail, who completed his title there by precept of *clare constat* from General Duncan Campbell as undivest mid-superior, dated 21st January and 14th July 1834, and instrument sasine thereon, dated 21st July and recorded 8th September 1834.

" By disposition dated 19th August 1808 General Duncan Campb sold and disponed to Sir James Milles Riddell the foresaid estate of mi superiority, to be holden of and under the Duke of Argyll, his heirs a successors, in feu-farm, for payment of the foresaid feu-duty of 500 mer and also of the sum of £27, 18s. Scots money in lieu and place of t foresaid services of hosting, hunting, and warding. Sir James was inf on this disposition, conform to instrument of sasine dated 5th and 6 June and recorded 15th July 1811.

" Sir James also afterwards obtained a supplementary disposition fr General Duncan Campbell of the said estate of mid-superiority, dat 13th February 1834. This deed proceeds upon the narrative of the fo said sale and disposition of 19th August 1808, and of that disposit containing only an obligation to infeft Sir James by a single manner

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lding *a se*, and upon the further narrative that Sir James had requested
at he should grant in Sir James' favour a supplementary disposition of
e said lands containing a warrant for infefting him therein *a se vel*
se. On this narrative General Campbell, without prejudice to the
id disposition of 1808 formerly granted by him, but in supplement
reof, sold and disponed to Sir James the said estate of mid-superiority.
e said disposition contains an obligation to infeft *a se vel de se*, with
curatory of resignation and precept of sasine. Sir James was infeft
n this deed, conform to instrument of sasine dated 21st July and re-
led 18th September 1834.

By charter of confirmation, dated 5th July 1849, the pursuer con-
ed to and in favour of Sir James Milles Riddell, his heirs and assignees,
said lands and barony, the disposition of the mid-superiority, dated
808, and the sasine in 1811 thereon, the supplementary disposition of
, and the sasine thereon, which last-mentioned sasine is described in
charter as 'dated the 21st day of July, and recorded in the General
ister of Sasines at Edinburgh the 18th day of December 1834, or of
ever other dates or tenor the said writs may be,' while the correct
of recording was 18th September 1834. This charter of confirmation
s that the said lands and barony are to be holden by Sir James and
foresaids immediately of and under the pursuer, his heirs and succes-
, in feu-farm, fee, and heritage for ever, giving therefor yearly to the
suer and his foresaids the sum of 500 merks, and also paying to them
sum of £27, 18s. Scots money in lieu and place of the services of
ing, hunting, and warding.

The *dominium utile* of the said lands and barony, which was entailed,
disentailed by Sir James Milles Riddell by instrument of disentail
d 12th July and recorded in the Register of Tailzies on 10th Septem-
1851. He thereafter, being thus in right of the property and mid-
eriority, conveyed by trust-deed the said lands and barony, both pro-
y and superiority, to Mr Barstow, who was infeft as trustee, conform
nstrument of sasine recorded on 10th September 1851.

On 8th December 1851 Sir James, as superior of the said lands and
ny, and as proprietor of the same, holding of himself, on the narrative
is infeftment in the *dominium utile* thereof, and upon the further
ative that by the disposition granted by General Campbell in 1834,
his infeftment in 1834 following thereon, the said lands are now held
him of himself, as superior thereof, and that it was proper that his
t of property in the lands should be consolidated with the right of
eriority of the same in his person, granted a procuratory of resignation
remanentiam for consolidating the same, together with all right, title,
interest which he had or could pretend to the same. An instrument
esignation *ad remanentiam* was expede thereon on 12th December,
ch was recorded on 22d December 1851. The defender objects to
instrument, that the person who acted as procurator is, although
ed, not designed.

On 16th and 19th December 1851 Sir James, with consent of Mr
stow as trustee, executed a deed of entail, by which, on the narrative
when he succeeded to the estate previously entailed the same was
ened with a feu-duty of £300 sterling or thereabouts, and that he
hased the superiority, which thus became vested in him in fee-simple,
reby the estate was relieved of the said feu-duty, he conveyed to him-
and the heirs of tailzie therein mentioned the said lands and barony,
h property and mid-superiority thereof, now consolidated in the per-
of me, the said Sir James Milles Riddell.' Infeftment in favour of
James followed upon this deed.

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"Thereafter a portion of the said estate was sold for payment of debts, under the authority of the Court, and was purchased by the late Mr James Dalgleish, whose trustees are the defenders in the present action. The disposition in favour of Mr Dalgleish contains obligation to infeft to be holden *a me vel de me*, clause of resignation, and precept of sasine, and binds Mr Dalgleish to free and relieve Sir James Milles Riddell of all cess, feu, blench, and teind duties, minister's stipend, and other burdens payable after Whitsunday 1856, the term of his entry, it being thereby 'declared that of the feu and other duties payable to the Duke of Argyll for the said whole lands and barony there shall be payable by Mr Dalgleish, for the lands disponed to him, 'the sum of £16, 14s. sterling, or as many merks Scots money as shall correspond to that sum of feu-duty to the Duke of Argyll, Sir James being bound to free and relieve Mr Dalgleish of the remainder of the said feu-duty 'payable for and out of the said whole lands and barony of Ardnamurchan.' On this disposition Mr Dalgleish was infeft, conform to instrument of sasine recorded 12th June 1856."

Sir James Milles Riddell died in 1861, and the pursuer maintained that on that event the estate of Ardnamurchan fell in non-entry.

The defenders averred that prior to the charter of confirmation in 1849 "the *plenum dominium* of the lands and barony of Ardnamurchan and Sunart was by the several deeds decomposed into four distinct estates—(1) The original *dominium directum* under the original feu-right of 1696 belonged to the Duke of Argyll as successor of Archibald Earl of Argyll, held of him for payment of 500 merks Scots, and other prestations. (2) An estate of mid-superiority, held under his titles of 1792 by General Duncan Campbell, of and under the Duke for payment of the said feu-duty of 500 merks, &c., but of which Sir James Milles Riddell was in a position feudally to divest him at any time, by obtaining from the Duke a confirmation of the disposition thereof in his favour by the General granted in 1808, and the infeftment thereon of 1811. (3) A lower estate of mid-superiority, created by the supplementary disposition granted by General Duncan Campbell to Sir James in 1834, and the infeftment thereon, which was held base of the General for payment of the elusory duty of one penny sterling, and had the effect of rendering the original mid-superiority, still remaining feudally vested in the General, a barren estate of mid-superiority; and (4) The *dominium utile* of the said lands and barony held by Sir James as heir of entail foresaid, under his infeftment on the precept of *clare constat* already mentioned, immediately of himself as mid-superior, in virtue of his foresaid infeftment, mentioned in the third head of this article, for payment to himself of 6000 merks Scots. 15. The *dominium utile* alone was entailed. None of the estates of mid-superiority were included within the deed of entail above mentioned. 17. The effect of that charter of confirmation was . . . to confirm and render public Sir James Milles Riddell's hitherto unconfirmed and unpublished infeftment of 1811, completely invest him with the mid-superiority as it stood in the person of the General at the date of the confirmation, and completely divest the General thereof. But in consequence of the base infeftment in favour of Sir James proceeding on the General's supplementary disposition of 1834 the only estate remaining in the General at the date of the confirmation, and which admitted of being vested in Sir James by the confirmation of his infeftment of 1811, was the barren estate of mid-superiority held immediately of the Duke of Argyll for payment of the original feu-duty of 500 merks and other prestations. The attempted confirmation of the disposition and infeftment of 1834 had as the effect of making that infeftment of Sir James Milles Riddell a public

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ftment holden directly of the Duke; it operated simply as a confirmation by the Duke of the sub-feu created by said disposition and investment, and held immediately of Sir James as mid-superior of the barren te of superiority above mentioned, in virtue of the confirmation of his r infeftment of 1811, which operated as a mid-impediment to the lic confirmation by the Duke of the said disposition and infeftment 834 . . . . 18. After the date of the said charter of confirma- the different estates of property and superiority above explained s held as follows:—(First) The original *dominium directum* was held efore by the Duke of Argyll; (Second) The barren mid-superiority held by Sir James Milles Riddell of the Duke for payment of the inal feu-duty of 500 merks Scots, and other prestations; (Third) substantial estate of mid-superiority was held by Sir James base of self, as mid-superior foresaid, for payment of the elusory feu-duty of penny, under his infeftment on the general supplementary disposition 834; and (Fourth) The *dominium utile* was held by Sir James as heir ntail of himself as proprietor in fee-simple of the substantial mid-eriority for payment of the sub-feu-duty of 6000 merks Scots, and other restations. 21. Even if the procuratory of resignation and instrument gnation expede in 1851 had effectually consolidated the estate of pro-ty and the estate of superiority, being the *dominium utile* and the sub-tial mid-superiority held by Sir James under the two infeftments tioned in the procuratory, there still remained feudally vested in his son the original estate of mid-superiority, in which he was publicly ft in virtue of his sasine of 1811, and confirmation thereof in 1849, dy mentioned. That original superiority was not even attempted to consolidated by the proceedings in 1851, and it was not then, and er has been, consolidated with the subordinate estate of mid-superiority with the *dominium utile;* and the same continued to be a separate te feudally vested in the person of Sir James Milles Riddell until his th. It is believed to be still *in hereditate jacente* of him and his son. Thomas Milles Riddell (the third baronet), is his heir, and is the ty entitled and bound to enter with the pursuer as vassal. He has been made a party to the present action."

The pursuer pleaded;—(4) The pursuer was not bound to call Sir omas Milles Riddell, the heir of Sir James Milles Riddell, second onet of Ardnamurchan, the last vassal entered, who had disponed the d lands and others to Mr Dalgleish, with obligation to infeft *a me vel me*, procuratory of resignation, and precept of sasine, and the action ght not to be dismissed or sisted in respect he has not been called as a rty. (5) The charter of confirmation by the pursuer to Sir James illes Riddell, second baronet of Ardnamurchan, in 1849, did not create confirm a sub-feu in his favour, holding of himself for payment of a b-feu-duty of one penny Scots, but made the said Sir James Milles iddell the immediate vassal of the pursuer in the mid-superiority, and ble directly to the pursuer in payment of the feu-duty of 500 merks ots, and other prestations, as expressed therein. (6) The instrument resignation *ad remanentiam* in 1851 had the effect of consolidating the id-superiority and property or *dominium utile* of the said lands and hers in the person of the said Sir James Milles Riddell, and made him e immediate vassal of the pursuer in the property or *dominium utile* of e said lands and others. (7) Even assuming a mid-superiority or mid-periorities of the said lands and others to have existed in the person of e said Sir James Milles Riddell after the execution of the instrument resignation *ad remanentiam* in 1851, which is denied, the whole rights, hether of mid-superiority or property in said lands and others, belong-

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ing to the said Sir James Milles Riddell, were comprehended in the new entail executed by him on the 16th and 19th December 1851, and were thereafter, under the authority of the Court, conveyed by him to Mr Dalgleish, and the said lands and others having been in non-entry since the death of the said Sir James Milles Riddell in 1861 the pursuer is entitled to decree of declarator of non-entry against the defenders, Mr Dalgleish's representatives, and successors therein.

The defenders pleaded;—(1) The pursuer not being the immediate lawful superior of the defenders he has no title to sue the present action and the defenders should therefore be assoilzied from the whole conclusions thereof, with expenses. (2) The action cannot proceed, and ought to be dismissed, with expenses, in respect that the true vassal of the superior is Sir Thomas Milles Riddell, the heir of the last vassal entered and that he has not been called as a party to the action. (3) The defenders and their predecessors having been in possession of the subjects libelled for a period of nearly a century and a half, upon titles flowing from others than the pursuer, and held of other superiors for payment of a different reddendo and performance of entirely different prestations from those set forth in the original feu-right, the present action is entirely unfounded, and the defenders should be assoilzied therefrom, with expenses. (4) The pursuer, as over-superior, having confirmed the sub-feu granted by General Duncan Campbell to Sir James Milles Riddell in 1834, he is not now entitled, even if the lands should be held to be in non-entry, to the rents of the lands to a greater amount than the sub-feu duty payable under that sub-feu, viz., one penny Scots.

The Lord Ordinary pronounced the following interlocutor:—"Repels the first and second pleas in law for the defenders: Finds that the lands and subjects specified and described in the conclusions of the summons are in non-entry as libelled, and appoints the cause to be put to the roll in order to the application of this finding." *

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* "NOTE.—(After the narrative given above)—Such being the state of the title, the defenders, Mr Dalgleish's trustees, maintain that the charter of confirmation of 1849 did not confirm the instrument of sasine which was taken on the supplementary disposition of 1834 in favour of Sir James Milles Riddell, because that instrument of sasine is therein described as recorded on 18th December, whereas the correct date of recording is 18th September 1834. The Lord Ordinary is of opinion that this objection is not well-founded, because the date of the sasine as following on that disposition is correctly given, which is sufficient for its identification. The charter also, after giving the erroneous date of recording, contains the words, 'or of whatever other dates or tenor' the same may be—(Adam v. Drummond, 12th June 1810, F. C.)

"The defenders maintained that as the charter of confirmation is in the form set forth in schedule D annexed to the Transference of Lands Acts, 1847 (10 and 11 Vict. chap. 48), and as that schedule only specifies the instrument of sasine as recorded, it is essential that the date of recording should be correctly set forth in the charter. The Lord Ordinary considers this objection untenable. The reason why the date of recording only is mentioned in schedule D is, that in the form of an instrument of sasine, given in the Infeftment Acts of 1845 (8 and 9 Vict. chap. 35), there is no date, and that by the said statute it is provided, sec. 3, that, after 1st October 1845, the instrument may be recorded at any time during the life of the party in whose favour it has been expede, and that the date thereof shall be taken to be the date of presentment and entry marked thereon by the keeper of the record. The adoption of the form given in the Transference of Lands Acts of 1847 does not prevent the identification in such a charter of an instrument of sasine expede prior to 1st October 1845 by the date thereof. Schedule D, annexed to the Act of 1847, provides for

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The defenders reclaimed.

They argued;—The pursuer was not the immediate lawful superior of the defenders, as the mid-superiority conveyed to Sir J. M. Riddell under [illegible] by containing the directory words in italics, 'or of whatever other date or [illegible] the said instrument of sasine may be.'

"It was also argued by the defenders that the charter of confirmation did not [illegible] the infeftment of 1834 on the supplementary disposition of that year a [illegible] infeftment holden directly of the Duke of Argyll, because Sir James's [illegible]ment of 1811, which was confirmed at the same time by the charter of [illegible]rmation, operated as a mid-impediment to the public confirmation by the [illegible] of that disposition and sasine of 1834, so that Sir James held base of him- [illegible] as mid-superior, in virtue of his confirmed infeftment of 1811, a substantial [illegible] of mid-superiority under the supplementary disposition and infeftment of [illegible]4. The Lord Ordinary is of opinion that this was not the effect of the [illegible]ter of confirmation of 1849. The disposition of 1834 is in all respects [illegible]plementary to that of 1808, and is another disposition of the same subjects [illegible] interest, granted, as it expressly bears, in supplement thereof, with an [illegible]rmative manner of holding. The charter of 1849 confirmed both rights at [illegible] same time, and made, the Lord Ordinary thinks, both public, and it expressly [illegible]rs that the lands and barony are to be held by Sir James of the Duke of [illegible]gyll in feu, for payment of 500 merks of feu-duty, and of £27, 18s. in lieu of [illegible] services of hosting, hunting, and warding. Sir James thus, according to the [illegible]w which the Lord Ordinary takes, held, by virtue of the confirmation of the [illegible]position of 1808, the supplementary disposition of 1834, and the sasines fol- [illegible]wing thereon, the mid-superiority of the Duke in feu; and by the resignation [illegible] *remanentiam* of 1851, which Sir James expede for the express purpose of [illegible]solidating the *dominium utile* of the lands and barony with the said mid- [illegible]periority, he consolidated the same. He thereafter divested himself of the [illegible]ction thereof sold to Mr Dalgleish by disposition, containing procuratory and [illegible]ecept. He had no intention of keeping up any mid-superiority, and he accord- [illegible]gly granted to Mr Dalgleish a disposition of the lands with his whole right [illegible]d interest therein, by virtue of which Mr Dalgleish could at once enter with [illegible]e Duke of Argyll as superior, and by which Mr Dalgleish is, as vassal, taken [illegible]ound to pay to the Duke as his immediate superior in the subjects bought by [illegible]m a certain proportion of the original feu-duty. No mention is made in that [illegible]position of the sub-feu-duty of 6000 merks, which was considered by all con- [illegible]rned as extinguished by the purchase of the mid-superiority by Sir James and [illegible] the consolidation above-mentioned.

"It is unnecessary, therefore, the Lord Ordinary thinks, to call as a party to [illegible]s action the heir of Sir James Milles Riddell, the last entered vassal—(Scott [illegible] Falconer, 18th July 1863, 1 Macph. 1164, and cases there cited).

"It is further objected by the defenders that the instrument of resignation [illegible]d *remanentiam* is inept, and that no effectual consolidation of the property and [illegible]periority took place, because the person who acted as procurator, 'Hypolite [illegible]illiam Cornillon,' though named, is not designed. The Lord Ordinary con- [illegible]rs this objection to be too critical. Any person can act as procurator, and it [illegible] he conceives, sufficient if it is clearly shewn on the face of the instrument [illegible]t there appeared before the notary a procurator to give resignation different [illegible]m the superior's commissioner or agent and the witnesses, and so distinctly [illegible]med as to distinguish him from others—(Morton v. Hunters and Company, [illegible]th November 1830, 4 Wilson and Shaw, 379). But even if such want of [illegible]signation were held fatal to the instrument, that would not, in the opinion of [illegible]e Lord Ordinary, avail the defenders, because they are in right of a disposition [illegible] the lands, both property and superiority, and if there is any defect in the [illegible]strument of resignation that cannot affect the right of the pursuer as superior [illegible] call upon them, the trustees of the true proprietor of the subjects to whom [illegible] whole right therein has been made over, to enter as his vassals, seeing that [illegible]e lands are in non-entry."

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the deed of 1808 never was conveyed to the defenders. It remained st in the *hæreditas jacens* of Sir J. M. Riddell.[1] The charter of confirmati of 1849 was not effectual from the mistake in the date of one of t sasines confirmed.[2] The instrument of resignation of 1851 was ineffectu as the person who acted as procurator was not designed.[3]

The pursuer's counsel was called upon to reply only on the last poi He argued;—It was quite sufficient that the procurator be named in t deed. There was no statutory requirement that he should also be d signed, and it is quite enough if the instrument shews that a procura was present. Besides, even if this were a good objection to the defende title, they are not entitled to object to their own titles.

At advising,—

LORD PRESIDENT.—In this case it cannot seriously be maintained that th lands are not in non-entry, for the last entered vassal, Sir James Milles Riddel died in 1861. But the defences relied on in argument are, in the first plac that the pursuer is not the immediate lawful superior of the defenders, and con sequently has no title to sue, and, therefore, that he cannot sue the defende without calling the heir of the last entered vassal. Now, in order to dispose o these two defences it is necessary to examine the state of the titles. The estat in question was first created by a feu-grant in the year 1696, by which the Ea of Argyll conveyed the lands and barony of Ardnamurchan to Campbell o Lochnell in liferent, and his eldest son in fee, for payment of 500 merks of fe duty, and Campbell of Lochnell granted a sub-feu of the same lands on payme of a larger amount of feu-duty in the year 1722. Now, as regards this sub-fe what may be called the *dominium utile* of the lands in question came into th person of Sir James Milles Riddell as heir of entail in 1834, and he was infe in the *dominium utile* on the 8th of September of that year. At a date con siderably anterior to that, however, he had acquired the mid-superiority of th lands by a disposition dated the 19th of August 1808; and so, when he su ceeded as heir of entail to the *dominium utile*, he had in his own person a ba zied title to that estate, and a fee-simple title to the mid-superiority. But the was a peculiarity about the conveyance of the mid-superiority by the deed o 1808, in respect it contained only one manner of holding,—a holding *a se*, an consequently Sir James Milles Riddell, in order to make his title to the mi superiority effectual, would have required an immediate entry with the superi That, apparently, was not desirable. Probably the fee was full, and it was n necessary, except for the peculiarity of the holding, to take any such entry t that time. And accordingly he obtained another disposition to the mid-sup riority from the same disponer, General Campbell of Lochnell, which is dated t 13th February 1834. Now, this disposition of 1834 is entirely of the nature o a supplementary disposition. There can be no doubt that the granter, Gene Campbell of Lochnell, was effectually divested of the mid-superiority by the d position of 1808, upon which infeftment followed in 1811. He had no long therefore, any estate to convey, and consequently the disposition of 1834 cou be nothing else than a mere deed to fortify and make more effectual the title his disponee of 1808. He had no additional estate to give. There was nothi in him. He had already given all that he had to give, viz., the estate in t superiority. Therefore, the disposition of 1834 was intended merely, and h merely the effect of giving to the disponee that which he had not by the dis sition of 1808, a double manner of holding as regards the said estate of m superiority. Infeftment was taken upon this supplementary disposition of 18

[1] Mags. of Hamilton v. Swim, Feb. 2, 1854, 16 D. 437.

[2] Macmillan v. Campbell, March 4, 1831, 9 S. 551; Kirkham v. Campb May 21, 1822, 1 Sh. 423 (1st ed.)

[3] Morton v. Hunters, Dec. 10, 1828, 7 S. 172, affd. Nov. 26, 1830, 4 W. & S. 379; Duff's Feudal Conveyancing, p. 105; Menzies, 571-572; M. Be Lectures, i. p. 609.

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d both the disposition of 1808, with its sasine of 1811, and the disposition of 34, with its sasine in the same year, were confirmed at the same time by the ke of Argyll in 1849. Now, it is maintained upon the part of the defenders t the effect of this confirmation was to create two estates of superiority in the son of Sir James Riddell, one of them holding of the Duke,—the mid-superity conveyed by the deed of 1808,—and another estate of mid-superiority, ich it is said came into existence by means of the infeftment taken upon the plementary disposition of 1834, and which other estate of superiority, it is , is held in virtue of that infeftment by Sir James Riddell of himself as the al of the Duke of Argyll. Now, it seems to me that that is a mere subtle gination, and nothing else, and that the true view of these two dispositions their sasines as confirmed in 1849 is this, that, taken together, they give disponee a good title to the mid-superiority with a double manner of hold-,—just exactly to the same effect as if the original deed of 1808 had con-ed that double manner of holding. In short, it appears to me that the true w of this piece of conveyancing is that the disposition of 1834 did nothing e than supply the defect which existed in the disposition of 1808. Now, next step in the progress of the titles which it is necessary to attend to is Sir James Riddell, having thus a good title both to the *dominium utile* to the mid-superiority, and having entered with the superior, was, as owner the *dominium utile*, his own vassal; and he proceeded very properly in 1851 take steps for consolidating the property with the superiority. And that he in the ordinary form, by a procuratory of resignation *ad remanentiam*, which horised resignation in his own hands as immediate superior, and by an instru-t of resignation following upon that, which bears date 12th of December 51. Sir James being thus vested with the consolidated estate, and holding entire estate of the Duke of Argyll, having in his own person the *plenum minium*, a portion of the estate was sold for the purpose of paying debt, and purchaser at the sale was the late Mr James Dalgleish. The conveyance to Dalgleish by Sir James Milles Riddell and his trustee is dated 30th May 3d June 1856; and that deed contained a procuratory of resignation and a cept of sasine, or at least it contains the clauses which in virtue of certain re-t Acts of Parliament come in place of the ancient form of procuratory and cept, and Mr Dalgleish was infeft upon this disposition. Now, Sir James les Riddell, being the vassal last entered with the superior, died in 1861, the superior now requires Mr Dalgleish's trustees to take an entry. The defence, viz., that the Duke is not the immediate lawful superior of the de-ders, rests upon that peculiar view of the double conveyance of the mid-eriority to which I have already adverted; and the argument founded upon e two dispositions being, in my opinion, entirely groundless, the whole foun-ion of this defence is removed, because the Duke is unquestionably the im-diate lawful superior of the estate,—the *plenum dominium* of the lands as they d in the person of Sir James Milles Riddell, and as it was transferred to Mr gleish by the disposition of 1856.

But there are certain other objections stated, which seem rather to be in-ded to support the defence that the superior cannot sue this declarator of non-ry without calling the heir of the vassal last entered. The first of these is , in the charter of confirmation which constitutes the last entry, there is a take in the description of one of the sasines confirmed. It is described in charter as being recorded in the General Register of Sasines upon the 18th December 1834, whereas, in point of fact, it is recorded upon the 18th of tember of that year; and it seems to be thought that this creates such a loulty in the way of the defender's title that he is entitled to say that the r of the vassal last entered must be called in this declarator. I confess I e not been able to follow the reasoning by which that conclusion is reached, it is of less interest to attempt to do so because it appears to me that the ction itself, whatever the effect of it might be if well founded, is entirely ounded. It is one of those mistakes which, although it is very desirable to id them, are yet of very little consequence when they do occur. The sasine con-ed is completely identified by its date, which is quite correctly given as being

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21st of July in the year 1834. There can be no doubt what is the sasin confirmed, and the general words which follow the description of that sa the other writs, viz., "or whatever other dates or tenor the said writs are intended to cover, and do, in the practice of conveyancing, co cover, small mistakes of this description. The objection, I think, is untenable.

But it is said, further, that the consolidation is ineffectual, and that, of result, the property was not consolidated with the superiority in the Sir James Milles Riddell, because of a mistake in the instrument of res The procurator who acted on behalf of the vassal,—the person making t nation,—is named in the instrument, but is not designed. Hypolite Cornillon is the name, but there is no designation added, and it is said fatal objection to the instrument of resignation. I should be very little to give any countenance to that objection. There is no statute requi procurator to be designed, or the bailie either; and the important thin set forth, and to be made very clear upon the face of an instrument of res is that one person makes the resignation and another person receives i is unquestionable. But there is certainly no statute, although there practice, requiring the designation of these persons. But I confess I find it necessary to consider this objection upon its merits, because I th quite a sufficient answer to it to say that it does not lie in the mouth defender to state that objection. He is not entitled, I think, in a decl non-entry, to take technical objections to his own title, which this un ably is. I think he must be held to be founding upon this instrument nation as an indispensable part of his title to the estate; and if he h good title to the estate he would have no defence against this declarato entry at all; and, therefore, I think, for that reason, this objection c listened to or stated by him.

That exhausts all the points that were brought before us by the d and I have no hesitation, for the reasons I have already stated, in adl the Lord Ordinary's interlocutor, by which he finds that the lands an specified and described in the summons are in non-entry as libelled.

Lord Deas.—There are two objections taken to this declarator of n —the one that the pursuer, the Duke of Argyll, is not the immediate of the defenders, and the other that the heir of investiture ought to h called for his interest. It is very difficult to see any plausible found the first of these objections, because whatever transferences may ha place since the original grant the superior is always entitled to com and enforce an entry. But I agree with your Lordship that the Duke is the immediate superior of the *dominium utile* of these lands, as w any mid-superiority that may exist. In 1722 Duncan Campbell con Sir James the mid-superiority held under the Duke, with one manner ing, on which infeftment passed. It is on that infeftment of 1811 particular objection is rested. But, then, in 1834, Sir James got th mentary disposition from Duncan Campbell, with two manners of hol was infeft on that disposition in September 1834. Now, I agree w Lordship that one of these deeds, being upon the face of it supplem the other, and being obviously intended to remedy the very inconvenien would have resulted from the one manner of holding in the deed these two deeds are to be read as one deed; and that the legitima is, that the whole were to be held with two manners of holding. 1849 he grants confirmation of these deeds and infeftments,—the deed the supplementary deed of 1834, and the sasines upon both of them. that deed of 1849 that the error occurs in describing the instrument of 1834 as having been recorded upon the 18th of December in pla 18th of September of that year. I agree with your Lordship that nothing in that objection. The question simply is, whether the sasi is confirmed is sufficiently identified. It is identified by its date, and (if you go beyond the face of it) by the circumstances,—there being

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position that would answer the description. There is no doubt at all about identity of the sasine confirmed, and therefore I think that objection totally founded. In 1851 Sir James consolidates the property and the superiority in person, and in 1856 he dispones the whole to Mr Dalgleish, or Mr Dalgleish's trustees, with two manners of holding.

Objection is taken to the instrument of resignation that the procurator named is not designed. Now, if that objection were raised by a singular successor uting with the party who held this particular title the objection certainly t require consideration, because, although it is true enough, as your Lordhas said, that there is no statute requiring the procurator to be designed, ame thing may be said with regard to the designations of all the parties otarial instruments and in feudal titles; and it would be a strong thing to that in none of these deeds, constituting the actual title to heritable subs, is it necessary that the parties whose act or presence is essential shall be signed as to identify them, and distinguish them from others; for with a designation I do not see the practicability of identification. The alleged y named may be anybody or nobody,—a pupil, or a woman, or other disified person; and it might be difficult to see good ground for distinguishing ween the identification by designation of the procurator and of anybody else e name is necessary. All that would require great consideration before we ld affirm the immateriality of this omission, especially as there is no practice nction it. But I agree with your Lordship that it is quite unnecessary to nto that, because I think it is not in the mouth of this party to take that obion to his own title.

s regards calling the heir, the old law undoubtedly was that the heir must ays be called; but it has been settled by decisions that if the former vassal granted a conveyance with procuratory and precept, or, in other words, a veyance upon which the disponee is in a position to obtain an infeftment ich shall denude the previous vassal, then you do not require to call the heir. w, I am disposed to think that that is the case here, whether there was a d consolidation or not. If the consolidation was good it is conceded that e is an end of the objection. But even supposing there was no good conidation, I think the same result would follow. In order to pass the property one party to another it is not necessary that the disponee should be in a tion to hold directly under any particular superior, if the vassal who is conng conveys all that he has, and gives the disponee every right that he has self to enter in the one way or in the other. Suppose that each of these s was in a totally different position, the disponee could still take a valid ment, which, from the date of recording, would be good to him against e world. It would not even require separate instruments, for in one inment you may have infeftment in different subjects, and in different ways; even supposing there was no consolidation at all I do not see anything to Mr Dalgleish's trustees here from taking an infeftment which shall make title complete, subject to any right which any superior or mid-superior have to call upon them to enter. They might have granted separate procuies or precepts applicable to the mid-superiority and to the property. These to be held embodied in this deed of 1834, which is equally available as if authorised infeftment in the mid-superiority by one manner of holding, in the property by another. Therefore, in no point of view can I see that leish's trustees are in any other position than that in which the Court have d that it is not necessary to call the heir.

LORD ARDMILLAN.—I have studied this case carefully, and I have come to the conclusion. The only thing I would like to add is, that I rather think objection taken to the want of designation of the procurator would not be a objection after the decision in the case of Morton in 1830, apart from the that this party cannot take the objection.

LORD JERVISWOODE concurred.

THE COURT adhered to the Lord Ordinary's interlocutor.

ALEXANDER HOWE, W.S.—DALGLEISH & BELL, W.S.—Agents.

No. 106.

May 23, 1873.
Balleny v. Cree.

ARCHIBALD BALLENY, Pursuer and Appellant.—*Mair.*
ROBERT SCOTT CREE, Defender and Respondent.—*Trayner.*

Reparation—Master and Servant—Collaborateur.—In an action of da for personal injury raised by a workman in a paper-work against his mas was proved that the pursuer had been injured in consequence of the machi which he was employed being in a defective state through the negligence o manager and a mechanic employed in the works, and that there had be personal negligence on the part of the master. *Held* that the master wa liable for the fault of those employed by him, seeing that he had taken reas care to employ competent workmen.

2D DIVISION. Sheriff of Renfrewshire. I.

ARCHIBALD BALLENY, a workman employed in a paper-work in Pol shaws, raised this action against his employer, Mr Cree, paper manu turer there, concluding for damages for bodily injury.

The pursuer was a machineman in the defender's paper-works while working at his machine his hand was caught between the felt and so injured that his arm had to be amputated.

The circumstances of the accident were thus described in the The pursuer deponed;—". . . . Mr Cree had a manager under him, Baillie, who superintended, and there was a mechanic, Benjamin Ste who looked after the machine being in working order, and made necessary repairs. On 25th August last, about two o'clock afterno was at work at the machine as usual, when an accident occurred. hand was caught between the felt-roll and one of the cylinders, drawn in and crushed and burned. It was the first felt-roll with w the paper comes in contact. . . . . The cylinder at which it happen known as the first cylinder. It was revolving at the time, as als the felt-roll, and the paper was being drawn downwards between t . . . . I ascribe the accident to the want of the guide-roll for the roller. That guide-roll was of brass, and should have been placed a above the point where my hand was caught. There was a brass g roll in that position all the time I was working there until a fort before the accident occurred. I found it removed one night when I to work, and saw it lying beside the machine. The 'journal' . . . . off it. It would not bide in when screwed on, being too loose. W the screw of the journal is loose the guide-roll will not work, an paper could pass over into the machine without being torn and br About two days after I told Mr Baillie that he would require eith get a new guide-roll or to have the old one sorted. He said they getting a new one. The reason I spoke to him of it then was, t thought it should have been sorted immediately on the guide-roll I found deficient, but seeing that nothing was done in two days I thi it right to speak to him about it. I did not speak to the mechanic a it; he saw the guide-roll every day, for it was lying about. The ma and defender must also have seen it, and could not fail to notice th was out of its place. It lay on a stance for holding paper in the pas down the room by the side of the machine, about six inches above ground. It lay there till three or four days before the accident, wh noticed that it had been placed under a table in the same room as machine. On the same occasion as I noticed that the brass guide- was removed out of its place I found that a wooden roll had been pla on a bracket close by the cylinder. It was on the same frame as bracket supporting the felt-roll, but further out from the cylinder. T wooden roll did not supply the place of the brass guide-roll. It was suitable from its position to supply its place. If the brass guide-roll

en in its place I could not have sustained this injury to my hand and n. My hand could not have been drawn in. There is very little risk danger if the brass roll is in its place; very little indeed, with ordinary e and attention. . . . . The felt-roll is about the height of my shoulder. e purpose of the brass guide-roll is to guide the paper down to the felt-l, and it prevents our hands from getting down to the felt-roll. The chine worked well enough, and made good paper during the fortnight t the brass guide-roll was not in its place. During that fortnight I sidered that there was danger in working the machine, owing to the nt of the brass guide-roll." . . . .

eorge Preston, also machineman with the defender, and working alter-e shifts on the same machine with the pursuer, deponed—". . . . About se weeks before the accident to the pursuer the brass guide-roll lead-to the first cylinder went wrong and would not work. I found it uld not revolve, and was breaking the paper. I removed it. . . . . The t morning after I took out the guide-roll I mentioned that I had done to Benjamin Stewart, the mechanic, and told him what was wrong h it. I also told him I could not do without it. He said he would e to get it sorted, but he did not say when. I spoke to him again ut it—a week before the accident. Pursuer had at that time nearly ; his hand caught by it, and I mentioned this to the mechanic, and said was dangerous to work without it. I do not remember what he said. lso spoke to the manager, Mr Baillie, about it. It was the same time a week before the accident—that I spoke to him. I said it would be ch better to get it sorted, or a new one in its place; and I also men-ned about pursuer having nearly had his hand caught in it. I also ntioned to him that I had put in the wooden one to try and save the per from being crushed in the back side. His only answer was that he uld have to tell Ben—meaning the mechanic—about it. Nothing was ne till after the accident. If that brass guide-roll had been in its place was nearly impossible that such an accident could have occurred as ppened to pursuer. I do not think it could have occurred. If that ss guide-roll had been in its place pursuer would not have had any casion in doing his work to have had his hand near the place where it s caught. He must then have gone out of his way to put it in either relessly or very stupidly. The wooden roll which I put in did not in y way serve as a protection from coming near to the felt-roll. . . . . I ver spoke to Mr Cree, the defender, before the accident about the roll ing taken out. Baillie was the manager, and I spoke to him." . . . .

On the other hand, Andrew Mason, managing engineer of James Ber-n and Sons, who had constructed the machine in question, deponed—. . . . As constructed by us the normal mode of working that machine that the paper should be led to the cylinder by means of the guide-l, and so be conducted to the felt-roll. The purpose of the brass guide-l is to place the paper so that it shall lie flat on the cylinder before it ches the felt-roll; also, it enables the paper to get all the advantage of cylinder. The guide-roll places the paper on the heated cylinder, so t the paper is flat against it before it reaches the felt. There is ther guide-roll represented on the plan—it is at the bottom of and ond the fourth cylinder. Its purpose is to guide the paper from the inders to the calender presses. In constructing this machine these de-rolls were intended solely for leading the paper, and had no refer-e to providing for the safety of the workmen. Each of the cylinders a framework of iron four inches in thickness, and that framework is open one, and is between the revolving cylinder and any person who y be standing at the end of the cylinders. . . . . If the brass guide-roll

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were away from defender's machine, and a wooden roller were placed on same bracket as the felt-roll, there would, in my opinion, be as great safety to a machineman as if the brass guide-roll were in position. A machineman's is a dangerous kind of work. . . . . When the machine was wrought by means of a wooden roller in place as above, and without brass guide-roll, I consider that it could only have been through carelessness that a workman could have his hand and arm drawn in between the cylinder and the felt-roll."

The pursuer pleaded;—The pursuer having, while engaged in the defender's service, been injured through or by a defective machine or apparatus belonging to the defender, the defender is liable to him in damages and *solatium*.

The defender pleaded;—(1) The injury sustained by the pursuer having been occasioned by or through his own want of care, skill, and attention or at least not by and through any fault, negligence, or carelessness of the defender, or those for whom he is responsible, no liability rests on the defender. (2) At the time of the occurrence of the accident libelled the pursuer was engaged in a hazardous employment, and any risk or danger to which he was thereby subjected being equally apparent to him as to the defender the pursuer was bound to look to his own safety.

The Sheriff-substitute (Cowan) and the Sheriff (Fraser) assoilzied the defender.

The pursuer appealed.[1]

At advising,—

LORD JUSTICE-CLERK.—It is quite clear that this accident was caused by the want of a brass roller to protect the hands of the workmen.

There had been such a brass roller, but it was not in its place at the time of the accident; in its absence an inefficient temporary substitute had been put up.

The next question is, how did it come that the machine was thus defective. This is not doubtful. As the brass roller, from its fastenings having given way, would not stay in its place, it ought to have been replaced by Stewart, a mechanic employed on weekly wages. There was also a foreman or manager of the name of Baillie. It seems that the defender, the owner of the works, was constantly on the spot, but that he was not acquainted with machinery, or qualified to judge of it.

The pursuer complained of the want of the brass roller, and the manager and Stewart were both quite aware that it was not in its place. Stewart affects to say that the machine was quite good without it. I do not go into that, for it is clear that the roller was an important and necessary part of the machine.

The first question comes to be, is there any reason to say that the pursuer went into danger knowingly? I have come to the clear opinion that the pursuer did not go into danger with his eyes open. His duty was to work the machine. No doubt he knew that the roller ought to have been there; but although the hazard was increased, still it was possible to work the machine, and I cannot hold that the pursuer contributed to the accident by continuing to work.

The next question is, was the defender responsible for the defective state of the machine? Personally he did nothing to make himself responsible. He had opportunities of seeing that the machine was defective, but he was not and did not profess to be a skilled mechanist, so as to be a judge of what was necessary. There seems no ground for charging him with personal fault.

Is he, then, responsible for the undoubted neglect of Stewart and Baillie, his servants? It cannot be disputed that they were guilty of the grossest neglect;

[1] M'Neill v. Wallace & Co., July 7, 1853, 15 D. 818; Alsop v. Yates, Jan. 18, 1858, 27 Law Journal (Exch.), 156; Fraser on Master and Servant, 2d edit. p. 94, *et seq.*

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the evidence does not shew that they were not qualified for the situations held. Stewart perhaps was not a very steady man, but he was undoubtedly fied, and he had been highly recommended. The case resolves into the appli- n of the rule that if an accident occur through the fault of a fellow-servant master is not liable. I am of the same opinion as the Sheriff-principal, and ally on the same grounds,—that as the accident occurred from the fault of ow-workman the master is not liable, seeing that individually and person- he was not to blame.

D COWAN.—I am of opinion with your Lordship that there is no blame hable to the pursuer, so as to exclude on that ground his claim for repara- The evidence proves that his conduct was that of a skilled workmen. an I hold on the proof that he wilfully went into a seen danger. The d of judgment, however, adopted by both Sheriffs is sufficient for the e. I do not agree with that part of the Sheriff's note to his interlocutor e he says that it is of no moment that the defender was practically not inted with machinery. I think that fact is far from being immaterial, for l on him the duty of being all the more careful in the selection of those to a he entrusted the superintendence and management. I think, however, he fully discharged his duty in this respect. As he himself was unac- ted with machinery he entrusted the charge of his work to a properly fied and skilled mechanic, and to a superintendent and manager. They cted their duty to get the machine properly repaired, and hence the acci- ; whether both or only one of them was in fault is not of consequence, se both were *collaborateurs* or fellow-workmen of the pursuer. I concur in ng that the defender is not liable on that ground.

D BENHOLME.—I concur generally, though not in everything which has said by your Lordships. What strikes me as sufficient to suppor the ment is, that there was no fault on the part of the defender. He himself ot a skilled mechanist, and he cannot be made responsible for the defect in achinery.
ardly concur regarding the pursuer's own conduct. I do not think he was om blame. He had had a previous warning by having his hand nearly ht by the machine.
was not prudent in him to continue to work while the brass roller was not ced, and as the manager refused or delayed to do so the pursuer ought to applied to the defender. If he had done so, and if the defender had ted to have the defect remedied, I would have held him liable, as the acci- would then have been plainly due to his personal fault.

D NEAVES.—I concur, and on the grounds stated by your Lordship in the t. I only add that I think the fact that the pursuer did not appeal to the ter, his master, when the machine was not repaired by the mechanic, con- the view that there was no personal fault in the defender. His being ntly on the spot gave the pursuer an opportunity of so complaining, and ursuer's silence justified the defender, in the circumstances, in thinking that s right. I give no opinion what would have been the result if the pursuer omplained and his complaint had not been attended to.

THE following interlocutor was pronounced:—"Find it proved that the injuries sustained by the pursuer were occasioned by the machine in question having become defective and dangerous, in respect of the absence of the brass guide-roll: Find that this state of the machine was occasioned by the fault and negligence of the manager, Baillie, and of the mechanic, Stewart: Find that the defender was not personally guilty of any fault or negligence in the matter: Find that he is not liable for the fault or negligence of those who were employed by him, seeing he took reasonable care to employ competent workmen: Find that the manager,

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Baillie, and the mechanic, Stewart, were fellow-workmen v pursuer in a common employment: Therefore dismiss the affirm the judgment appealed against, and decern: Find penses due in this Court."

THOMAS LAWSON, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 107.

May 29, 1873. Smith's Trustees v. Graham and Others.

MISS JEMIMA RUSSELL AND ANOTHER (Smith's Trustees), Pursue Real Raisers.—*Fraser—M'Laren.*

MRS J. W. GRAHAM or MORTYN now FERGUSSON AND OTHERS (D of Peter Graham), Claimants.—*Watson—Mackintosh.*

ALEXANDER GOODSIR AND OTHERS (Trustees of Robert Graham Sr *J. P. Wilson.*

MRS JEMIMA GRAHAM OR RICHARDSON AND ANOTHER (William G Children), Claimants.—*Adam—Johnstone.*

Succession—Testament—Vesting—Power.—A truster directed his tr pay the free yearly interest of the residue of his estate to his widow, an death to make over the fee to his two sisters and three nephews, and t of their bodies, in such proportions as his widow should appoint, faili appointment, to the beneficiaries equally, the share of any nephew dyi out issue, or of either sister who should die without settling, or shoul cease, the same to be divided equally among the survivors and their issu of the sisters survived the testator but predeceased the widow, leaving ment of, *inter alia*, her share of the fee of her brother's estate. *Held* the fee did not vest till the death of the truster's widow; and (2) that t of the trust-deed did not authorise the truster's sister to settle her sha fee until it had vested.

Apportionment—Illusory Payments—Statute 11 *Geo. IV. and* 1 W *c.* 46.—*Question*, Whether the enactment in the above statute that all a ments under a power shall be valid, whether illusory or not, applies to S

2D DIVISION. Ld. Ormidale. I.

THE late Dr Peter Smith of Dunesk died on 7th July 1833, l trust-disposition and settlement dated 20th May 1822.

After disposing of his landed estates of Dunesk and Bilbow, s viding certain liferent annuities from the revenue of his moveabl to his sisters, the testator directed his trustees—"Sixthly, I direct my said trustees to pay to my said wife, in case she shall me, during all the days of her lifetime, the residue of the free interest or return arising from any moneys or other moveable me estate I may die possessed of: And lastly, with regard to the fee s residue of my moveable means and estate, I hereby direct my said t to make over the same to and in favour of my said sisters, Mi Smith, and the said Miss Anne Smith, and my said nephews, Graham, William Graham, and Peter Graham, and the heirs o bodies, in such proportions as my said wife, in case she shall surv shall direct and appoint by any writing under her hand, and faili appointment, then to my said sisters and nephews equally among share and share alike; it being hereby expressly declared th children of any of my said nephews predeceasing me shall succeed share which would have fallen to their parent, to be divided amon equally, share and share alike; and the share of any of my said n dying without issue, or of my said sisters who shall die without i the same, or shall predecease me, shall be divided among the su and their issue as above provided, equally, share and share alik which shares, except in so far as liferented by my said sisters, s paid over to my said sisters and nephews, or their issue, at the fir of Whitsunday or Martinmas that shall happen next after the l one year from my decease or my said wife's decease, whichever o

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shall last happen; and the said sums so to be liferented by my isters shall in like manner, at the first term of Whitsunday or amas after the death of the said annuitants, be divided among my esiduary legatees as before provided; providing always, that if my shall then be in life, the division shall be suspended till the first after her death, she being always entitled to the liferent thereof, as provided; and also that either of my said sisters shall be entitled pose by will of one-fifth part of the sum liferented by her."

truster's sisters and nephews above named all survived him, but eased his widow, Mrs Henrietta Erskine or Smith. Miss Jane died in 1835, leaving a settlement dated 5th November 1834, by she conveyed to her nephew Robert Graham (afterwards Robert m Smith),—"her whole moveable means and estate, and, in par-r, 'that portion or share of the means and estate to which she had under the deeds of settlement executed by her said deceased brother, ter Smith of Dunesk, or to which she might otherwise have right e of the executors and successors of the said Peter Smith in his and estate.'"

testator's widow, Mrs Smith, who liferented the residue of his able estate, died on 8th July 1871, leaving a deed of apportionment 26th June 1866, in which, after stating that as it was doubtful ier the shares thereof destined to Jane Smith, Anne Smith, and t Graham Smith had vested in them in consequence of their deaths the date of division, she proceeded to apportion £20 to the repre-tives of each of them in the event of vesting having taken place, and heirs of Peter Graham £1000, and the balance to William Graham children.

on the death of Mrs Smith, Dr Smith's trustees proceeded to divide rust-estate, which consisted of £9000 consolidated stock, and £500 of the British Linen Company. Various questions having arisen g the beneficiaries, the trustees raised the present action of multi-inding and exoneration.

e competition chiefly depended upon two questions—First, Whether e of the residue vested *a morte testatoris*, or not till the death of the or's widow? Second, Whether the apportionment made by the or's widow under the power contained in the settlement was valid ffectual?

s Isabella Graham or Mortyn and others, daughters of Peter Graham, tained that the fee of the residue vested *a morte testatoris*, and dingly that the representatives of the testator's three nephews and isters were all entitled to share in the division. But if it should be held he fee did not vest till the death of the widow, that a special power pointing their shares was conferred by the testator upon his sisters, hat this power had been exercised by Miss Jane Smith. According latter view, the persons entitled to share in the division were—(1) Graham's children; (2) William Graham's children; (3) Miss Jane 's appointee. But whether the apportionment fell to be made in hares or into three it could not be regarded as valid, seeing that one re of the parties entitled to share received an illusory share.

s Richardson and others maintained;—The fee of the residue did est till the death of the widow,[1] and upon a sound construction of ttlement no power of appointing her share was conferred upon Miss Smith. Peter Graham's children and William Graham's children thus the only parties entitled to share in the residue. The appor-

[1] Young v. Robertson, Feb. 13, 1862, 4 Macq. 314.

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tionment was therefore tripartite, and in this view it was admittedly Even supposing that Miss Jane Smith had a power of appointing share, there was no authority for holding that an apportionment of out of such a fund was illusory.[1]

The Lord Ordinary pronounced this interlocutor:—"Finds that competition in this case relates to the residue of the moveable means estate left by the late Dr Peter Smith under his trust-disposition settlement, and that it chiefly depends upon two questions, viz.,- Whether the fee or capital of said residue is to be held as having ve *a morte testatoris*, or not till the death of the testator's widow, to w the liferent enjoyment of it is destined; and 2d, Whether the appoi ment made by the testator's widow of the residue under a power tained in his deed of settlement is, or is not, to be held valid and effec Finds, in regard to the former of these questions, that the bequests b testator of the fee or capital of said residue must be held to have ve not at the death of the testator, but at the death of his widow, the rentrix, being the date of its payment or distribution; and finds in re to the latter question that said apportionment is to be held as valid effectual."*

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[1] Watson v. Marjoribanks, Feb. 17, 1837, 15 S. 586; Sivright v. D Jan. 27, 1824, 2 S. 643; Crawcour v. Graham, Feb. 3, 1844, 6 D. 589.

* "NOTE.—The sixth and last purposes of the testator's deed of settle are the important ones to be kept in view in considering the questions w have now been determined by the Lord Ordinary.

"The testator, after some special bequests in the sixth purpose of his s ment, leaves the residue of his moveable means and estate to his wife, i event of her surviving him, in liferent, and then proceeds, in the last purpo his deed, to dispose of the fee or capital of the residue so to be lifere Notwithstanding the apparent complication, not to say confusion, arising fro manner in which the last purpose is expressed, the Lord Ordinary thin clear—1st, that the liferent of the whole residue has been destined by the te to his wife in the event of her survivance, an event which happened; 2d, consequently no part of the capital of the residue could be paid or distrib till after the death of his wife, it being moreover expressly directed that respective shares of the residuary legatees—sisters and nephews—should be over to them only after the death of the testator or liferentrix, whichev these events should first happen; and 3d, that the shares of the residue le his nephews dying without issue, or of his sisters who should die without sett the same or should predecease himself, must be divided among the survi and their issue. There is thus both a liferent and survivorship in the pre case, and accordingly the capital or fee of the residue cannot be benefici possessed or enjoyed by, or be paid to, or distributed amongst, the parties na by the testator as his residuary legatees and their issue, or the survivors of th and their issue, till after the death of his widow, the liferentrix.

"In this state of matters, and supposing there are no specialties to render necessary to treat the present case as an exceptional one, a matter which will afterwards adverted to, it falls, in the opinion of the Lord Ordinary, to governed by that of Young v. Robertson, as decided in the House of Lords February 1862 (4 Macqueen's Appeal Cases, p. 314). There it was held in words of the Lord Chancellor (Westbury), to be a settled rule of construct equally in the law of Scotland as of England, 'that the words of survivor in a settlement (that is, in a will), should be referred to the period appointed that settlement for the payment or distribution of the subject-matter of the g And again, dealing with a case such as the present, the learned Lord says,— a testator gives a life estate in a sum of money, or in the residue of his est and at the expiration of that life estate directs the money to be paid or residue to be divided among a number of objects, and then refers to the pe

rs Jemima Graham and others reclaimed. No. 107.
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RD JUSTICE-CLERK.—We have had a very able argument from Mr Watson,

of some one or more of these persons dying without specifying the time, lirects in that event the payment or distribution to be made among the sur-s, it is understood by the law that he means the contingency to extend the whole period of time that must elapse before the payment or distribu-takes place. The result, therefore, is that in such a gift the survivors are ascertained in like manner by a reference to the period of distribution, ly, the expiration of the life estate.' There can be no doubt, therefore, nless this principle of construction has been rendered inapplicable to the nt case by some specialty or peculiarity, the Lord Ordinary is right in hold-nat the vesting of the fee or capital of the residue in question did not take until after the death of the liferentrix, when it fell to be paid or dis-ed.

The Lord Ordinary does not think that there is any such specialty or pecu-r in the present case. On the contrary, it appears to him that the peculi-s—such as they are—of the destination of the residue in the present case e testator tend rather to support than otherwise the conclusion which has arrived at. Thus, the destination by the testator of the capital or fee of sidue of his estate to his sisters and nephews, not as a class, but individu-y name, is only in the proportions that may be directed and appointed by ife in the event of her surviving him. Now, although this may not be usive of the point, it is at least strongly indicative of the period of vesting r postponed till after the death of his wife; for until then the precise nt which each of the residuary legatees may be entitled to cannot be known. clause, again, to the effect that, failing a direction and apportionment by estator's widow, his sisters and nephews should succeed equally, tends to ame conclusion; for until the death of the testator's widow it cannot be n whether she has failed to direct and appoint what shares the residuary ees are to have. Nor is it unimportant to observe that no part of the income he residue goes to the residuary legatees, or any of them, till the period of payment or distribution of the capital or fee, and that the assignees of the tees are not mentioned in the destination at all. Neither can the Lord nary find any sufficient reason for holding that the fee of that portion of the estate out of which the annuities of the testator's sisters are to be paid be held to vest *a morte testatoris*, for that portion of the estate, on being ee by the death of the annuitants, falls into residue to be treated just as the

On the principles therefore established in the House of Lords in the case of g v. Robertson, and being of opinion that there is no specialty in the nt case to exclude it from the operation of these principles, the Lord Ordi-thinks it must be held that the fee of the residue in question did not vest he period of payment or distribution after the death of the testator's widow. In regard to the other question, viz., whether the apportionment by the tor's widow of the residue among the residuary legatees is a valid and ual one, the Lord Ordinary has been unable to see sufficient ground for ing that it is not. The question, however, is not one which he can say is tended with difficulty.

It was maintained on the part of some of the claimants that the apportion-by the widow of £20 to legatees whose share of the residue would other-be about £3000 must be held to be illusory, and a fraudulent exercise of power of apportionment committed by the testator to his widow. No case, wer, was cited in which such a contention has been sustained by this Court. e, on the contrary, conceded, that in no case which has yet occurred in this t has an apportionment been held to be void on the ground that the sums tioned were illusory, and consequently that the exercise of the power was dulent. Cases, however, were cited in which the question was raised, the

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but the views for which he contended can only receive effect if we a proposition on which the argument proceeded, that a power to settle l

more important of these being Watson v. Marjoribanks, 17th Febru 15 Sh. 586; Crawcour v. Graham, 3d February 1844, 6 D. 589; and Trustees v. Marder, 30th March 1853, 15 D. 633. In the first of th there was no decision on the precise point, the deed of apportionmen been set aside on a ground which has no place here. Neither was t decision of the question in the case of Crawcour v. Graham, although tions relating to it of more or less value are reported to have been made of the Judges. In the remaining case of Marder's Trustees v. Marde held that an apportionment of £50 out of £2000 to one of two daughte the remaining £1950 were given to the other, could not be set aside as

"So standing the authorities, the Lord Ordinary does not see tha derive much aid from them in deciding whether the apportionment o some of the residuary legatees in the present case is illusory or not. Th the cases referred to is the nearest in point to the present, and, so far a the Lord Ordinary thinks it is calculated to support rather than othe conclusion at which he has here arrived. It must be kept in view testator himself might undoubtedly have apportioned the residue of l just as his widow has done, and if so, why should the apportionment his widow not be equally good. The Lord Ordinary thinks it clear testator's object in regard to this matter was to substitute her into place; and he has certainly, neither expressly nor by implication, imp limits or conditions upon her discretionary exercise of the power he c to her. The residuary legatees are not said, and do not appear, to have legal claim at all for a share of the residue in question. Not being ch the testator or his widow they did not stand even in that favourable Keeping these considerations in view, the Lord Ordinary has been unal how he either ought, or could, on any satisfactory ground, set aside th tionment in question as illusory or fraudulent. He feels himself a unable to say that an apportionment of £20 in the circumstances wh occur must be held to be illusory. No rule or principle has been indicated by the testator or his widow for determining such a point. fore, the Lord Ordinary were to disturb the apportionment which has be he would be interfering with the discretionary power committed to h by the testator, not on any principle that he could define, but simply if he had been in the widow's place, he would have divided the fund di from what she has done. But surely no proceeding could be more arbit haphazard than that; and none could partake less of a judicial characte

"Entertaining these views, it is unnecessary for the Lord Ordinary mine the question which was raised by the parties, whether the statute IV. and 1 William IV. cap. 46, which declares that all apportionmen under such a power as that in question should be valid and effectual, e only nominal and illusory, applies to Scotland or not. The Lord Ordin here remark, however, that this statute appears to have been noticed and in some of the cases above referred to as if it were applicable to Englan and of course since the passing of that statute such a question as the could not occur in England. But the report of the case of Butcher v. (9 Vesey's Chancery Reports, p. 382), decided by Sir William Grant, m of the Rolls, in 1804, is very instructive on the subject. There, as apportionment was challenged as illusory and fraudulent, but the Maste Rolls, in an elaborate judgment, in which he reviewed the authorities in l and entered into the inquiry whether there was or could be any sound on which a Court could disturb the discretionary exercise of such a p the party to whom it had been committed, held, as the Lord Ordinary here, that he was unable to discover any such principle.

"The Lord Ordinary understood at the debate that on the two which have now been determined being disposed of they would pro

onferred by the truster on his sister, Miss Jane Smith, even if she prede- d the term of payment. There are two questions which we must consider, as to the term of vesting, and second, as to the supposed power of settle- conferred on Miss Jane Smith. In regard to the first point I am of the on of the Lord Ordinary that the shares did not vest till the death of the ntrix. Though every case depends on its own circumstances I consider this case clearly falls within the principle of Young v. Robertson. Not is there postponement of the term of payment by the interposition of a nt, but there is a right of survivorship or destination over, and there is a r of distribution given to the testator's widow. None of these circumstances ecessarily conclusive, but the coincidence of all, and especially of the last, h renders the amount of each share altogether uncertain till the death of iferentrix, shews that vesting is postponed until the death of the liferentrix.

regard to the second question, notwithstanding a good deal of ambiguity in rust-deed, I am of opinion that no such power as is contended for was con- d on Miss Jane Smith of leaving by will the amount to which she would been entitled if she had survived the term of payment. It was maintained, e first place, that such a power was given, and, in the second place, that the of Miss Jane Smith, though not specifically bearing to be a settlement of hare, yet, referring as it does to her interest in the succession of her brother, be held to be a sufficient exercise of that power. Had the success of the iners' argument depended only on the second point I should have been osed to hold that if the power existed it was sufficiently exercised by im- ation. But I do not think that the words of the trust-deed which are said nfer the power warrant that conclusion. The words are,—"And the share y of my said nephews dying without issue, or of my said sisters who shall without settling the same, or shall predecease me, shall be divided among survivors and their issue as above provided, equally, share and share alike." w, the general context and syntax of the clause does not confer a power, but er refers to a power already existing. It is not immaterial to observe that re the testator intended to give a power of settlement which would not erwise have existed he has used distinct words to express his meaning. It pears to me that the meaning of the clause comes to this, "if either of my ters survives the term of vesting, but dies without a settlement, her share all go, not according to law, but by the terms of my settlement." It imposes striction, and does not confer a privilege. The testator intended to bring k to his general estate the share of either of his sisters who died without king a settlement.

On these grounds, I am of opinion that the fee did not vest till the death of liferentrix, and that no power of settling her share was conferred upon Miss e Smith if she predeceased the term of vesting. If this be the case, it is ceded that the appointment by Mrs Smith is good. I am therefore for ad- ing to the interlocutor of the Lord Ordinary; and on the question whether apportionment of £20 to the representatives of Miss Jane Smith would have n illusory I indicate no opinion.

LORD COWAN.—I do not adopt all the observations of the Lord Ordinary, but ncur in the result to which he has come,—that the period of distribution s the death of the widow; and that, first, because there is no indication of any er period of vesting than the period of payment; secondly, because of the ver of apportionment given to the widow, which is an element of importance; l thirdly, because there is a provision over, and a taking by survivors under distribution, and until the widow's death it was impossible to know who uld, or who would not, have a share.

As to the other question, regarding the right of the sister to regulate the suc- sion to the share she would have been entitled to had she survived, I am of

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e to adjust the necessary interlocutor of ranking so as to exhaust the case, of course if any point should be found still to require discussion before the d Ordinary the parties can have a further opportunity of being heard."

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opinion that the words "dying without settling the same" did not confer on her such a right. If she had the power she undoubtedly exercised it, but I am clear that she never had it at all.

LORD BENHOLME.—I agree with the Lord Ordinary as to the period of vesting, and there only remains the question whether the division is bipartite or tripartite.

In order to bring in the question of an illusory apportionment it was necessary to make out that the division was tripartite, and that the third party had not got a substantial share, but as in my opinion the division was bipartite only we have no occasion to consider whether the distribution was illusory or not.

I will only say that the Courts in England had gone very far in carrying the question of illusory into the question of adequacy, so that almost every case of apportionment was brought into Court. This became a nuisance, and the remedy was the Act of Parliament which has been so often referred to.

In Scotland the Courts have never interfered. The decided cases shew that illusory may be pleaded, but there is no case in which it has been successfully pleaded. I do not think, however, that our Courts would ever, like the English Courts, merge the question of illusory into that of adequacy. It is altogether different. The question of illusory stands by itself. It consists in a fraud against the trust, making an apportionment which is altogether a mockery. But in the circumstances of this case that does not arise, for I am clearly of opinion that the division was bipartite only.

LORD NEAVES concurred.

THIS interlocutor was pronounced:—"Refuse the note, and adhere to the first finding of the Lord Ordinary's interlocutor: Find that the apportionment in question only takes effect between the children of Peter Graham and the children of William Graham, the other claimants having no interest therein: Find that the settlement in question did not confer power on Jane Smith to settle by will any part of the succession before the period of vesting; and therefore adhere also to the second finding of the said interlocutor: Find no expenses due since the date of the Lord Ordinary's interlocutor, and remit the cause to the Lord Ordinary to proceed further with the same."

JARDINE, STODART, & FRASERS, W.S.—DALMAHOY & COWAN, W.S.—A. & A. CAMPBELL, W.S.—JOHN GALLETLY, S.S.C.—A. J. NAPIER, W.S.—Agents.

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Mackintosh, &c. v. Ross.

AGNES STUART ROSS OR MACKINTOSH, Petitioner.—*Sol.-Gen. Clark—Mackintosh.*
MRS ANN ROSS OR ROBERTSON AND OTHERS, Petitioners.—*Pattison—Thoms.*
ANDREW GILDART REID, Petitioner.—*Millar—Blair.*
WILLIAM MUNRO ROSS, Petitioner.—*Watson—Keir.*

Succession—Heir of Line—Heir of Conquest—Entail.—A person purchased an estate, and entailed it upon himself and his heirs-male, and, after various substitutions, on his own heirs whatsoever. *Held* that, under the destination to his own heirs whatsoever, the heir of line was to be preferred to the heir of conquest.

Process—Jury Trial.—In general questions of pedigree are sent to trial by jury.

1ST DIVISION. Sheriff of Chancery. M.

IN 1790 William Ross of Shandwick executed an entail of certain lands, which he had purchased, "in favour of himself and the heirs-male lawfully to be procreated of his body, whom failing, to the lawful heirs-female of his body, the eldest daughter or heir-female always succeeding without division, whom failing, &c., whom all failing, such other heirs

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l members of taillie as he should thereafter nominate and appoint by a ting under his hand at any time during his life, whom failing, his heirs l assignees whatsoever."

Mrs Christina Cockburn Ross, daughter of the entailer's niece, Mrs e Ross or Cockburn, the last substitute heir of entail, died on 16th y 1872, vest and seised in the said lands. The other branches of the ination being exhausted, the estate devolved upon the "heirs whatso- r" of the entailer.

he petitioners, Agnes Stuart Ross or Mackintosh, Ann Ross or Robert- , and Andrew Gildart Reid, claimed to be heirs of line of the iler. The petitioner, William Munro Ross, claimed as heir of con- st of the entailer.

he petitions were conjoined by the Sheriff of Chancery, and brought re the Court by Mrs Agnes Stuart Ross or Mackintosh by an appeal r the Titles to Land Consolidation Act, 1868, 31 and 32 Vict. c. 101.

he three other petitioners objected that William Munro Ross had no to appear, as the deed of entail did not call the heir of conquest, but heir of line. He had therefore no title to appear.[1]

he petitioner, William Munro Ross, answered that the estate being quest in the person of the entailer the person who succeeded under title of heir whatsoever was the heir of conquest, and not the heir of [2]

t advising,—

ORD PRESIDENT.—Mrs Christina Cockburn Ross died on 16th May 1872 vest and seized in the entailed estate of Shandwick, in the county of Ross. have before us four different sets of claimants to the succession of that e, each claiming to be served as heir of provision in special to the deceased Christina Cockburn Ross. Three of them ask to be served as heir of pro- n to Mrs Cockburn Ross, in respect of being the heir of line of the entailer. Mr Munro Ross, asks to be served as heir of provision to Mrs Cockburn in respect of being the heir of conquest of the entailer.

he question arises on the construction of the deed of entail executed by am Ross of Shandwick on 5th May 1790. There is no doubt that the e of Shandwick was conquest in his person. By the deed of entail he made stination in favour of himself and the heirs-male of his body, whom failing, he heirs-female of his body; then follow several substitutions in favour of es of his own; lastly, he calls his cousin, Captain David Ross, and the heirs- e of his body, whom all failing, such other heirs and members of taillie as he uld thereafter nominate and appoint by a writing under his hand at any time ng his life, whom failing, his heirs and assignees whatsoever. It is admitted Mrs Cockburn Ross was the last substitute heir of tailzie, the whole branches he destination being now exhausted, and that the estate has devolved upon heirs whatsoever of the entailer, there being no deed under which any one claim as assignee.

he question is, whether the words "heir whatsoever" signify heir of line or of conquest. If the heir of conquest be the party designated, then Mr o Ross, on proving his propinquity, is entitled to be served as heir of pro- n to Mrs Christina Cockburn Ross, and the petitions of the other claimants fall to be dismissed. If the heir of line is to be held as the person entitled served, Mr Munro Ross has no case, and his petition must be dismissed. of opinion that the question has been settled by authority, and the cases

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[1] Boyd v. Boyd, June 28, 1774, M. 3070; Robison v. Robison, June 3, 1859, 905; Grant v. Shepherd, July 5, 1836, 14 S. 1096; Innes v. Kerr, June 807, M. App. *voce* Tailzie, No. 13.

[2] Miller v. Miller, Jan. 19, 1831, 7 W. & S. 1; Aitchison v. Aitchison, March 29, 7 S. 558.

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of Boyd v. Boyd, Miller v. Miller, and Robison v. Robison establish a ge rule which is applicable to this case. No doubt all these cases were differe their circumstances. In the case of Boyd two subjects in dispute were in *ditate jacente* of John Boyd, as conquest in his person, one destined to his heirs and assignees, and the other to his father's heirs and assignees. The was held to go to John Boyd's heir of conquest, as the legal order of succe But as regards the second, the Court found that "in respect that the substi in said disposition is not in favour of his own heirs whatsoever, but in favo the heirs whatsoever of Mr Robert Boyd, his father, which might have different from the heirs whatsoever of the son, that the pursuer, as heir o to the father, was entitled to take as heir of provision called by said sub tion." This decision laid down the principle that where a destination o kind is to the heirs whatsoever of a third party, and where that third takes no right of fee, the construction is the heir of line, and not the conquest, even although the lands may have been conquest in the person disponer. In the case of Miller the property was held in trust for the p of being conveyed to William Miller and his heirs and assignees what William Miller predeceased the time at which the conveyance was to be and no right vested in him. The heir of line was preferred to the heir quest as the party designed by the term "heir whatsoever."

Neither of these cases is precisely on all-fours with the present. Here dealing with a case in which the disponer calls his own heirs whatsoeve case of Robison comes much nearer. Lands were disponed by a post contract to the longest liver of the spouses in liferent, and in fee to grandc the heirs of their bodies and their assignees, whom failing, one-half to th whatsoever of each of the spouses. One of the grandchildren having s the spouses, but having died in pupillarity, it was held, in a competition b the heir of line and the heir of conquest of the husband, that the heir must be preferred.

That case comes exceedingly near the present. A distinction between t of Robison and this has been pointed out by Mr Keir. In the case of R the conveyance was to the spouses in liferent and the grandchildren in fe failing grandchildren, to the heirs whatsoever of the respective spouses. was no conveyance of the fee either to the husband or wife. In the pres William Ross conveyed the estate in the first place to himself and the he of his body. The distinction in point of fact exists, but I am unable to difference in the law applicable to the case. I look upon the case of Rob a direct authority for the decision of the present case, and I am ther opinion that the petition of Mr Munro Ross should be dismissed.

LORD DEAS, LORD ARDMILLAN, and LORD JERVISWOODE concurred.

Andrew Gildart Reid moved that the case should not be tried b but a proof should be allowed before one of the Judges. It was that the proof would be chiefly documentary and of an intricate an cult character, and that a jury would be apt to go wrong.

At advising,—

LORD PRESIDENT.—This case does not differ from other cases of pe We are told that there is much documentary evidence, but so there is i cases of pedigree. It is said that there is a great deal of evidence to be abroad, but that does not appear to me to affect the question whether th should be tried by jury or not. I do not dispute that it would be con for us to send this case before the Lord Ordinary without a jury. I find of More,[1] 9th July 1870, in which proof was taken before one of the Ju the Second Division. The question is one of propriety and convenience. tainly the practice has been, except in a particular class of cases, to sen cases to a jury. We have all had experience of them, and I do not thin

[1] 7 S. L. R. 623.

tribunal has been found unsuitable. I quite understand that cases like the No. 108.
dalbane case[1] and Livingstone v. Fenton,[2] would be unsuitable to send to a
; from the peculiar nature of the questions which they involved. But this May 30, 1873.
mply a question of propinquity, and I do not see that the fact of there being Mackintosh, &c. v. Ross.
several issues to be sent to the jury ought to create any inconvenience.

ND DEAS.—The great advantage of trial by jury is, that the verdict fixes
matter of fact which otherwise would be open to controversy in this Court
in the House of Lords. This is a question of pedigree, and consequently a
tion of fact, and I think we ought to follow the ordinary practice, which
seen to send such cases to a jury, and from which practice it is not alleged
any miscarriage or inconvenience has arisen.

e other Judges concurred.

THE COURT dismissed the petition of W. M. Ross, and appointed the other petitioners to lodge issues.

& A. INGLIS, W.S.—GEORGE WILSON, S.S.C.—HUNTER, BLAIR, & COWAN, W.S.—STUART & CHEYNE, W.S.—Agents.

JOHN SMITH (Robertsons' Factor) and MISS ISABELLA CAMPBELL, Petitioners.— *Watson—Readman.* No. 109.

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imentary Provision — Discharge — Judicial Factor— Trust. — By trust-
ment an annuity was directed to be paid, and was declared to be alimen-
nd "not assignable for causes onerous or gratuitous, and not subject to
ment or other legal diligence, and not subject to the debts or deeds" of
onee. A judicial factor, who was appointed on failure of the trustees, car-
out all the purposes of the trust except two. These were payment of the
ity and handing over the estate to the residuary legatee. The judicial fac-
he annuitant, and the residuary legatee came to an agreement that the
uary legatee should grant a personal bond for payment of the annuity to
nnuitant, who was to grant a discharge to the judicial factor, and that the
estate should be wound up and the residue paid over to the residuary
ee. The judicial factor presented a petition praying for exoneration and
arge on this arrangement being carried out. *Held* that the annuitant had
ower to grant a discharge of the alimentary provision, and petition refused.

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)HN SMITH, judicial factor on the trust-estate of the late Misses
rtson, presented a petition, with concurrence of Miss Isabella Camp-
the residuary legatee on that estate, praying the Court for authority to
e up a title to certain heritable subjects, and to convey the trust-estate
iss Isabella Campbell, and upon that being done that the petitioner, as
r, should be discharged. The petition set forth,—By trust-disposition
settlement, dated 2d December 1848, Misses Mary Robertson, Eliza-
Robertson, and John Robertson, Largs, gave, granted, assigned, and
ned to themselves, and the survivors of them, their whole estate,
able and moveable; and, on the death of the survivor of them, they
by disponed, assigned, and conveyed to Mungo Campbell, Esq.,
r, merchant in Glasgow, and various other persons therein named,
either predeceased the survivor of the testators (the said Miss John
rtson) or declined to accept and act, as trustees, for executing the
thereby created, the whole heritable and moveable, real and personal
e which might belong to them, or either of them, at the time of the
h of the survivor of them, in trust for the purposes therein written,
payment of certain annuities and legacies; and, lastly, the trustees
thereby directed and appointed, after fulfilment of the other pur-

[1] June 26, 1866, *ante*, vol. iv. 867. [2] Nov. 25, 1853, 16 D. 104.

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poses of the trust, to dispone, assign, pay, and make over to M Campbell, merchant in Glasgow, and his heirs, the residue and rem of their means and estate, whether heritable or moveable.

Miss John Robertson, who was the last survivor of the said testators, died on or about 16th January 1861, and the trust creat the trust-disposition and settlement and codicils then came into tion. Of the trustees named in the trust-disposition the only on accepted office and intromitted with the trust means and estat Mungo Campbell junior, who in the course of his management pai handed over to the beneficiaries legacies and bequests to the amoun value of £5000 or thereby. Mr Campbell, the residuary legatee, ceased Miss John Robertson. The concurring petitioner, Miss Is Anne Hay Janet Campbell, was his only surviving child and hei thus the party entitled to the residue and remainder of the trust-e Mr Mungo Campbell junior, the only accepting trustee, having di 20th December 1866, the Court, upon a petition presented by the curring petitioner, Miss Campbell, on 25th March 1867, appointed the tioner, John Smith, to be judicial factor upon the trust-estate of M Robertson. The purposes of the trust, so far as unfulfilled, consist (1) the payment of an annuity of £100 to Miss Helen Campbell; (2 payment of the annual interest of £500 to Miss Helen Campbell yearly during her lifetime, and upon her death the payment of the cipal sum to the concurring petitioner, Miss Isabella Anne Hay Campbell; and, lastly, the payment to the said petitioner of the residue and remainder of the estate. These sums were payable und following clauses in Misses Robertson's trust-settlement :—

"Fourthly, for payment of an annuity to the said Helen Campb £100 during her lifetime, commencing the first half-yearly paym the first term of Whitsunday or Martinmas after the death of the vivor of us for the half year preceding, and so forth half-yearly termly thereafter during her lifetime. Fifthly, for payment to th Helen Campbell of . . . . and the annual interest of a sum of £5 the event of her brother, the said Mungo Campbell, predeceasing (an event which happened), "payable at the first term of Whitsund Martinmas occurring six months after the death of the survivor o . . . . and continuing the payment of the said interest of £500 yearly and termly during her lifetime; . . . . and we direct and ap our said trustees or trustee to set apart or lend out, upon heritable or sonal, or such other security as to them or him may appear satisfac such sum or sums out of our means and estate as will yield to the Helen Campbell the foresaid annuity of £100, ... and to take rights and title-deeds of the said securities in name of the said truste trustee, themselves or himself, in trust for payment of the said a ties, during their respective lives, of the said Helen Campbell, ... thereafter for payment of the principal sums so secured to the Mungo Campbell and his heirs and successors in fee: Declaring al that the trustees or trustee shall have power, if they see fit and required by the said Mungo Campbell, to purchase from any respon life assurance company annuities of the foresaid amounts in favo the said Helen Campbell, ... instead of investing a sum to yield said amount as above; and we further direct and appoint our truste set apart . . . . £500 in liferent for her (Helen Campbell's) use allen . . . . And it is hereby specially declared that the said annuities of to the said Helen Campbell, ... and the said contingent lif interests in the sum of £500 provided to the said Helen Campbell all purely alimentary provisions in favour of the said Helen Cam

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. . and not assignable for causes onerous and gratuitous, and not sub- to arrestment or other legal diligence of the creditors of any of them, l not affectable by the debts or deeds of any of them."

By discharge, dated 9th November 1872, Miss Helen Campbell exonered, mitted, and discharged the judicial factor, and the estate of the Misses bertson, of the annuity of £100, and of her right during her lifetime to annual interest of the sum of £500, and of all other claims and demands petent at her instance against the judicial factor. The discharge pro- ded on the following narrative:—"And further considering that all purposes of the said trust-disposition and settlement have now been filled, excepting the payment of the foresaid annuity of £100, and the erest of the said sum of £500, to me, and the payment of the residue the said Isabella Anne Hay Janet Campbell; that the said judicial tor has expressed a desire that the trust be now closed and himself and trust-estate finally discharged, and that for that purpose, instead of chasing an annuity from a life assurance company, or of a certain sum money being set apart and invested in the name of the said judicial tor to meet my foresaid annuity and the interest on the said sum of 00, it has been arranged between the said judicial factor, the said bella Anne Hay Janet Campbell, and myself, that the said sum of 00, and the whole residue of the said trust-estate, be now disponed and l over to the said Isabella Anne Hay Janet Campbell, as legatee and duary legatee foresaid; that she should grant in my favour a per- al bond of annuity for the sum of £125, consisting of the foresaid uity of £100 and £25, the agreed on fixed sum at the rate of 5 per t as the interest of the said sum of £500; and that I should discharge said trust-estate of the said annuity and interest, and the said judicial tor thereof, and of all the obligations thereanent contained in the said t-disposition and settlement."

A personal bond was accordingly executed by the residuary legatee, aining, *inter alia*, a declaration in similar terms to the trust-deed that annuity should be strictly alimentary, &c.

The petitioner further stated,—"As the whole purposes of the trust ted by the said trust-disposition and settlement by the said Misses rtson, and codicils thereto, have now been satisfied or discharged, the exception, as before-mentioned, of the payment to the concurring ioner, Miss Campbell, of the sum of £500 liferented by the said Miss n Campbell, and of the whole residue and remainder of the estate, it been arranged between the petitioner, John Smith, as judicial factor said, and the concurring petitioner, Miss Campbell, that the factor close the factory by completing a title to the said property at . . . . and conveying and paying over the same, and the residue remainder of the estate, to the concurring petitioner, Miss Campbell, tisfaction of her claim to the said sum of £500 liferented by the Miss Helen Campbell, and to the residue and remainder of the e, and that on his doing so he shall be discharged of his office."

The Lord Ordinary pronounced an interlocutor by which he authorised ctor to complete a title to the heritable and moveable estate, and, e disposing of the prayer of the petition remitted to Mr Ralph Dun- W.S., to inquire into the facts, and to Mr William Ross, C.A., to ire into the petitioner's accounts.

Mr Dundas gave a detailed report on the trust-estate, and concluded port as follows:—"Subject to these observations, and if your Lord- shall be of opinion that the bond of annuity granted in favour of n Campbell by the residuary legatee is a sufficient substitute for the ection of the trust, the reporter begs to report to your Lordship that,

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in his opinion, the whole prior purposes of the trust have been fu and the concurring petitioner, Miss Campbell, is the proper per have the whole residue made over to her, and that there appears to reason why that should not be done now, and the trust at once and the bond of caution delivered up in the event of the judicial accounts being found correct."

Thereafter the Lord Ordinary pronounced this interlocutor:— Lord Ordinary having resumed consideration of the petition and pr ings, with the report by Mr Ralph Dundas, W.S., on the petitione plication for authority to the petitioner, John Smith, as judicial foresaid, in terms of the second branch of the prayer of the petit convey to the concurring petitioner, Isabella Anne Hay Janet Ca the whole residue of the trust-estate, and thereupon, in terms of th branch of the prayer of the petition, for discharge of the petitioner Smith, as judicial factor foresaid, of his whole intromissions and m ment, and for an order for delivery to him of the bond of caution g by him and his cautioner, refuses the application for authority fo and for discharge, and dismisses the petition, and decerns." *

* "NOTE.—The Lord Ordinary, by interlocutor of 23d December last, g authority to the petitioner, Mr Smith, as judicial factor, to complete titles person to the various heritable subjects belonging to the trust-estate of th Misses Mary, Elizabeth, and John Robertson, on which estate the petitio March 1867 was appointed judicial factor after the death of Mr Mungo bell junior, the only trustee who accepted of the trust created by the tru position and settlement of the late Misses Robertson; and at the same before disposing of the prayer of the petition otherwise, remitted to Mr Dundas, W.S., to inquire into the facts and to report, and to Mr William C.A., Edinburgh, to report as to the petitioner's accounts with a view to h taining a judicial discharge.

"The petitioner has not proceeded with the remit to Mr Ross, but a by Mr Dundas has been lodged, by which, with reference to the position trust-estate, the question is raised whether the petitioner, Mr Smith, i position in which he is entitled now to wind up the estate finally as pro and is thereupon entitled to be discharged of his whole actings and int sions. The Lord Ordinary, after having made avizandum with Mr Dund port, intimated to the petitioner his opinion that the application could n granted in the present state of the trust, and thereafter, at the petitione quest, heard counsel in support of the application. Farther consideration application has, however, confirmed the Lord Ordinary in his original vie he has therefore refused the application.

"The purposes of the trust created by the trust-disposition and sett have all been executed with the exception of the payment and conveyance residue, and the payment of an annuity of £100, and the interest of a f sum of £500, to Miss Helen Campbell, who is still in life, and which th tees were directed to pay to her during her lifetime.

"The residue of the trust-estate was appointed to be paid and conveyed fulfilment of the other purposes of the trust' (which included the paym debts and various legacies and annuities) to Mungo Campbell, the nephew trusters, and his heirs. The concurring petitioner, Miss Isabella Anne Janet Campbell, the surviving child of Mr Mungo Campbell, the residuary tee, who predeceased the trusters, has right to the residue of the trust and, subject to the observation made by Mr Dundas in his report as to h taining service and confirmation to her late brother, she would be entitl payment and conveyance of the whole residue of the trust-estate, if the purposes had been entirely fulfilled.

"The provisions in favour of Miss Helen Campbell are contained in the and fifth purposes of the trust, and are thus expressed:—'Fourthly, for pa of an annuity to the said Helen Campbell of £100 during her lifetime

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The petitioner reclaimed, and argued;—The beneficiaries are entitled to enter into the arrangement they propose. All the cases where the Courts

mencing the first half-yearly payment at the first term of Whitsunday or Martinmas after the death of the survivor of us, for the half year preceding, and so th half-yearly and termly thereafter during her lifetime. Fifthly, for payment the said Helen Campbell of a further legacy of £500, and the annual interest the further sum of £500 in the event of her brother, the said Mungo Campll, predeceasing her, payable at the first term of Whitsunday or Martinmas occurg six months after the death of the survivor of us, if he should predecease us, d failing his predeceasing us, at the first term of Whitsunday or Martinmas occurg six months after his death, and continuing the payment of the said interest £500 half-yearly and termly during her lifetime.' On the death of the ther, Mungo Campbell, Miss Helen Campbell received payment of the legacy £500 mentioned in the fifth purpose of the trust, and became entitled to the erest half-yearly of the further sum of £500 there mentioned. The deed ther contains directions to pay annuities of £80 each to Elizabeth and therine Munro, and a direction and appointment to the trustees to set apart d lend out, upon heritable, or personal, or such other security as to them may pear satisfactory, such sum or sums as will yield to the different annuitants e amounts of their annuities, and to take the rights and title-deeds of the secuies in name of the trustees, in trust for payment of the annuities during the pective lives of the annuitants, and thereafter for payment of the principal es to Mr Mungo Campbell and his heirs and successors in fee: Declaring t the trustees should have power, if they saw fit and were required by Mr mpbell, to purchase from any responsible life assurance company annuities of foresaid amounts in favour of Miss Helen Campbell and the other annuitants ve named, or any of them, 'instead of investing a sum to yield the said unt as above.' There is a similar provision in the deed for setting apart a m of £1000, and lending and securing the same in name of the trustees, for yment, *inter alia*, of the liferent interest of £500 which now subsists in favour Miss Campbell.

"The deed further contains this important clause,—'And it is hereby specially ared that the said annuities of £100 to the said Helen Campbell, and of £80 h to the said Elizabeth and Catherine Munro, and the said contingent life-t interest in the sum of £500 provided to the said Helen Campbell, are all ely alimentary provisions in favour of the said Helen Campbell and Elizah and Catherine Munro respectively, and not assignable for causes, onerous or ituitous, and not subject to arrestment or other legal diligence of the creditors y of them, and not affectable by the debts or deeds of any of them.'

"The petitioner and concurring petitioner have produced with the applica a discharge by Miss Helen Campbell, dated 9th November 1872, by which, the narrative, *inter alia*, that she had obtained a personal bond by the conring petitioner, Miss Isabella Anne Hay Janet Campbell, in her favour for annuity of £125, she has discharged the judicial factor and the trust-estate the foresaid annuity of £100, and of her right to the interest or liferent of said sum of £500. With reference to this discharge, it is stated in the peti that the whole purposes of the trust have now been satisfied or discharged, epting the conveyance of the residue, and that it has been arranged between petitioner, and the concurring petitioner, Miss Campbell, that the factor shall the factory, convey the residue of the estate to the concurring petitioner, l be discharged of his office,—and the authority of the Court is asked for carg out this arrangement, to be followed by a judicial discharge of the whole ings of the judicial factor.

"The Lord Ordinary is of opinion that the arrangement which the Court is ed to sanction is in violation of the trust, and cannot be granted. The Court not asked to approve of any security being granted for the payment of Miss len Campbell's annuity. But even if an appication for such approval had n presented the Lord Ordinary is of opinion, notwithstanding the general wer conferred on the trustees to lend out the necessary sum 'upon heritable

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have held that such an arrangemont was illegal have been questions between husband and wife, and the *ratio decidendi* was that the wife's interest must be protected. A testator who leaves an alimentary provision to a person whom he is under no obligation to aliment cannot prevent the annuitant from refusing the gift. The proposed arrangement is a reasonable one, and should be sanctioned by the Court. The trustees would have been able to make such an arrangement with the concurrence of the beneficiaries, and the judicial factor has the same power. The testators shewed that they contemplated that the trust should be brought to an end before Miss Campbell's death, by allowing the trustees to purchase an annuity for her.[1]

At advising,—

LORD PRESIDENT.—The petitioner, John Smith, is judicial factor upon the trust-estate of three old ladies, who died some time ago leaving considerable means. The person who concurs in the petition is Miss Isabella Campbell, the residuary legatee, and also a special legatee to a considerable extent. The condition of the estate is such that the only other beneficial interest now remaining is that of a certain annuitant, Miss Helen Campbell, who is entitled to an annuity of £100 a-year out of the estate, and to the annual interest of a sum of £500. What the petitioner proposes to do is to wind up the trust after making

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or personal, or such other security as to them may appear satisfactory,' that the Court would not authorise a judicial officer to accept of a mere personal obligation by the residuary legatee as a satisfactory security.

"The position maintained by the judicial factor and the residuary legatee that Miss Helen Campbell might have discharged her rights, if she had thought fit, gratuitously, and that her rights under the deed have been validly and effectually discharged by an arrangement satisfactory to her, so that nothing remains to be done except to dispose of the whole residue, as directed by the trust-deed. Had the case been one of a fee burdened by a simple liferent the view thus maintained would have been unquestionably sound, but if the arrangement founded on is to receive effect the important clause of the trust-deed last quoted, by which the provisions in favour of Miss Helen Campbell are declared to be purely alimentary, not assignable for causes onerous or gratuitous, nor subject to arrestment or other legal diligence, and not affectable by her debts or deeds, will be simply treated as of no effect whatever. Under this clause it appears to be obvious that an assignation by Miss Helen Campbell of her right to the annuity would be ineffectual, but a discharge in favour of the residuary legatee is just an assignation to her of the annuitant's right, and is in the opinion of the Lord Ordinary one of the deeds by which it is declared in terms that the right to the annuity shall not be affectable.

"It was pleaded for the petitioners that Miss Helen Campbell might decline to receive her annuity from time to time if she thought fit, and that in the same way she must be entitled to renounce the right itself; but the Lord Ordinary is of opinion that the right to discharge the provision entirely does not result from the power, which no doubt the annuitant has, to refuse to take each half-yearly payment as it falls due.

"The application, so far as the Lord Ordinary is aware, is novel. It is not said that any precedent at present exists in the law for the discharge of alimentary rights granted as in the present case, and if the present application were successful it appears to the Lord Ordinary that serious and important results might follow in the case of many existing trusts. The authorities appear to the Lord Ordinary to be against the contention of the petitioners—Rennie v. Ritchie, 25th April 1845, H. of L., 4 Bell's App. 221; Balderstone v. Fulton, 23d January 1857, 19 D. 293; Martin v. Bannatyne, &c., 8th March 1861, 23 D. 705.

[1] Paterson v. Paterson, Jan. 26, 1849, 11 D. 441; Lewis v. Australian, June 11, 1852, 14 D. 857, Dec. 15, 1852, 15 D. 260; Ramsay's Trustees v. Ramsay, Nov. 24, 1871, *ante*, vol. x. 120.

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for payment of these annuities. The provision which he proposes to that Miss Helen Campbell shall grant a discharge to the judicial factor, Miss Isabella Campbell shall grant a bond of annuity in favour of Miss umpbell, proceeding on the provision which the trusters made in her . the trust-settlement. Now, if this had been a simple annuity, and the security of Miss Isabella Campbell had been sufficient, there might n no legal objection to the arrangement. But the annuity provided in ment is of a peculiar kind, and it is necessary to see if the proposed ent is not in violation of the intention of the trusters. The settlement in the 4th head—(*Reads 4th head of settlement*). Then there is the . of £500—(*Reads 5th head of settlement*). Then there is the provi- if the trustees see fit they are to purchase an annuity. And, lastly, special declaration that the annuities are purely alimentary provisions, t assignable for causes onerous or gratuitous, and not subject to arrest- other legal diligence of the creditors of any of them, and not affectable lebts or deeds of any of them." In short, by this clause both the f £100 and the life interest in the £500 are declared to be alimentary ost stringent terms. This indicates a most serious desire on the part of ers that Miss Helen Campbell should be restricted during her lifetime nentary provision, and we must take care that she should not be liber- this restriction. It was suggested that, as the trustees have power to an annuity from an insurance company, it is to be inferred that the lid not intend that the trust should be kept up for ever. But if the ad exercised this power they would have been bound to take the an- der the same restraint as in the trust-deed. But even if the judicial d the same power of purchasing an annuity as the trustees he could ise that power now. The trustees were not authorised to purchase the unless called upon by Mr Campbell, and he is now dead; so that there ver in the deed to authorise the purchase of an annuity.

ubt the bond of annuity repeats the alimentary clause of the trust- t, and that clause might be effectual. But the bond of annuity does the same security as the existence of the trust. The existence of the not be put an end to except by the carrying out the purposes, and so he annuity remains payable the trust must subsist. But what security that the bond may not be cancelled, and the whole provision made in- ? I think that it would be a violation of the trust purposes to put it ower of these two ladies to dispense with the provision. I therefore t the Lord Ordinary is right in refusing to sanction this arrangement.

DEAS.—The testators in this case were three old ladies, who conveyed ite to trustees to be distributed in a certain way, to take effect on the the last survivor of them. Among these purposes was a direction to cified annuity to Miss Helen Campbell during her life, with a certain t addition, which, for brevity, may be conveniently included in the erm annuity, specially declared to be a purely alimentary provision, ignable for causes onerous or gratuitous, and not subject to arrestment legal diligence" of her creditors, and not affectable by the annuitant's leeds. Then there is an express direction that the trustees shall lend out t capital sum on heritable, or personal, or other satisfactory security, and he rights and securities thereof in their own names, as trustees, for pay- the annuity, and thereafter for payment of the principal sum to Mr ampbell, the residuary legatee, and his heirs and successors in fee, with ative power that, if required by Mr Campbell, they might purchase an f corresponding amount from any responsible life assurance company. these conditions are perfectly clear and explicit. The question, there- es to be, whether, when a testator makes a gratuitous provision in this a legatee, the conditions on which alone the provision is given can be by the legatee with consent of the person on whom the testator has con- s ultimate residuary interest?

uction a view of that kind would, I think, be inconsistent with prin-

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ciples recognised in our law and practice from the earliest period,—nam
that the donor may attach to his gratuitous legacy any lawful cond
thinks proper; and, second, that it is a lawful condition to restrict th
of the legatee in the way which has been done here for the benefit of th
himself or herself as the case may be.

The legacy must be taken under the condition on which it is given, or
altogether. It is for the interest of the party intended to be favoured
should be so, for if the law were understood to be otherwise the lega
very often not be given at all. To a prodigal son, for instance, a fath
feel it better to leave nothing than to bequeath what he knew would
in riot and dissipation.

In many other cases the principle is equally advantageous, and it is f
recognised by conveyancers, and carried out in our practice. A child n
weak intellect and easily imposed upon, although neither addicted to
prodigality, and consequently liable to be reduced to poverty in the ab
any such restriction. A married woman may be known to have a v
husband, on whom, from blind affection, she would be likely to beste
thing which had been left to her from personal regard for herself. In t
many other cases parties may require to be protected against themselv
the law cannot practically ascertain and discriminate between the p
circumstances of each case, and consequently the rule must be general t
conditions shall be recognised as lawful, and receive effect wherever
conceived in the appropriate form.

This has been done here by the instrumentality of a trust. I am
pared to say that, as in a question with creditors, it could be done in a
way. The trustees are directed to keep up that trust. It is now pro
substitute for the trust a personal bond of annuity by the representativ
residuary legatee, deceased, which the reporter, Mr Dundas, states he l
and that it embodies all the alimentary clauses contained in the tr
Upon the narrative of an arrangement that some such bond should be
Miss Campbell has executed an extrajudicial discharge of the trust in f
the judicial factor. That discharge bears that all this had been done a
sire of the judicial factor. If that narrative be correct the judicial fa
misapprehended his duty, and he has at all events proceeded adventu
obtaining these deeds without first coming to the Court for authority t
them, which would have been the proper course even if the truste
have had a discretionary power to obtain them, which they would n
trust-deed is not printed, and its terms are not fully and satisfactorily s
in the petition. But on attending to them it is clear that even the
would not have been entitled to substitute a personal bond by the r
legatee for the deeds of security in favour of themselves prescribed by th
deed, and we cannot authorise a judicial factor to exercise discretionary
which the truster did not confer on the trustees appointed by himself.
over, I am by no means satisfied that the purpose which the truster
view would be equally secured by a bond in the proposed terms in favou
annuitant. On the contrary, I am disposed to concur with the observa
the reporter on this point, and to hold that if the prayer of this petiti
granted the truster's purpose might be altogether defeated, which just ab
danger of taking away the protection which the truster himself wisely pr

LORD ARDMILLAN and LORD JERVISWOODE concurred.

THE COURT pronounced this interlocutor:—"Adhere to the
locutor, except in so far as it 'dismisses the petition, and d
Recall that part of the interlocutor, and remit to the Lor
uary to consider whether any and what part of the trus
may now be conveyed or made over to Miss Isabella C
the residuary beneficiary, consistently with maintaining the
a security for the alimentary provisions in favour of Mis
Campbell."

C. & A. S. DOUGLAS, W.S.—Agents.

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June 3, 1873.
Girdwood v. Paterson.

ROBERT GIRDWOOD, Pursuer.—*Sol.-Gen. Clark—Balfour.*
RGE PATERSON and ELIZABETH PATERSON, Defenders.—*Marshall —Mair.*

erty—Boundary—Proof of Possession—Condition—Singular Successor.

858 the owners of a shop, who were tenants of the sunk flat below, d, from the owner of the sunk flat, permission to enlarge their shop win- lowering the sill, whereby the window of the sunk flat was diminished on condition that on demand the latter window should be restored to its state. The owners of the shop sold their property in 1867.

n action raised against the purchaser by the owner of the sunk flat to s window restored to its former condition, *held* that the purchaser's right extend beyond the boundary of his property, and that as the titles of jects did not define the boundary between the flats, it fell to be deter- by the possession of the defenders' authors under their title as proprietors hop.

1ST DIVISION. Ld. Ormidale. B.

present action was raised by Robert Girdwood, proprietor of a at in Bank Street, Edinburgh, concluding that the defenders, G. and rson, proprietors of the shop above, should be ordained to restore dow of the said flat to the size, height, and level in which it was year 1858, when the pursuer permitted D. & P. Mackinlay, then tors of the shop and tenants of the sunk flat, to alter the window hop by lowering its sill and enlarging it so as to encroach on the r of the pursuer's premises, &c.

following narrative is taken from the note of the Lord Ordinary :— roperty both of the pursuer and of the defenders forms part of mer tenement fronting the Lawnmarket and Bank Street, Edin- erected by Andrew Irving. The defenders' property consists of the nd back shop No. 1 Bank Street, which was conveyed by the rates and Town Council, and Andrew Irving, to George Strachan,), and which has been transmitted to the defenders by a regular s of titles. The pursuer's property consists of the shop No. 2 Bank and also of the dwelling-house or tavern, with cellarage and nts forming the ground flat or sunk storey situated under the f the said tenement, with certain exceptions, and entering from ay's or Morocco Close. The pursuer acquired these subjects in In 1858 Peter Mackinlay, a partner of the firm of D. & P. Mac- general drapers and outfitters, was proprietor of the shop No. 1 treet, and the firm of D. & P. Mackinlay were tenants of the said o. 1 Bank Street, and also of the pursuer's shop No. 2 Bank Street, und flat or sunk storey, under a lease for ten years from Whit- 1858. The level of Bank Street had been lowered by the Im- ent Commissioners, and the window of the shop No. 1 Bank Street ; well suited to show off shop goods. But it could not be lowered arged without encroaching upon the window of the room in the 's ground flat, which was situated immediately below the shop r. This window, as is proved, was originally constructed in the all of the tenement, which is two feet six inches or thereby thick, the top thereof was fifteen inches or thereby above the level of r of the shop No. 1 Bank Street. In these circumstances the firm P. Mackinlay applied in 1858 to the pursuer, their landlord, for nission to encroach upon his window and room in the ground flat, they might enlarge the window of the shop No. 1 Bank Street, ng it nearer the level of the street. The pursuer consented there- the condition, as is clearly proved, that his window should be to its original height and position in the front wall of the tene-

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ment whenever he should require this to be done. Upon this condition the firm of D. & P. Mackinlay enlarged the window of their shop No. 1 Bank Street, by taking fifteen inches off the height of the pursuer's window, and extending their shop window downwards so as to include within their shop window the said fifteen inches, and the space behind the same, which was part of the pursuer's ground flat.

"In the year 1864 Messrs D. & P. Mackinlay proposed to the pursuer that Mr Stark, ironmonger, should become the tenant of his shop and ground flat. To this the pursuer consented, and an agreement was entered into, which was signed by D. & P. Mackinlay, whereby it was provided 'that if necessary Mr Stark must give every facility to Messrs Girdwood and Mackinlay to alter the window of No. 1 Bank Street when required.' A lease of the said subjects for ten years from Whitsunday 1865 was thereupon granted by the pursuer to Mr Stark, in which a similar provision was inserted.

"Thereafter in 1867 the pursuer raised an action against the firm of D. & P. Mackinlay, and against Peter Mackinlay, for the purpose of obtaining decree ordaining them to restore his window to its former height and position, and interdicting Peter Mackinlay as proprietor of the shop No. 1 Bank Street from selling or disponing the same until the pursuer's window should be restored. Inhibition was raised on the dependence of this action, which was executed on 3d and recorded on 17th May 1867. The pursuer obtained decree in absence in this action on 24th February 1871. On 25th February 1867 the defenders' predecessor, John Stevenson, purchased the shop No. 1 Bank Street, conform to missives of sale interchanged by him and Peter Mackinlay of that date, and his title was completed by disposition dated 31st May, which, with warrant of registration, was recorded in the Burgh Register of Sasines on 30th September 1867. The defenders purchased and acquired the said shop from Stevenson, conform to disposition, dated 13th and recorded in the Burgh Register of Sasines on 20th May 1870." There was no mention of the obligation in favour of the pursuer in either of the dispositions or on the records.

The pursuer pleaded;—(1) The permission given by the pursuer to make the alterations on the window of the shop No. 1 Bank Street, and thereby to encroach upon and take a portion of the pursuer's window having been given on the condition and understanding that the pursuer's window was to be restored to its original height or level whenever the pursuer required it, and the defenders having refused to restore it, the pursuer is entitled to decree in terms of the first conclusion of the summons.

The defenders pleaded;—(3) It is incompetent for the pursuer to prove excepting by writ, that any part of the shop No. 1 Bank Street, as now possessed by the defenders or their tenants, is the property of the pursuer. (4) The pursuer cannot prove, excepting by writ or by the defenders' oath, the agreement which he avers to have been made to restore the window to its alleged original level. (5) Assuming the agreement in question to be set forth in the letter of D. & P. Mackinlay,* quoted in article 5 of the condescendence, the only claim competent to the pursuer is one for "reasonable compensation" against the sequestrated estates of D. & P. Mackinlay and the said Peter Mackinlay. (6) The action of April and

* "29th August 1865.—Dear Sir,—In reference to the window of our shop No. 1 Bank Street, the window of which you permitted us to lower, taking a portion from the window of your premises beneath, we of course agreeing, when you required us, to raise it to the original level, or a reasonable compensation.—We are, dear sir, yours respectfully, D. & P. MACKINLAY."

ibition of May 1867 have no bearing upon the acquisition of Mr Stevenson, in respect that his purchase thereof was com- 5th February 1867. *Separatim*, the inhibition became ineffect that no decree was obtained in terms of the conclusions of

Further, it was an inappropriate diligence, *quoad* the *ad standum* and interdict conclusions said to have been contained nons. (7) The pursuer having permitted the defenders' authors nd occupy said shop in such manner as to lead the public and ers to believe that their right of property was co-extensive possession, and the defenders having in said belief (which was icted by the titles), purchased and paid for the said shop, the arred from insisting in the present action against them.

s of both properties contained no description of the boundary em, and no reference to the obligation to restore the window.

. Ordinary, after a proof, pronounced an interlocutor finding— n the year 1858 the pursuer was proprietor of the shop No. 2 t, Edinburgh, and of the ground flat or sunk storey of the tenening from Galloway's or Morocco Close, with certain exceptions, ester Mackinlay, a partner of the firm of D. & P. Mackinlay, . outfitters, was proprietor of the shop No. 1 Bank Street, confront and back shop; (2) That the said firm of D. & P. Mac- tenants, in 1858, of the whole foresaid subjects, their lease of r's subjects being for ten years from Whitsunday 1858; (3) ursuer consented, in or about the year 1858, to the alteration firm of D. & P. Mackinlay upon the window of the room in flat or sunk storey, which is situated below the shop No. 1 t, Edinburgh, which now belongs to the defenders, upon the at the said window should be restored by the said D. & P. Macs original size and position in the front wall of the tenement e should require this to be done; (4) That the said alteration l immediately, or soon thereafter, upon the said condition, for of enlarging the window of the shop No. 1 Bank Street; and executing the said alteration fifteen inches were taken from he pursuer's said window, and that the window of the shop Street was proportionally enlarged: Finds that Peter Macof the partners of the said firm, and proprietor of the shop Street, never acquired any right as heritable proprietor to the he pursuer's foresaid window and ground flat or sunk storey, nder the foresaid agreement and condition been encroached e purpose of enlarging the window of the said shop, and that rs, as the singular successors of the said Peter Mackinlay red right thereto: Finds that the pursuer is entitled to have of his ground flat or sunk storey altered and restored to the , and level in the front wall of the tenement in which it was, the year 1858, previous to the foresaid alteration, and derves consideration of the question whether the said restoration nade at the expense of the pursuer, or at the expense of the nd appoints the cause to be put to the roll, with a view to edure." *

(After the narrative above given the Lord Ordinary's note pro-:—"Such being, as the Lord Ordinary conceives, the facts estabe proof, he is of opinion that the pursuer is entitled to have the is room below the defenders' shop restored to its former size and he front wall of the tenement. Neither Peter Mackinlay nor the his successors ever acquired right to that portion of the pursuer's

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The defenders reclaimed;—There was no direct authority question of this kind as to the boundary between an upper a tenement. We must look at the position of the parties at the ti conveyance by Stevenson to the defenders; and that dispositio the subjects as described in the disposition by P. Mackinlay to that described them as possessed by Mackinlay's firm. T nothing in Girdwood's title to shew that he ever had a right to in question.

At advising,—

Lord President.—The interlocutor of the Lord Ordinary gives a exhaustive account of the facts of the case, and I am of opinion tha inference his Lordship has drawn from the facts is a correct one. assumed from the circumstances before us that the arrangement betwe suer and the Mackinlays in 1858 was entered into for the purpose light to the shop. That was more necessary then than afterwards, level of Bank Street had been lowered in consequence of the operati Improvement Commissioners. There is distinct evidence that in 1858 tion was made by the Mackinlays when they were occupants of both and the sunk floors. This could only have been done with the cons proprietors of both. We have evidence that it was done with such co that a very natural condition was added, viz., that whenever the pursue the window in his premises should be restored to its former size, l level. Now, it is said that the defenders, as singular successors, are by that arrangement. Certainly that is so; but that is not the f question before us. The question is whether that part of the buil which the alteration was made is the property of the pursuer or of the If the titles settle that question we can look no further. But then t settle that. They only tell the length and breadth superficially, an former possession. It might be said that we do not require to have t dary—the boundary between the upper and lower floors—set forth, b joists are there the natural boundary. Here, however, there is n boundary, because the property of the lower proprietor now exte inches above that natural boundary, and formerly extended above it t extent. The boundary, therefore, is undefined, and where a necessity determining such a boundary I know of no mode of doing so except b possession. The question turns into a case of disputed boundary, j march fence had been removed. That being so, I am of opinion that is quite clear, and that the Lord Ordinary's judgment is correct.

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window and ground flat into which the window of the shop No. 1 B had been extended by the firm of Messrs D. & P. Mackinlay with th consent under the temporary agreement between them. Peter Mac quired right to, and was infeft in, the shop No. 1 Bank Street, pre stood when conveyed in 1800 to George Strachan, the disponee of t trates and Andrew Irving. He never had, and neither he nor his Stevenson could convey, any right of property in that part of the te which the pursuer's window was originally constructed, and in wh situated previous to the temporary alteration by D. & P. Mackinlay. perty thereof, and right thereto, belonged to and remained vested in th and he is entitled to vindicate the same. It is proved that the dimi the window seriously affects the light of the pursuer's low room, and portion of the tenement in question which originally was included in a part of the pursuer's low room is of considerable value.

"Further, John Stevenson, the disponee of Peter Mackinlay, was v of the pursuer's claims in regard to the said window and portion of ment before he purchased the shop No. 1 Bank Street. So also defenders' agent, Mr James Paterson, before the disposition in their fa executed and the price paid, and both of them relied upon the absolut dice of their predecessor as regards that matter."

D DEAS.—There is here a question of some novelty and delicacy, so far as No. 110.
the effect to be given to the disposition in favour of Mr and Mrs Paterson.
e whole, however, I think that there is no incompetency in the parole June 3, 1873.
ny, and that the Lord Ordinary has arrived at a right result. I do not Girdwood v. Paterson.
it necessary to go into particulars.

D ARDMILLAN.—I agree with Lord Deas that apart from the question of
fides there is some difficulty, but it is clear that both Stevenson and
on were in the knowledge of the agreement. The delicacy is this, that we
o authority to support the proposition that an heritable right conveyed
ormal disposition and infeftment can be qualified by means of parole testi-
The case of Lang v. The Magistrates of Dumbarton, June 29, 1813,
is very strong for giving effect to parole proof, but in that case the original
:tion was clearly within the knowledge of, and had been acquiesced in by,
rson standing upon his infeftment. I think that the specialty which your
hip pointed out in the present case is a most important point. The only
ption is of the superficial extent, and there is no description that touches
mediate question here raised as to depth as distinguished from superficial
rement, or the length and breadth of the subjects. Hence you are not
ng proof of a verbal agreement to contradict the written description, but
o qualify the apparent possession in a matter where the description is not
r conclusive.

D JERVISWOODE concurred.

THE COURT adhered to the Lord Ordinary's interlocutor.

DEWAR & DEAS, W.S.—SKENE, WEBSTER, & PEACOCK, W.S.—Agents.

IAM EDWARD COOPER AND MANDATARIES, Pursuers.—*Sol.-Gen. Clark* No. 111.
—Mackintosh.
BARR AND SHEARER, Defenders.—*Watson—Balfour.* June 6, 1873.
Cooper v. Barr and Shearer.

—Lien for Repairs—Possession.—A vessel was placed in a patent slip
ing to a firm of shipbuilders for repair. When certain outside repairs
ompleted she was removed into a public wet dock, into which the patent
ened, and the repairs were there completed, the vessel being attached to
situated within the premises of the shipbuilders, and lying close to their
From time to time she was moved for the convenience of those using the
d an adjacent crane, this being done at the order of the harbour-master,
iefly by the shipbuilders' men. During the whole time the master was
t in the ship during the day, and at night a ship-keeper. *Held (rev.*
ent of Lord Gifford) that the lien which the shipbuilders had for the cost
repairs while the vessel was in their slip ceased when she was removed
he public wet dock, and became subject to the orders of the harbour-
r, the power of detention being absolutely necessary to the right of lien.

IS action was brought by W. E. Cooper, as mortgagee of the barque 1st DIVISION.
n Cunllo" of Aberystwith, against Barr and Shearer, shipbuilders at Lord Gifford.
ossan, concluding for delivery to the pursuer in virtue of his mortgage M.
e said ship, described as "at present lying in the defenders' patent
at Ardrossan," and in the event of their failure to do so for payment
3000.
e owner of the ship, Mr Lewis, in September 1872, had put her into
ands of the defenders to have certain repairs done, and by them she
put on their patent slip in their shipbuilding yard, which opens into
ublic wet dock in the harbour of Ardrossan. After a portion of the
rs had been executed she was removed from the slip to make room
nother vessel, and was moored in the wet dock, where the defenders'
men continued their work upon her. On 18th December she was

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again placed upon the patent slip by the defenders, who claim her in virtue of their lien for the cost of the repairs executed l

On 8th January 1873 the pursuer took possession, or clain possession, of the "Joan Cunllo," in virtue of his mortgage, notarial instrument of intimation.

The pursuer pleaded;—(1) The pursuer, in virtue of th libelled, is entitled to possession of the ship or barque thereby and to sell the same in payment of his debt preferably t creditors. (2) The defenders, having lost their lien or retentio vessel, are not entitled to withhold delivery thereof from the p

The defenders pleaded;—(1) In respect of the defenders l cuted the said alterations and repairs upon the said "Joan Cu have a lien or right of retention over her, preferable to any r the pursuer has as mortgagee, and, in virtue of their said lien retention the defenders are entitled to retain possession of her said account is paid. (2) In respect of the arrestments used in of the defenders they cannot be compelled to cede possession c vessel until the said arrestments are withdrawn or otherwis (3) The pursuer's whole material statements being unfounded defenders ought to be assoilzied, with expenses.

Proof was led before the Lord Ordinary, the import of whi in the note of the Lord Ordinary and the opinion of the Lord The following are the more important passages of the eviden Murray, master of the "Joan Cunllo," deponed,—"The shi upon the slip on the 2d or 3d October. There was a go outside work to be done to her, such as caulking, and three r were required outside. These repairs could not be done with her out of the water. The outside work was done about or 16th November, and she was launched off the slip in dock about the 18th. All the deck work repairs were t after that. We had to get a new mast in, and a new d and little jobs about the deck were to be done. After launched I was ordered by the deputy harbour-master to p the north side of the dock, opposite the patent slip, and I o order. She was moored there about half-past ten in the morn had come off the slip about ten. She lay on the north side till past one, and then moved over to the other side. I asked the master previously to give me a berth closer to the slip as I had working, and there was material to bring down from the slip, an be more convenient to have her there. He said he would gi in the afternoon; accordingly he moored me at the foot of t four o'clock. She was moored right across the bottom of the lay at the foot of the slip till about 12th December. She was n lying at the same place till that date. I had to shift her head at various times to let vessels off and on the slip. There w ballast crane astern, and I had to shift to let them get to it. 12th December the vessel was moved away altogether from th the slip, and was put into the west corner of the dock, the gra being between the ship and the slip. She was moored there by hawsers. She was moved to that place because I had been sp the harbour-master a few days before that to give me a quieter the carpenters were about off work, and I had only the second ship-keeper on board. I expected the ship to be chartered Accordingly he put me into that berth, and he put me into it on December. After the 12th December very little repairs remain executed. On the 17th the ship was still in the corner. I return

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ight on the morning of the 18th, and found the vessel still in the same ion. The carpenter was at work, and I stayed till half-past eleven. I went up to the town to write a letter to the owner. On returning about o'clock the ship was not there, and they were just entering her on the slip. took her up upon the slip. I had given no authority, and I had no idea as going to be done. I asked the foreman why they were doing it, he said they had been instructed by the manager to do it. I went ok for the manager (Mr Thomson), and when I found him I asked the reason. He said it was done by Barr and Shearer's orders. I plained, and demanded the ship off the slip, but he refused. He told the vessel had been taken back to the slip for payment of their unt. I asked a letter from Barr and Shearer in consequence, and got dated 18th December 1872."

rchibald Steele, harbour-master, deponed,—"The wet dock is a public . It is part of the harbour, and is used by vessels resorting to the our, whether they require repairs or not. It is my duty to assign hs to all vessels. I had nothing to do with the mooring of the 'Joan llo' after she came off the slip. I consider I am entitled to give rs as to mooring vessels within the wet dock. They are under my rol when they are there, and I give orders for them to be berthed as ase. I do not know any of the pawls by the name of the shipyard ls. There are some in the defenders' yard. Those on the east side he slip are within their enclosure. The one opposite the crane is not in their enclosure. By land the pawls are shut in by the enclosure, there is always access to them by water. (Q.) I suppose that with-these pawls they neither can take a ship on or off the slip? (A.) It uite possible they may, but the pawls are used for that purpose. (Q.) they constantly used and useful for that purpose? (A.) Yes; Barr Shearer sometimes complete the repairs on vessels in the wet dock; hat case the vessels are sometimes moored in one place and sometimes nother. The usual place is across the mouth of the slip, which is the convenient place for them. I am not in the habit of moving them f that place unless there is some necessity for it."

arles Adair, deputy harbour-master, deponed,—"I remember the n Cunllo' being taken off the patent slip about the middle of No-er. I saw her launched, and took her under my orders as soon as she afloat. When she came off the master asked me where he would her, and I told him to take her to the north side right opposite the He took her over, but asked me to give her a more convenient , and I told him that as soon as I could get another schooner up on patent slip I would lay across there again. By-and-bye I let her , about four o'clock in the afternoon. The vessel had come off t ten o'clock. At four o'clock she was moored off the patent slip. lay there about a week, and then I ordered her to be removed to the h-west corner of the dock. Her stern ropes were moored to the pawls ween the graving dock and the patent slip. I am in the way of ing vessels loading and unloading to those pawls. All the vessels ch lie in the same berth are moored to those pawls. When we can-get over the gate we have access to the pawls by steps from the dock, at the corner of the patent slip. The vessel remained a considerable e at the south-west corner. I cannot say how long. She remained she was on the slip again. I had no communication ever with Barr Shearer's people about shifting the vessel. I gave my orders, not to , but to the master, when I could find him, or the mate."

hn Thomson, manager of defenders' shipyard (examined for de-ers), deponed,—"There was no other reason for the 'Joan Cunllo'

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being put off the slip except the convenience of Barr and Sh accommodate the 'James Annan.' There was a great deal of wo to the 'Joan Cunllo.' Taking the proportion of the account, nea half of the work was to be done when she was put off. She ready to put to sea at that time, or to be delivered to the owner one on his behalf. She had her mainmast to be taken out and a put in. The old mainmast was a sprung one, and part of the rep to take it out and put in a whole one. That was done after afloat. She was not in a condition to have carried cargo. (Q.) In the vessel off the slip did you consult at all with the captain, o done by Barr and Shearer at their own hand? (A.) At their ow (Q.) Was the vessel delivered over to the captain or in his charg way when she was put off? (A.) No. (Q.) Or any one else on b the owner? (A.) No. (Q.) In putting the vessel off the slip h any intention of relinquishing possession of her? (A.) None w After she was put off Barr and Shearer's men were working at same as before. It is quite usual, when the hull of a vessel i repaired that she can float, to put her into the water and finish th in the water inside the dock. After she was put off she required deal of iron keel fastening in the between decks, a new deck-house crew, a water-closet, main hatch altered, and new coombings, and ber of other things. All these were done after she was put off. T place I saw her at after she was put off was across the entrance slip, the men working at her all the time. She was attached to the pawls there. Till she was put on the slip again she was mostl across the mouth of the slip, sometimes moved when vessels req be put on or off or for other reasons, and when she was moved it w a little to the one way or other, a distance of perhaps half her On the occasion of these movements she was always fastened to th which were in Barr and Shearer's yard, two to the north and tw south of the patent slip, between that and the graving dock. It foreman who moved her off the slip. The captain had nothing to it to my knowledge. When she was moved about it was done foreman and the carpenters. They were on board daily during th working hours. I cannot say how many would be on board at the number would vary, but a full staff of men was kept on for the to be done. I kept the 'berths' of the men full—a berth being i building language the space for a man to work in. I gave instruc the foreman as to the pawls to which she was to be moored, and t to be particular in keeping these moorings there, and to see no o them off."

The Lord Ordinary, on 11th March 1873, pronounced this interl —"Finds it sufficiently instructed in point of fact,—First, That fenders, Messrs Barr and Shearer, were employed by Thomas L Walcott, Bath, the owner of the ship or barque 'Joan Cunllo' of A with, and who was in possession and management of the said ship, to certain repairs upon the said ship; Second, That under and in v this employment the defenders, Messrs Barr and Shearer, obtain session of the said ship or barque, and placed her upon their Ardrossan for the purpose of executing the said repairs, or part t Third, That under the said employment the defenders, Messrs Ba Shearer, executed extensive repairs upon the said ship, in respect of a large account is now due to them; Fourth, That the defenders, Barr and Shearer, never gave up, surrendered, or lost possession said ship or barque, but that they still retain possession thereof in s of the payment of their said account for repairs and work ex

: Finds in point of law that the defenders, Messrs Barr and , have a valid and effectual lien over the said ship or barque, or a retain the same in security of their said account, and finds that the is not entitled to demand or enforce possession of the said ship or without paying or securing the said debt due to the defenders; the above effect sustains the defenders' pleas, and assoilzies the rs from the conclusions of the action, and decerns: Finds the de- entitled to expenses, and remits the account thereof, when lodged, Auditor of Court to tax the same, and to report." *

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[OTE.—It is quite fixed that a shipwright in a home port who builds or vessel, and who has the entire possession thereof, has, so long as he possession, a lien or right of retention over the ship for the amount of unt for building or repairing the same, unless there is a contract, express ied, to the contrary—See Bell's Comm. (M'Laren's ed.) ii. 93. A ght in this respect is in the same position as any other tradesman to moveable subject is delivered or handed over in order that work may nted thereon. The tradesman who executes the work may retain the e subject until his account for the work is paid, unless he have expressly o give credit or to give up the article before the term of payment. This le both in England and Scotland, although there are certain places,—for , the Thames,—where, by local usage, there is no lien for repairs on ie custom and implied contract being to give credit.

ras conceded in argument, and indeed seems quite clear, that the owner hip now in question, Mr Lewis, was entitled to employ the defenders to er, and to hand her over or deliver her to the defenders for that purpose. ot the ship was under mortgage to the present pursuer, Mr Cooper. But per allowed the vessel to remain under the full control and management wner, Mr Lewis, and he cannot object to Mr Lewis having exercised nary and necessary acts of management. It is sufficiently proved that was absolutely in need of an overhaul and of extensive repairs. With- a she could not continue to trade. Her classification at Lloyds' had and she could not be re-classed without being surveyed and repaired at it of Lloyds' surveyor. Without re-classification she would not have ployed to carry any ordinary cargo. To get her repaired at the sight of surveyor, and get her re-classed, was an ordinary, a prudent, and indeed necessary act of administration or management, and this is just what Mr id. It seems also sufficiently proved that the repairs actually executed defenders have enhanced the value of the vessel to an extent at least , if not greater than, the amount of the defenders' account, so that the f the repairs have been profitably and beneficially *in rem versa* of the alf. It is in these circumstances that the pursuer, the mortgagee, now s delivery of the vessel from the defenders, the shipwrights, without any part of their account.

s shipwrights, the defenders, Messrs Barr and Shearer, resist the pursuer's , on the ground that they have a lien over the ship for the amount of count, and the question in the present case is whether the defenders ch lien or not. There is a subordinate question about arrestments, but restments, if valid at all, which the Lord Ordinary strongly doubts, could e withdrawn or loosed, and the sole question really in dispute is the rs' lien. The Lord Ordinary is of opinion that a valid and effectual er the ship was created in favour of the defenders, and that it still .

) The lien was duly created. The defenders obtained entire and absolute ion of the ship in order to execute the repairs thereon. The ship was into the defenders' private shipbuilding yard. She was placed upon the rs' private slip, where she remained for a considerable time. This was ely necessary. The hull of the ship had to be opened up, and her bottom ng, or part thereof, removed, and this could not be done while she

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The pursuer reclaimed, and argued;—Even if it were conce the ship so long as she lay on the slip was in the possession o

remained afloat. There seems no doubt, therefore, that the vessel pa the legal possession of the shipwrights just as much as if she had bee them in their yard, or upon their slip.

"Indeed, this was not seriously disputed by the pursuer, whose chiefly rested upon the plea that the defenders' lien and possession afterwards lost, and it seemed to be conceded that if the ship ha remained upon the defenders' slip their claim of lien could not h resisted. Still, with special reference to the alleged loss of possess necessary to keep in view the state of matters, even when the ship rem the defenders' slip.

"The crew had all been discharged and paid off except the master, a who seems to have acted as a sort of mate. When the ship wa defenders' slip nobody lived on board of her—both the captain and ma lodgings in town; but captain and mate, as well as the owner, were f going about the ship. At night also there seems to have been a w employed by the captain, called a ship-keeper, whose duty it was to be or beside the ship, and to see that nothing was pilfered or taken awa was necessary, for although the ship was wholly in the defenders' yar their private slip the defenders' premises were quite exposed, unfence on one side, and themselves protected only by watchmen. So matt till the repairs had proceeded so far that the ship could again b Undoubtedly up to this point the defenders had a valid lien.

"(2) The Lord Ordinary thinks that the defenders never lost the p so attained by them. No doubt about the middle of November, and defenders' contract was not nearly completed, the ship was taken off th moved into the public dock in order that the repairs might be there c It is said that this was a surrendering or giving up of possession, and the very act of launching her from the slip the defenders lost their p and lost their whole right of lien. The Lord Ordinary does not think thinks the possession once completely attained by the defenders was n merely shifting the vessel's place for the sake of convenience.

"The removal of the vessel from the slip was not the act of the ow the pursuer, or of any one representing them. She was removed defenders themselves, exclusively by the defenders' workmen, and solel defenders' convenience. Their slip was required for another vessel, a simply for this reason that the defenders took the 'Joan Cunllo' off the put her into the dock. The owner wished her to remain on the sl seems to have thought the repairs would get on faster there. Then the launched, not with the view of delivering her to the owner, or of giving session, but simply that the repairs contracted for might go on with afloat. It often happens that some kinds of work can only be done, c best done, with the ship afloat, for example, rigging, taking in engine on. The defenders launched the ship, not to hand her over, but to h till the repairs were done. Accordingly she remained under the contro defenders just as before, only, instead of her being on the defenders' priv she was moored to the defenders' quay. No doubt on one occasion, f hours, she was on the other side of the dock, but this was merely te till a berth next the defenders' yard could be got, and the defenders' m working on her all the time. Ever after this she was actually moored, one end of her, to the defenders' pawls, that is, to mooring-posts, situate the defenders' ground. It is true also that she had occasionally to be either to allow vessels to get off or on the defenders' slip, or to give the h master the use of an important loading crane at the corner of the doc this was solely for the convenience of the defenders themselves, or of t bour-master, and could not alter the legal possession of the ship. Pla harbour-master, who ordered some of the removals, was in no sense in

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s, so as to give them a lien for the cost of the repairs which they executing, this possession was clearly lost as soon as she was put e public harbour. The existence of such a lien as was here claimed ng doubted in the maritime law of Great Britain, and, when it was ted, was subject to the limitation that there must be distinct and te possession by the ship-carpenter in order to its constitution and uance.[1] This possession did not exist where repairs were executed essel lying in an open roadstead or harbour.[2] Here the ship was l in a public dock, and it could not reasonably be held that her ttachment to pawls was sufficient either to give or to continue the ite possession. The connection between workmen and a vessel in a public harbour could be severed at any moment. Then, mere ce on board a ship could not by any process of reasoning be held fer a real or constructive possession on them or their master as t the shipowner. The presence of a joiner repairing a private might just as well be held to transfer the possession of the house its owner to the tradesman by whom he is employed.

was argued for the defenders;—The subsistence of a lien while the l lay on the slip was admitted; but at that time the master, mate, hip-keeper were about her just as much as they were afterwards she was removed to the dock. It was enough to preserve the lien vessel continued to be physically attached to the shipbuilders' pre-, as in this case she was, by the pawls belonging to the defenders. ad been so attached all along, except during the short time she was

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f the ship, and the removals were always effected by the defenders' own en. Still farther, no change occurred in the mode of looking after the . Neither master nor mate came to live in her, but just visited her as . The night watchman watched just as before till he also was given up or ed at last, and by day the repairs went on just as formerly. There is a e how much of the repairs were done on the slip and how much in dock, e preponderance of evidence seems to be that about a half was executed the vessel was floating. The account does not shew exactly.

n the whole, the Lord Ordinary holds, without much difficulty, that the lers having once attained possession of the ship did not lose possession r by themselves floating her for the express purpose of continuing the . This would be a very startling conclusion, and would be both dan- and unjust to shipbuilding interests. For example, it would prevent ilders from launching vessels, even to get in machinery, until their ts were paid. The Lord Ordinary cannot think that the moment the ship d the water at the foot of the defenders' slip she could have been seized by the pursuer, as mortgagee, or by the owner himself, or by the owner's ers, and towed off, all dismantled as she was, and incomplete, to defeat the ilders' rights.

n the Lord Ordinary's view nothing turns upon the ship having been ed on the defenders' slip. If the defenders had once surrendered posses-hey could not have regained their lien by taking possession of new at their hand, and without the owner's or master's consent. But if they never lost sion they were quite entitled to make the custody secure by placing the in a safe place.

The Lord Ordinary has not the means in the present action of determining exact amount of the defenders' account. The owner is not a party to the nt action, and is being separately sued. All that the Lord Ordinary can to sustain the defenders' lien, and to this effect assoilzie the defenders from pursuer's unqualified demand."

[1] Bell's Com. 98; Bell's Prin. 1420; Abbott on Shipping, 117; Franklin Ionia, 4 B. and Ald. 341; Hartley v. Hitchcock, 1 Starkie, 408.

[2] Authorities above cited.

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at the other side of the dock, being then truly *in transitu* to the she finally occupied close to the defenders' slip. This was differen the case referred to by the authorities, which was plainly that of a in an open roadstead or harbour with a full crew. Here the vess no crew, was dismantled, could not go to sea, and was not even about the harbour except by the defenders' workmen. The lien ship-carpenter, which confessedly existed when she was on the slip, be lost only by putting her in the complete "nautical" possession owner or master. There had been nothing like delivery to them, actual or constructive. The contract for repairs had not been fi the ship-carpenter had not completed the obligation he had unde and was not entitled to turn her over into the hands of the owner had done his part of the contract. By the contract she had been over to him for repair, and remained in his custody until the contr fulfilled.

At advising,—

LORD PRESIDENT.—I confess I was rather disposed all along, if I co adhere to this interlocutor, because the case seems a hard one for the shipb but I have formed the opinion that the facts will not justify the conclu the Lord Ordinary.

Although the kind of lien pleaded on the part of the defenders is ve defined, there is not much authority on the point. The law was laid authoritatively in the case of Franklin v. Hosier, 4 Barn. and Alderson, 3 that law has since been followed in the books and decisions. In that c Lord Chancellor sent a question to the Court of King's Bench in the fo terms:—"Whether Daniel Brent, &c., as shipwrights, having the sa 'Northumberland' in their actual possession in their dock, at the time bankruptcy of William Masson, the managing owner of the said ship, ha on the said ship for the repairs of the said ship?"

It had been contended that this lien, even when there was actual pos was unknown to the law of England. The answer made under the pre of Chief-Justice Abbott, who is a high authority on this branch of the la "We are of opinion that Daniel Brent, &c., as shipwrights, having the sa 'Northumberland' in their actual possession in their dock, at the time bankruptcy of William Masson, had a lien on the whole ship or vessel the 'Northumberland.'"

The meaning of this answer is quite plain. It says, in point of law, t shipwrights, having had the ship in their actual possession in their dock time of the bankruptcy, had a lien over her.

Accordingly, not only in the latest edition of Abbott on Shipping, but writings of Professor Bell, both in his Commentaries and in his Principl law is laid down to the same effect. In section 1420 of his Principles, Pr Bell lays down, "Retention of a ship is competent for repairs. . . . right of retention depends on possession, and is not, like hypothec, confi the case of repairs made abroad. It is effectual for repairs made on a vess home port. But ship-carpenters repairing a ship in an open harbour or stead have not the possession necessary to retain the right."

Now, applying that doctrine to the present case, it seems to me that wh vessel was launched from the slip of the defenders after a portion of the r had been executed, and was placed in a berth in harbour, that the pos necessary to secure a lien had altogether come to an end.

The history of the matter is as follows:—The owner of the vessel, Mr L sent her to Ardrossan to be repaired, so as to get her class at Lloyd's r When she arrived she went into the old harbour, and from that into the dock, and remained there for some days, waiting her turn for the defen patent slip. It was necessary that she should go upon the slip, because t was some outside work to be done on her, such as caulking, and three planks to be put on. When the work, which could not be done except on

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nt slip, was completed, the shipbuilders, for their own convenience, removed to make room for another vessel. Accordingly they launched her into the dock, and when launched into it she was, by the orders of the deputy harbour- ter removed to a berth at the north side of the dock opposite the patent slip. lay there for a few hours, and then, because the master persuaded the harbour- ter, for the convenience of the carpenters, to have her shifted, she was removed berth at the foot of the slip, where she lay moored by her own ropes for some s. She was afterwards moved into the west corner of the dock. All that is about her then is that her stern ropes were attached to pawls in the premises he defenders. It seems to me that these pawls, though locally situated in the nders' yard, were really a part of the ordinary dock apparatus. I am of nion that as soon as she left the premises of the defenders she was no longer hat "actual possession" which is necessary to sustain a lien. In these cir- stances it appears to me she was no longer, after she left the slip, under the ody or control of the defenders,—she was then under the orders of her master the harbour-master. The power of detention appears to me to be absolutely essary to the right of lien.

For these short reasons I cannot concur with the view taken by the Lord linary.

LORD DEAS.—I come to the same conclusion very unwillingly, because I think equity is on the other side.

We must not, however, interfere with the settled rule of law in such matters. seems quite clear that if the vessel had never been taken out of the wet dock, the whole repairs had been executed there, the defenders would have had no t at all.

What might have been the case if the wet dock had been used solely for the poses of a wet dock would be a different question. But the wet dock here is of the public harbour. The owner was never altogether out of possession of vessel. Some of his men remained in her even when she was on the patent . The only fact which gave custody and lien was the single fact that she did on to the slip. Neither when on nor off the slip were the defenders ever lly in possession of the vessel. If the owner had devolved the whole re- nsibility and safety of the vessel, when in the dock, on the shipbuilders, it ht have been different, but this was not so.

he single fact, as I have said, out of which lien arose was, that the vessel was he slip, and so soon as she was lawfully taken off the slip that lien neces- y ceased.

LORD ARDMILLAN.—I have not without some degree of reluctance formed the opinion. The shipbuilders have a strong equitable claim. But the law is nst them, and the legal question is important. I find that the definition of lock" given both by legal and commercial authorities is "an artificial basin ception of a ship,"—not necessarily for repairs. And accordingly, it is the that vessels may enter and lie for a time in dock which are not under repair, are not in any sense in possession of those who have slips in connection with dock. To give a right of lien over a ship it is necessary that the ship should n possession of the person claiming the lien; not indeed a possession adverse hat of the owner, but still a distinct separate possession of the ship by the on repairing her, the person who claims the lien. When such possession is the lien is at an end. In this case I think we must hold that whenever the el left the slip the lien was gone. When she was launched into the dock ther vessel might take her place on the slip, and indeed I imagine did so, it is plain that whenever that second vessel was placed there the shipbuilders uld have a lien over her. By the slip the possession which sustains the lien maintained, and when the ship was no longer on the slip she was no longer hin the lien.

I see no alternative but to come to the same conclusion with your Lordships.

LORD JERVISWOODE concurred.

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THE following interlocutor was pronounced:—"Recall the locutor: Repel the defences, and decern and ordain the defe forthwith to deliver to the pursuer the barque 'Joan Cunl present lying on the defenders' patent slip at Ardrossan, and at the sight of Archibald Steele, harbour-master of Ardr Authorise interim extract of the decree, and dispense wit minute-book: Find the defenders liable in expenses; allo account," &c.

MORTON, NEILSON, & SMART, W.S.—WEBSTER & WILL, S.S.C.—Agents.

No. 112.

June 7, 1873.
Shirra v. Robertson.

MRS GRACE EDMONSTONE OR SHIRRA, Pursuer.—*Brand.*
GEORGE BISHOP ROBERTSON, Defender.—*Asher.*

Process—Sheriff—Appeal.—An interlocutor by a Sheriff-substitute re the defences in an action as irrelevant. The Sheriff on appeal recalled the locutor, and allowed the defender a proof before answer of certain averme the writ or oath of the pursuer. The pursuer having appealed to the Co Session, *held* that the Sheriff's interlocutor was not a final judgment with meaning of the Sheriff-court Act, 1853, section 24, and Court of Sessio 1868, sections 53, 54, and therefore was not appealable at the instance pursuer.

Opinion that the interlocutor was not appealable under the 40th sect the Judicature Act.

Expenses.—Where no objection was taken to the competency of an app the Single Bills, but an objection taken by the Court at the hearing was and sustained, no expenses were allowed to either party.

1ST DIVISION. Sheriff of Edinburgh. M.

MRS SHIRRA brought this action in the Sheriff-court of Edinburgh, cluding for £100 contained in a promissory-note dated 26th July granted by George Bishop Robertson in favour of the pursuer.

The defender stated in defence (article 1), that he believed the su the note had been lent by the pursuer to his brother, James Robertso whom interest thereon had been paid, and who had been treated by pursuer as the proper debtor therein. He averred that no debt was to the pursuer in respect of the note libelled on, the same having paid or otherwise extinguished by arrangement between the pursuer the said James Robertson. The defender set forth in detail cer arrangements between him and his brothers William and James, whe William became bound to relieve the defender of this among other de and stated that it was a debt for which James Robertson was liable; (article 7) that the present action had not been raised with the con or authority of the pursuer, but at the instigation of the said Ja Robertson, who was the real *dominus litis.*

He pleaded;—(1) The present action not having been raised by authority or instructions of the pursuer, but by the said James Robert who is the real *dominus litis,* the action ought to be dismissed. (2) defender not being indebted in the sum sued for ought to be assoil (3) The said James Robertson being the true debtor for the amount tained in the said bill, and the pursuer having dealt with and treated as such, and no debt being due to the pursuer in respect of said bill, is barred from now suing the defender.

The pursuer pleaded;—The promissory-note founded on being ex for value, and its contents being admitted by the defender to have paid by the pursuer, the defender is not entitled to prove non-onero even by the writ or oath of the holder.

The Sheriff-substitute (Hallard), on 13th December 1872, pronou an interlocutor finding "that this is an action upon a promissory-no

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istance of the proper creditor and against the proper debtor therein: s that the signature 'G. B. Robertson' appended to said promissory- is the true and genuine signature of the defender, on the faith of h the pursuer advanced the sum contained in said note: Finds that ayment of interest indorsed on said promissory-note was so indorsed e hand of the defender: Finds that said promissory-note is a liquid merous document of debt: Finds that no sufficiently specific aver- ; of payment has been made by the defender on the record, nor any iently specific allegation of extinction of said liquid and constituted such as it would be competent to refer to the pursuer's oath: There- repels the defences, and decerns in terms of the conclusions of the "

e Sheriff (Davidson) on appeal, on 28th February 1873, recalled the locutor appealed against, and before answer allowed "the defender a f of the first and seventh statements in his revised defences by the or oath of the pursuer."

e pursuer appealed.

e defender did not object to the competency of the appeal when the appeared in the Single Bills, but the Court having suggested at the ing that the appeal was incompetent, he argued that it was so, in re- ; that the judgment was in no respect a final one, nor one falling in the 24th section of the Sheriff-court Act, 1853. Neither was it alable under the 40th section of the Judicature Act.[1]

e pursuer argued that the appeal was competent, as its practical re- was to dispose of the whole merits of the cause. He also referred to erms of the Court of Session Act of 1868 (31 and 32 Vict. c. 100) 53 and 54, as clearly shewing it to be appealable.[2] The effect of the locutor, if adhered to, would be to prevent the pursuer from objecting e relevancy of the defences. The terms of the Judicature Act, sec. hewed that it was intended that an order for proof should be the ct of an advocation if either of the parties thought fit.

; advising,—

RD PRESIDENT.—The question which we have now to dispose of is as to the etency of this appeal, and as the question thus raised is one of importance ave verbally consulted the Judges of the Second Division, and we have imously arrived at the same result. The Sheriff-substitute, by his inter- or of December 13, 1872, repelled the defences, but on appeal the Sheriff led that interlocutor, and allowed the defender a proof before answer of the nd seventh statements in his revised defences by the writ or oath of the er. The peculiarity of the case is that this appeal is by the pursuer, to e oath reference is made by the interlocutor appealed against. The pursuer nds that the judgment of the Sheriff-substitute is well founded, and she that if the judgment of the Sheriff is to stand, and her oath is taken, she lose the benefit of any objection she might have taken on the relevancy. is not quite correct, but still there is a good deal in the complaint, and we lt considerable sympathy for the pursuer, and if we could have held the locutor appealable we should have done so. But unfortunately the 24th on of the Act 16 and 17 Vict. is conclusive, for it not only enumerates what locutors shall be appealable, but it further enacts that it shall not be com- t to review any others; and, as regards the last class of interlocutors men- d, namely, those disposing of the whole merits of the case, we are further htened as to what they are by sec. 53 of the Court of Session Act of 1868. s been suggested as matter for consideration whether this case does not under sec. 40 of the Judicature Act, but all the authorities are against that

[1] Primrose v. Mackenzie, Nov. 18, 1859, 22 D. 1.

[2] Lamond v. Croom's Trustees, May 14, 1872, *ante*, vol. x., 690.

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view, and so, on the whole matter, I, with reluctance, am of opinion that this appeal is incompetent.

The other Judges concurred.

The respondent moved for expenses.

The appellant objected that the objection to the competency of the appeal had not been taken by the respondent in the Single Bills, but had only been raised by the Court at the hearing, and therefore argued that no expenses should be found due.

THE COURT pronounced the following interlocutor:—"Having heard counsel on the competency of the appeal, refuse the appeal as incompetent: Find no expenses due to or by either party, and decern."

A. W. HASTIE, S.S.C.—MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

No. 113.
June 7, 1873.
Buchan, &c.
1ST DIVISION. B.

C. F. FORDYCE BUCHAN AND OTHERS (Fordyce Buchan's Tutors), Petitioners—*Pearson.*

Process—Petition—Tutor.—In an action of giving up tutorial inventories at the instance of the tutors of George C. Fordyce Buchan and others, the pursuers called as defenders the nearest relatives of the pupil resident in Scotland, and presented a petition to the Court to dispense with the citation of the next of kin who were resident in England. The Court expressed some doubt as to the necessity of the application, and remitted to Mr Archibald Broun, P.C.S., "to inquire into the practice of requiring a petition of this nature, where the summons calls kindred on both the father's and mother's side who are within Scotland and of full age, though the nearest kindred on both sides are out of Scotland."

Mr Broun reported * that the general practice was in favour of the

* "The practice of applying to the Court to dispense with the citation of one or more of the nearest of kin, where all or any of them were non-resident, appears to have been early introduced in the process for making up tutorial and curatorial inventories. The penal provisions of the Act 1672, c. 2, having been stringently enforced against tutors and curators who had neglected to comply with the precise regulations of that statute—(See cases of Bruce, M. 16,337; Lothian, M. 16,337; Henderson, M. 16,375, affd. on appeal; and Kilpatrick, M. 16,381)—parties gladly availed themselves of a form of procedure which lessened the risk of subsequent challenge. The earliest reported case of dispensation appears to be that of Cruikshank (Faculty Collection, Feb. 11, 1813), where the petition proceeded on the narrative of there being 'no relations of the pupils within Scotland, their only relations being resident in Ireland,' and 'in respect of the particular circumstances' the Court granted dispensation.

"In the subsequent case of Hobbs (June 29, 1831, 9 Sh. 841), the summons set forth the fact of 'no relations on the mother's side being resident in Scotland,' when, upon the report of Lord Medwyn, the Court directed a written petition for dispensation to be presented, and afterwards 'in the circumstances' dispensed as craved.

"In Shields (Feb. 2, 1832, 10 Sh. 282), dispensation was again granted to meet the case of none of the 'next of kin' on the mother's side, being minors, residing in Scotland.

"In the case of Lady Blantyre (June 23, 1832, 10 Sh. 702), the petition for dispensing craved leave to cite those of the next of kin resident in England, but the Court 'in respect it is stated that there are no relations on the mother's side

followed by the petitioners, and the Court accordingly ordered ion in common form. No. 113.

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GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—Agents.

nd, except one who is disqualified, being the wife of a tutor, found it ary to cite the next of kin on the mother's side in England.' The of the Lord President (Hope) may be referred to.

Fordyce (June 23, 1836, 14 Sh. 992), where the nearest cognates of a ere resident abroad, the Court, 'in conformity with previous practice,' d with their citation, upon a petition which set forth that 'the only of the minor on the mother's side resided in the East Indies.'

in, in a case reported in the Faculty Collection (A v. B, June 11, 1841, pon an application to the Lord Ordinary, setting forth that 'the next of re out of the country, his Lordship reported to the Court, who advised mmons should be first raised before the Judge Ordinary of the bounds, ı that 'application should be made to the Court to dispense with the of the next of kin.'

in the more recent case of Thomson (Dec. 6, 1855, 18 D. 193), the Division of the Court ordered personal intimation to be made to two kin abroad, whose addresses were known to the petitioner, and there- pensed with their citation.

the still more recent case of Kyle (June 15, 1861, 23 D. 1104), the fter ordering a minute as to the grounds of the application, and on full ation of the authorities, dispensed with citation of the next of kin of a where he (the petitioner) had no next of kin on the mother's side resi- Scotland.

nerous other cases of dispensation are to be found, reported petitions to rt for that purpose having become general, whenever any of the 'nearest to the pupil or minor were non-resident. But while none of these cases expressly deal with the construction of the statute in regard to icular matter now before the Court they cannot be said to fix any con- practice. On the one hand, they cannot be viewed as establishing that ie whole class of nearest of kin reside abroad, parties are entitled, without for or obtaining judicial authority, to dispense with citation of such of kin, and call in their room more distant kindred, who, though resident and, may be too remotely related to have any interest in the minor's

doubt the case of Guthrie (M. 16,319, June 24, 1701), goes far to sup- broader construction of 'next of kin' as a flexible term including the ıvailable kindred. But that decision was pronounced before any prac- lispensing with citation had arisen, and is scarcely an authority for not g to the *nobile officium* of the Court where the *species facti* renders sanction desirable.

the other hand, the reporter has not discovered, either in the reported orted cases, any unequivocal course of decisions or practice which would er exclude the construction of the statute contended for by Mr Fraser on Guardian and Ward, second edition, p. 200), as the only true con- ı. Probably any usage which can be traced down to the present time ather tend to support the earlier statement of the same author, that the next of kin are so situated that it would be difficult or impossible them notice of the proceeding the early practice was to cite the next y the later practice, however, intimation to the nearest of kin so dis- l will be dispensed with altogether'—(Personal and Domestic Relations, 03). But it must be admitted that the later usage is not so clear as e desired, and leaves too much to be gathered by inference from the ance that amidst the great multitude of petitions for dispensing, in terms, with citation of 'the nearest of kin' resident abroad, no inquiry ever to have been suggested or made, whether more remote kindred did t 'within Scotland' for purposes of legal citation under the statute.

or a diligent search, both in the Register House, and among a valuable

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Potter v.
North British Railway Co.

STEPHEN POTTER, Pursuer.—*Scott—Rhind.*
THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*Sol.-Gen. Clark—Marshall—Moncreiff.*

Reparation—Contributory Negligence—Railway.—In an action of damages against a railway company raised by a passenger for injuries received in alighting from a train at a railway station it was proved that the carriage in which the pursuer was seated had been stopped short of the platform, that in consequence of the darkness of the night and the absence of artificial light the pursuer had not observed this, and in leaving the carriage backwards had fallen and injured himself. The jury returned a verdict for the pursuer.

In a motion for a new trial, on the ground that the verdict was against evidence, *held* (1) that it was the duty of the railway company to have given the passengers some notice or warning of the danger, or assistance in alighting; and (2) that the question of contributory negligence on the part of the pursuer was one for the jury.

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collection of petitions preserved in the Advocates' Library, the reporter has found only a very few cases at all resembling, and perhaps no more than one or two of these very analogous to the present. He may notice the following:—

"1. The petition Davidson (Feb. 7, 1848, Pet. Adv. Lib. 1847–52, vol. vii.), set forth that the petitioner had called as defenders to the summons his next of kin by the father's and mother's side, but as all these parties were 'furth of the kingdom' he had also called as defenders Mr Cosmo Innes, advocate, his nearest of kin by the father's side in Scotland, and two other persons, his nearest of kin by the mother's side in Scotland. The application bore to proceed with the concurrence of Lady Grant, the petitioner's nearest relation, but residing in England, and it prayed the Court to dispense with the citation of any of the next of kin other than those named as resident in Scotland, and the Court dispensed accordingly —(Minute Book, Feb. 3, 1848).

"2. The petition Cooper Millar (Nov. 24, 1848, Petitions, Adv. Lib. 1847–52, vol. vii.), stated that the petitioner's maternal uncle, his nearest of kin on the mother's side, was resident in London, and that two cousins of his mother, who were major and resident in Scotland had been cited. But 'as it was doubtful how far the citation of these remoter relations was authorised by the statute' (Minute Book, Nov. 28, 1848), the petition craved to dispense with the citation of the nearest of kin on the mother's side, which was accordingly done.

"3. The petition Lord Macdonald (Dec. 17, 1863, Petitions, Adv. Lib. vol. xxv. 1860–64), on the narrative that there were only one sister and cousins of the petitioner's father resident in Scotland, the other brothers and sisters of his father being all resident abroad, and that his relations on his mother's side, except his mother, were also resident abroad, and that the petitioner was therefore unable to comply with the statutory regulations, craved dispensation: Whereupon the Court pronounced decree (Minute Book, Jan. 6, 1864), 'dispensing with the citation of such of the nearest of kin of the petitioner on his father's and mother's side respectively as are resident furth of Scotland as prayed for.'

"4. The petition Gordon (Nov. 15, 1859, same vol. Adv. Lib.), bore that action had been raised against certain relations more distant than the nearest of kin on the father's side, but being the only relations on that side majors and within the kingdom, and prayed to dispense with the citation of the nearest of kin on both the father's and mother's side, on the ground of their being all non-resident, and this prayer the Court granted—(Minute Book, Nov. 26, 1859).

"In conclusion, the reporter may state, that, with the view of ascertaining any other instances of professional practice in regard to the subject of the remit he addressed a letter of inquiry to six well-known legal firms in Edinburgh, but the answers received furnish no farther information than that already submitted."

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Potter v. North British Railway Co.

1ST DIVISION. M.

THIS action of damages was brought against the North British Railway Company by Mr Stephen Potter, a painter in Dalkeith, who held a season ticket on that railway between Dalkeith and Heriot stations. The issue put to the jury was,—"Whether, on or about 30th September 1872, and at or near Heriot Station on the defenders' line of railway, the pursuer fell and was injured, through the fault of the defenders, to the loss, injury, and damage of the pursuer. Damages laid at £1000."

It appeared in evidence that the train in which the pursuer was travelling, in a third-class carriage, the second from the guard's van, arrived at Heriot, on 30th September, a little after eight o'clock in the evening. The pursuer deponed,—"Train stopped, and I heard porter calling out word 'Heriot.' I thought we were at platform, and opened carriage door and stepped out. I stepped on iron step of carriage as I got out. With next foot I intended to take platform, and fell. I fell on my back with my feet towards wheel of carriage. I fell across a rail—one of rails of a siding..... Carriage had stopped short of platform. Night was very dark by time we arrived at Heriot. There was no light to shew me where I was stepping..... I travelled every night but Sunday by same train. Never paid particular station to station, but knew it well. Train did not always draw up opposite platform; one night it went a good deal beyond it. It generally overshot platform; night in question first time it was short of platform all that night I had always got down at platform..... I looked out of carriage window before I opened door; was looking towards Heriot at first. Saw lamp which I think man was moving in his hand. He was calling out 'Heriot' as he was waving 'lamp.' I understood he meant it was station to get out at. Did not understand why he was waving. I did not see lamp of station. The man with lamp passed the carriage before I got out. Did not see him do so, as I was arranging parcel and shawl; window was closed, and I was sitting on seat. I opened window, but cannot say whether I opened door from outside or inside. Don't know if you can open it from inside. Think I would open door from outside. Did not look where I was before opening door. Knew I was at Heriot station, but did not take any trouble to see whether opposite platform or not. Stepped on to iron step with back outwards; I always do that when at platform. I did not get out with face to platform that night, because not my custom. There was light in carriage, and I saw helped by that. I was holding on by handle and feeling for platform with other foot. Put down parcel on floor to be ready to get it away. Don't know why I did not leave it on seat, except that I thought it handier to have it on floor..... There was light in carriage. Did not see light put down on ground behind carriage. Knew porter had passed to the end of train because he came from there to help me up. Had not seen him pass. ... There is light at station on side at which train stopped. It is beside the shed. This is before you come to the level crossing going to Eskbank. If you have not passed this lamp you know you have to come to crossing. We had not passed lamp that night. The light of the lamp did not shine on the place where I fell..... The way I came out of carriage on that night was my usual way. The handle I laid hold of was on left-hand side of door as I came down. I took hold of it with left hand. I came out with my usual care."

William Murray, porter, Heriot Station, deponed,—"From end of platform to where pursuer fell it would be about fifteen yards. Carriage went out of platform that distance. There is siding where pursuer fell. He must have fallen across one of rails..... I saw no one offering to come out. If I had seen any one I would have cautioned him to take care. Carriage was lighted, and there was a light on guard's van on side next sta-

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tion. It shone along carriages towards engine..... Was there light enough for person in carriage to see that train not opposite platform? Can't say as to that, as never experienced it..... My lamp might throw light twenty-five yards, but not distinctly. Light at station is in passengers' shed, and no light outside."

Thomas Robertson, station-master, Heriot, deponed,—"There are two platforms on the same side at Heriot, with separation between the two at level crossing. The two platforms and level crossing extend 245 feet. Level crossing may be thirty feet. Platform is lighted by one lamp in shed. Paraffin oil light. This only light. It is in centre of shed in inner wall. Can't tell depth of shed. Shed is enclosed on both sides and open to front. Don't think rays of that lamp could reach place where pursuer fell. Lamp would not shew light along whole platform..... The height of platform is twenty inches above level of rail. The place where pursuer had to get out on night in question would be a little lower than the level of the rails at level crossing."

The jury returned a verdict for the pursuer; damages £600.

The defenders obtained a rule upon the pursuer to shew cause why the verdict should not be set aside as contrary to evidence, and on the ground that the damages were excessive.

At advising,[1]—

LORD PRESIDENT.—The defenders in this action obtained a rule upon three different grounds. The first ground was that there was no evidence to go to the jury of negligence on their part causing the injury for which damages are sought by the pursuer. The second ground was that, even on the assumption that there was negligence on the part of the defenders, there was contributory negligence on the part of the pursuer leading to the accident. The third ground was excessive damages.

We have now heard the pursuer shew cause against the rule, and a reply from the defenders, and we are to dispose of the case upon these three different grounds. It is a case of some nicety undoubtedly, but as regards the first ground,—want of evidence of negligence on the part of the defenders,—I think the case is pretty clear. The train by which the pursuer was travelling was to stop at the Heriot Station, and the proximate cause of the accident was that the carriage in which the pursuer was travelling was not brought opposite the platform, and he required, in leaving the carriage, to descend from the floor of the carriage to the level of the rails; and, the place being dark, he came out expecting to find a platform, and descended much further than he had expected, and so fell over and was injured. Now, this Heriot platform was of sufficient length to have accommodated the whole train. The length of the platform was very considerably greater than the length of this particular train. The platform is divided into two near the middle by a level crossing, and where the level crossing exists there is no platform, and a person getting out of a carriage there would require to descend to the level of the rails; but upon one side of this level crossing the platform extends eighty-nine feet, and upon the other side of it it extends eighty-two feet, so that, with the interruption of the level crossing, there was ample platform accommodation for this or even a much larger train than

[1] *Pursuer's authorities*:—Foy v. London, Brighton, &c., Ry. Co., 18 C. B. N. S. 225; Cockle v. London and S.-E. Ry. Co., L. R. 7 C. P. 321, 336; Adamson v. Whitson, Feb. 21, 1849, 11 D. 680.

Defenders' authorities:—Bridges v. N. London Ry. Co., L. R., 6 Q. B. 377, 40 L. J. Q. B. 188; Praeger v. Bristol, &c. Ry. Co., 24 Law Times, 105; Slater v. G.-W. Ry. Co., L. R. 4 Ex. 117; Harrold v. G.-W. Ry. Co., 14 L. T., N. S. 440; Houlden v. Couper, Dec. 20, 1871, 44 Jur. 144; Stewart v. Cal. Ry. Co., Oct. 27, 1869, *ante*, vol. viii. 486; Hunter v. Miller, Nov. 23, 1865, *ante*, vol. iv. p. 78; Snare v. Earl of Fife, June 18, 1852, 14 D. 895.

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ras. It is not explained in any way why the train was not brought up to latform; in short, it is left to be inferred that it was a mere accident that s not so,—some slight miscalculation probably in the driver of the engine pping a little too soon. That certainly in itself cannot be called negli- on the part of the company or the company's servants, because it is a sort ing that may occur frequently without any fault at all. Arresting a train e application of drags and the stopping of the engine is a thing which will affect more or less readily according to circumstances, according to the state e rails as affected by wet, or according to the state of the atmosphere as wet also, and also in some degree it may depend on whether the wind is rable or the reverse. In short, there are a great many circumstances affecting which will easily account for a train not being brought exactly opposite to latform. But when this occurs there is certainly a demand upon the com- 's servants to do all they can to provide against evil consequences resulting it. If the ground in the neighbourhood of the station is of such a charac- at it would not be very safe for passengers to get out except upon the plat- that would probably impose upon the company's servants an obligation to y the mistake in the most obvious way,—that is to say, to put the train in n again and bring it to the platform. That would be the most obvious ly. But if it is thought not worth while to take that trouble, or to en- er the delay which perhaps might arise thereby, then it seems to me that ompany's servants ought to see that the passengers who have occasion to at at a place where there is no platform ought to be warned in some way e care of themselves, or helped in some way, if necessary, in descending the carriages. Now, the place where this pursuer had to get out was cer- a place of some danger, and it must be observed also that he had no ative but to get out there. It was plain, and he took it for granted,—and ight in taking it for granted,—that the persons conducting the train in- d the Heriot passengers to get out where the train stopped. There was no tion of altering the position of the train before they got out, and therefore lternative presented to him was either to get out or to allow himself to be d on. As to the doctrine propounded to us, that a passenger in such a ion should not get out unless he is perfectly satisfied that he can do so with y, and that his proper remedy is to allow himself to be carried on and then an action of damages for the inconvenience occasioned to him, that is a ine which I cannot adopt. I think that the pursuer had no alternative but t out where he did. The place, as I said before, was a place of some er. This is quite plain. It is proved, I think, by the circumstance that a n getting out of a carriage there had to make a very considerable descent, even if he had been quite aware of what he had to do, the night being dark, s not a very safe thing to get out, at least without some assistance. The r at the station very plainly confirms this impression, because he said that he went back, upon the train stopping, to the van to get his parcels he nobody coming out of the carriages which were not opposite the platform, if he had he would have stopped and assisted them, or warned them that had to descend to the level of the rails. It is quite plain, therefore, that orter thought that anybody getting out there ought to have been either l or warned. And there is other evidence bearing upon this. The place e the pursuer got out is even a longer step down than it is to get out oppo- he level crossing; and at the level crossing both the station-master and the r agree that it is the practice to give the passengers special help in getting f a carriage that is opposite the level crossing, so that I think we may take it that the place where the pursuer had to get out was a place of danger, where it was reasonable to expect that the railway servants should some help, or at least some warning, to the passengers that were to get out. nothing of this kind was done; and there was certainly no very good to aid the pursuer in getting out. There were lights in various places, but were not generally very available for this purpose. The light in the n shed was of no use. That seems to be quite clear, because the end wall e shed prevented the light shining upon the place where the pursuer was.

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There was a light in the carriage in which the pursuer travelled, but that also afforded very little aid. It is said further that the porter's light was placed upon the footboard of the van when he went back to the van to get his parcels; but that was a light of a very peculiar kind, and it is not by any means clear whether it would have helped the pursuer to see his way out of the carriage or the reverse. The light attached to the van itself, I think, was of no use. It was a bull's-eye light, and was at a level of eight feet above the ground, so that its rays at the short distance which it was from the place would not shine upon the ground at all, or upon any level so low as the place where the pursuer was getting out. Upon the whole matter, therefore, I think that the place where the pursuer was intended to get out, and was, I think, morally obliged to get out, was a place of danger, and that it was the duty of the railway servants either to provide a different place for him to get out, by bringing the train opposite the platform, or to give him some warning or assistance in leaving the carriage; and their failure to do so appears to me to constitute negligence upon their part, which is the negligence of the company.

But then the question is, whether the pursuer did not himself contribute by his own negligence to bring about the accident of which he complains, and this part of the case is attended with more difficulty. He got out in a way that seems rather rash and imprudent, that is to say, he did not look before him, as to speak. He took for granted that everything was right, and that the train was opposite the platform, and that his carriage in particular was opposite the platform. Now, his own experience of this station,—for he was a very constant traveller by this line, and this station was the station at which he always stopped,—his own experience of this station taught him that it was not an uncommon thing for the carriage in which he travelled not to be opposite the platform. The mistake generally committed, no doubt, was the carriage overshooting the platform; but it was just as possible that it might fall short of the platform, and therefore it is rather doubtful whether he was entitled to assume that the carriage was opposite the platform. He did not apparently look out to see whether it was so or not; whether he would have seen if he had looked out is another question. That is very doubtful, but at all events he certainly got out, and he got out with his back foremost, so that in descending he could not very well see what he was putting his foot upon; when he made the step from the iron step on the level of the carriage floor he could not very well see what he was going to step upon. I cannot say that I think that was very prudent, but at the same time it seems to me that that was a question very peculiarly suited for the jury to consider, and I am not able to say that the evidence of negligence upon his part is so clear and strong that the jury were certainly not justified in giving him a verdict. I do not say how my own verdict would have been; I do not think it necessary to consider that. But I cannot say that the verdict is so plainly wrong in this respect that we are entitled to set it aside, and therefore I am not for sustaining that ground for a new trial either.

The only remaining point is the alleged excess of damages. Now, we have had occasion in some recent cases to consider this matter, particularly in the case of Houlden v. Couper, in which, I think, we all concurred in saying that we would never interfere with the verdict of a jury on the ground of excessive damages unless the excess was something very plainly extravagant. That the jury have given more damages than the Court would have given in the circumstances, if they had been sitting as a jury themselves, is no reason at all for setting aside the verdict. The excess must be extravagant, and the only question comes to be whether this verdict is extravagant and excessive in that sense. There is no doubt that the injury sustained by the pursuer was a serious injury. There is no doubt that he sustained pecuniary loss in his business, not certainly to the full extent of the £600 which the jury awarded, but I am not prepared to say that there was not a very considerable amount of pecuniary loss proved to the jury. And then the result of the medical evidence appears to me to be that there was concussion of the spine. I think that is the fair result of the evidence, taken altogether, and that is a very serious injury, the ultimate consequences of which it is often very difficult to foresee; and although the medi-

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gentlemen generally take a favourable view of the prospects of the pursuer's overy, still they all admit that it is one of those cases which may in its ulti- be consequences be much more serious than they are at present inclined to ect. The injury being of that kind, and its possible effects hereafter being y difficult to ascertain, the jury, I think, were entitled to some considerable gin in assessing the damages on this account; and although £600 does seem the circumstances rather large, still I cannot pronounce it, taking all these cir- stances into consideration, to be an excessive award of damages. I am efore for discharging the rule.

LORD DEAS.—The first question is, whether there was negligence on the part the railway company; and I concur with your Lordship that it is sufficiently blished that there was such negligence. I agree with your Lordship that it did necessarily infer negligence that the train stopped short of the platform. I k that the negligence consisted in this, that, having stopped short of the form, it was the duty of the company to give some notice or warning to the engers that it had so stopped short, whereas no such warning was given. train had come to the end of the journey, so far as passengers to that ion were concerned, and it was intended that the passengers should then and e get out. Now, the arrival was at night, and it was dark, except in so far here might be artificial light; and that being so, I think there is ground for ing that there was negligence on the part of the company in giving no ce, warning, or assistance to the passengers. The company's servants could tell what the condition of the passengers might have been. Some of them ht have been lame; some of them very old; some of them sick; some of m might have been children; and to stop short of the platform in these cir- stances, without any notice at all, constitutes, in my opinion, negligence.

The second question is a much more difficult and a very narrow one, viz., ther there was also contributory negligence on the part of the pursuer. , I agree in thinking that that was a question peculiarly for the jury. It d have been difficult even for the jury to get all the little circumstances, all precise information necessary for judging in regard to that question; but it uch more difficult for anybody else. The jury had the opportunity of satis- g themselves by putting questions to enable them to judge of that; and on sideration of all the circumstances they came to the conclusion that there not contributory negligence, and I am not prepared to say that that was a ng conclusion. Except for the artificial light, it is plain enough there was proper provision made for the passengers getting safely out, and it is very lt to say whether the artificial light, such as it was, might not tend to con- the pursuer rather than assist him in getting out. I think that is, to say least of it, exceedingly doubtful. Now, once we have got the length of ing that there was negligence on the part of the company, it becomes incum- on the company to make it reasonably clear that there was sufficient to enable the pursuer to see what he was about in coming out of the car- , and in my opinion that is not satisfactorily proved. No doubt he came with his face to the carriage, but it is matter of difference of opinion and ice what is the best way of coming out of a railway carriage. I think I have authority near me for the opinion that the best way is to come out backwards. not say that I am clear about that. But it is the practice of some who are y well able to judge always to come out that way; and supposing the pur- to have been aware of the distance he had to come down, I do not know that uld have come out in any better way than backwards. There is certainly ficulty here, and if I had been upon the jury I should have felt it a very w question. I do not exactly know at what conclusion I might have ved upon it, but I am clearly of opinion, with your Lordship, that the evi- e upon that is not such as would entitle us to interfere with the verdict of jury. I have only further to say that the recent English cases,—which very properly referred to,—in so far as they have a bearing upon this case, r tend to confirm the result I have arrived at on both of these points. only one that goes the other way is the case of Bridges, 11th May 1871.

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The only remark I shall make on that case is, that the judgment of the Court of Queen's Bench was confirmed by the Court of Exchequer by a majority of only one—four being one way and three the other. On reading that case very attentively I think I would have been of opinion with the three, and not with the four. The other cases, so far as applicable, all go in the other direction.

Upon the question of damages I quite agree with your Lordship. I think there is no doubt that the pursuer suffered very severe injury, and likewise loss of business; and I am of opinion that there is no such excess of damages as entitles us to interfere with the verdict on that ground.

LORD ARDMILLAN.—I so entirely agree with your Lordship on both questions in regard to the fault or negligence of the defenders that I shall add nothing to what has been said. I think there was a sufficient degree of fault and negligence proved to make the defenders liable, if there was not contributory negligence. I am of opinion that, where fault is proved on the part of the defenders, they must prove the contributory negligence as clearly as the pursuer must prove the fault in the first instance. That, I observe, is stated by Lord Neaves in the case of M'Martin,[1] and I concur in the observation. I think that in this case the fault is sufficiently proved to support the verdict, and to prevent the Court interfering with the verdict of the jury. It was a fair case for the jury. In the next place, I think that the jury were quite entitled to hold that the proof of contributory negligence was not sufficient, and I am inclined to think that they were, on the whole, right,—at least, not so far wrong as to call for the interference of the Court. Upon the question of damages I agree with your Lordship that there is no room for interfering. With regard to the English authorities I have only to say that I am entirely satisfied with the exposition of the law as laid down by Chief-Justice Cockburn in the case that was referred to, and I see no reason to suppose that our law differs from the law of England as so stated.

LORD JERVISWOODE concurred.

LORD MURE.—On the question of negligence on the part of the company I have nothing to add to what your Lordship has said. I felt at the trial, and felt again on reconsidering the case, that the difficulty lay in the question of contributory negligence. Because at the time of the accident there appears to have been even to the last some doubt in the mind of the pursuer whether he was at the platform or not; for he said in his evidence in cross that before the accident happened he was getting down from the iron step and feeling with his other foot for the platform, and must therefore have been in a state of uncertainty as to whether the train was at the platform when he got down. I read that part of the evidence to the jury, in order that they might have it clearly before them when they were considering the question; and I put it to them, having regard to the circumstances of the case, and particularly to the want of light—if they were satisfied that want of light was proved,—I put it to them to consider whether or not there was, in their opinion, such negligence on the part of the pursuer in getting out of the carriage as to lead them to think that the accident arose from his fault. And the jury, having that put distinctly to them, after deliberating for more than an hour and a quarter on that and the other evidence in the case, gave a unanimous verdict for the pursuer. In these circumstances, the question of contributory negligence being peculiarly suited for the jury's consideration, there was, I think, evidence sufficient to warrant them in holding that contributory negligence was not established by the company, on whom the *onus* lay of establishing it. On the question of damages I concur as to the grounds on which the verdict should be allowed to stand.

THE following interlocutor was pronounced:—"On the motion of both parties, apply the verdict found by the jury in this case

[1] M'Martin v. Hannay, Jan. 24, 1872, *ante*, vol. x. 411.

and in respect thereof decern against the defenders for payment to the pursuer of the sum of £600 in name of damages: Find the defenders liable to the pursuer in the expenses incurred by him; allow an account," &c. No. 114. June 7, 1873. Potter v. North British Railway Co.

W. OFFICER, S.S.C.—DALMAHOY & COWAN, W.S.—Agents.

JOHN D. RODGER, Appellant.—*Strachan.*
JOSEPH RUSSELL (Wilson's Trustee), Respondent.—*Pattison.*

No. 115. June 10, 1873. Rodger v. Russell.

...-Contract—Real Burden—Mutual Gable—Sequestration—Preference.— ...d B feued two adjoining stances, both feu-contracts declaring that the ...s should be mutual, and should be built to the extent of one-half on the ...ning feus. This provision was declared to be a real burden on the feu. ...that A, having built a mutual gable which was made use of by B, was ...led to be ranked preferably on B's sequestrated estate for one-half of its ...

2D DIVISION. Ld. Shand. I.

...r a feu-contract of date 9th and 12th February, and recorded in the ...ster of Sasines 20th March 1872, John D. Rodger, builder in Edin... h, feued from James Steel, builder there, a building stance at Dalry. ...contract contained this stipulation—"The gables of the said tene... shall be mutual gables, and shall be built to the extent of one-half ...e thickness thereof on the ground hereby feued, and to the extent of ...ther half on the ground adjoining the same on the north and south ...ctively, and the cost of erecting the said gables shall be borne equally ...e feuars to whom they shall belong in common, but no part of such ...shall be borne by the said James Steel or his foresaids,"—which ...nade a real burden on the feu. Rodger built on the stance, the south ... of his building being erected to the extent of one-half on his own ...d and to the extent of the other half on the ground adjoining.

...exander Wilson, builder Edinburgh, feued from Steel the stance ...diately to the south of Rodger's feu. His feu-contract contained ...isions as to the gables similar to those in Rodger's contract, and ...ired them to be real burdens on the feu. Wilson proceeded to build ...is stance, and his building was roofed in before 8th October 1872, on ...h date he became bankrupt. Russell, the respondent, was appointed ...ee on his sequestrated estate, and entered into possession, and pro... ...ed with the internal finishing of Wilson's tenement. Rodger had ...r demanded from Wilson the value of the one-half of the gable, and ...d not been paid, On 5th February 1873 Rodger lodged a claim in ...sequestration to be ranked preferably for £84, 7s. 5½d. as the one-half ...e value of the gable. The claim was disallowed by the trustee, under ...vation of Rodger's right to lodge an ordinary claim.

...odger appealed to the Lord Ordinary on the Bills (Shand), who pro... ...ced this interlocutor:—"Sustains the appeal: Recalls the deliver... of the respondent, as trustee on the sequestrated estate of Alexander ...on, complained of, and remits to him to sustain the claim of the ...llant to be ranked preferably on the sequestrated estate for the sum ...84, 7s. 5½d. claimed, and decerns: Finds the appellant entitled to ...nses," &c.*

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*NOTE.—In the ordinary case the person who builds a mutual gable, in ...liance with the usual stipulations in his feu-contract, does not thereby add ...s neighbour's property to the extent of the building erected on the ground ...ning his own, for the maxim *inædificatum cedit solo* does not apply. He ...ight to the whole wall or gable, subject to an obligation to give to the

No. 115. The trustee reclaimed.[1]

June 10, 1873. At advising,—

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LORD JUSTICE-CLERK.—I concur with the Lord Ordinary's judgment, and substantially on the same grounds. But as we were told that the question was

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adjoining proprietor, in return for payment of one-half of the total expense, a right, not to the part of the wall built on his ground, but a common or *pro indiviso* right to the whole wall. The adjoining feuar is entitled, when he requires it, to make use of the common gable for the purposes of his building, but it is a condition of this right that he shall pay the one-half of the expense when required to do so. The right of the proprietor who erects the gable is real. It is transmitted by a simple conveyance of the property, and does not require a special assignation or conveyance. Again, any assignation or conveyance in favour of the adjoining proprietor is unnecessary in order to give him right to use the gable. The payment of one-half of the expense, or a discharge of his liability therefor, granted by the proprietor of the adjoining property, by whom the gable has been built, or by his successor in the property, gives a title to the gable as common property, and to the use of it accordingly. The law, as thus stated, is settled by the cases cited by the parties in the course of the argument in the present appeal, viz., Wallace v. Brown, 1808, Mor. Personal and Real, Appendix, No. 4; Hunter v. Luke and Others, 2d June 1846, 8 D. 787; and Law v. Monteath's Trustees, 30th November 1855, 18 D. 125.

"It seems to follow from what has been now stated, that while, on the one hand, a party about to make use of a gable built by the adjoining feuar can acquire right to do so by payment of half of the total expense, on the other hand, the proprietor who built the gable is not divested of that real right until payment be made to him of the half of the expense, or until in some way he has discharged the adjoining feuar of his liability to make such payment, and consented to the appropriation of the gable, and to the adjoining feuar acquiring a *pro indiviso* right of property in it.

"Applying these principles to the present case, the Lord Ordinary is of opinion that the decision is not attended with difficulty. The appellant, who built the gable as a mutual gable, in terms of the obligations imposed on him in his feu-contract, has not received payment of any portion of the expense; and in the opinion of the Lord Ordinary he remains the proprietor of the whole gable until that expense is paid to him. It was maintained for the trustee on the bankrupt's estate that the claim is one of recompense, and that the appellant having allowed the gable to be made use of can only rank as an ordinary creditor on the bankrupt's estate for the half of the expense claimed. The Lord Ordinary cannot adopt this view. Payment has not been made, and it is not said that liability for the amount has been expressly discharged. In a question with the bankrupt the appellant is not bound to part with the property for a composition on his claim, or for anything short of full payment of the half of the expense of the building. The trustee is in no better position. He enters to possession of a building which has, no doubt, been roofed in, but which was yet in an unfinished condition,—for it appears from the joint minute of admissions, No. 12 of process, that the respondent 'has since proceeded with the internal finishing thereof.' The Lord Ordinary cannot see that in this state of matters the appellant, either by his actings or acquiescence, has done anything which has transferred a *pro indiviso* right to the gable to the bankrupt, and consequently to his trustee, or which has limited the appellant's right to full payment of a half of the expense of building, as a condition of the trustee taking the benefit of the gable. It may be that if a party having such a claim allows the gable to be made use of, and adjoining buildings are erected, con-

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[1] Wallace v. Brown, June 21, 1808, M. Per. and Real, App., No. 4; Hunter v. Luke and Others, June 2, 1846, 8 D. 787; Law v. Monteath, Nov. 30, 1855, 18 D. 125; Earl of Moray v. Aytoun, Nov. 30, 1858, 21 D. 33.

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f some general importance I shall shortly state the impression which the argu- ent has made on my mind.

It seems to be conceded on both sides, and indeed after the case of Wallace could not be disputed, that when one of the conterminous proprietors of urban ing ground builds, the adjacent stance remaining unbuilt, the gable, although tly built on the *solum* of the adjacent ground, remains or becomes the sole perty of the man who built, with a power to the adjacent proprietor to acquire *pro indiviso* right in it when he comes to build, on paying half the expense of and an obligation on him when he builds to pay. Assuming this to be so it llows, first, that the builder of the gable is the feudal proprietor of it, without y specific title to part of the *solum* on which it rests; secondly, that the *pro diviso* right to it may be acquired by the adjacent feuar, without any written le excepting that to the one-half of the *solum*; and third, that the right is at e transferred by the use taken of the gable, along with payment of half the pense of erecting it.

If this be so it is plain that the right is a very anomalous one, its nature ing, as was explained in Wallace's case, from the necessity of the position of parties. But the Court have held very clearly that the right to demand half price transmits to a singular successor in the property, as in the case of Luke Hunter; and that the obligation to pay the price transmits against a singular cessor, which was directly decided, and indeed conceded, in the case of Law Monteath. The nature of the right, therefore, is one of real property, which essarily remains with the builder until the property is transferred. Probably right may be correctly defined as a right of property, qualified by an implied st for the adjacent feuar, with an obligation to denude on payment of the ce.

t was suggested that the mere fact of building, and thereby appropriating the le to the common use, *ipso facto* transferred the property and left the claim half the price a mere personal debt. But I find neither principle nor autho- for that view; and it seems altogether inconsistent with the result of Luke Hunter, in which the right to demand payment went to an adjudging creditor in ue of his title to the house. I think it is not properly a real burden, but

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ed, and occupied, and thereafter transferred to a singular successor, that a n against such successor might be excluded, upon the ground referred to by d Deas in the case of Law v. Monteath's Trustees, that in the whole circum- nces the successor was entitled to assume that the half of the gable had been dy paid for, and that the creditor must look to the person who used and pied the buildings for reimbursement of his claim. The question which ld arise in such a case would be attended with considerable difficulty, for e is much to be said in favour of the view that nothing short of payment or charge of the claim for one-half of the expense will transfer the real right. ny view the question would turn on the special circumstances, which must ount to a bar of the creditor's claim, in respect of his own actings or acquies- ce. In the present case there are no circumstances which can create such a . It cannot, in the opinion of the Lord Ordinary, be said that there was ue delay to make the claim, or acquiescence in the use of the gable with- payment so that the real right in it was transferred because the creditor not enforce his claim before the building was roofed in. If he had dered the account while the building was going up this would appear be all that could be expected of even a party very careful of his rights. was surely not bound to interdict the building in order to preserve his ht; and the Lord Ordinary cannot think that, in the circumstances, his ht to full payment was forfeited by delay to make his claim to the effect enabling the trustee to acquire a real right in property for which no pay- nt was ever made. Indeed, the principle of the case of Wallace v. Brown, ich is the foundation of all the decisions since its date, seems to ex- le the argument maintained by the respondent, that the appellant must be sed to rank as a personal creditor, and to accept a composition on his claim. objection was stated to the amount claimed, assuming liability to exist."

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a right of property, and therefore subsists against all who make use of until the price is paid.

But if I were of opinion that the right of the builder of the gable be carried so far, there are separate elements in the present case which me sufficient for the decision of this case. In the first place, this is n burden in the contract of feu; and although that is a stipulation with rior, I am inclined to think it is binding on the vassal, whoever he m question with the feuar who is creditor in the price. It is difficult t any other force to such a provision, which seems clearly for the ben conterminous feuar. It is at all events complete notice to a purchase second place, the trustee found the house unfinished, although the completed. He could only realise its value, and create out of it a n commodity, by taking advantage of the mutual gable; and whatever the case with an ordinary purchaser, after the house was complete the trustee who took possession of and finished the house could o under the liabilty for one-half the price of the gable. And lastly, doubt if a trustee in a sequestration stands, in such a question, in th of a singular successor. He is an adjudger, and takes the property of rupt *tantum et tale* as the bankrupt held it.

Lord Cowan.—The feu-contracts of the parties respectively contai stipulations that the gable between the building stances shall be a mut and the cost of erecting it be borne equally by the feuars, to whom the g belong in common. There are other obligations and stipulations connected premises, and the contracts contain an express declaration that the obligat visions, and others contained in them shall be real liens and burdens the several pieces of ground and buildings erected and to be erected ther this state of the titles there is really no difficulty in the case, having the relative position of the two parties. The right of the respondent house was first erected, to enforce against Wilson, by whom the adjoi was feued, the half expense of erecting the mutual gable so soon as t made use of the gable in the erection of a house on his feu, is beyond As Lord Ivory expresses it in Law v. Monteath, "all the authorities that there is a real right, inherent in the subject itself, to have the val gable when the other party comes to use it, and therefore, that right inherent, it passes with the property as an necessary adjunct of it." principle it was that in the subsequent case of the Earl of Moray, which t disposed of on the title, I rested my opinion in favour of the defender, Aytoun, to whom the half cost of the gable had been paid by the fi built on the adjoining feu. Now, that being the character of the rig the party has to demand payment, it seems clear to me, apart from stipulation, that the owner of the unbuilt on stance, when he does bu adopts the mutual gable as part of his building, does so subject to the b making payment of one-half of the expense of the gable, as a real c affecting his right and the building erected on the ground. The *solu* gable appears to me to become, from the time of its appropriation, *indiviso* property of the two parties under their several titles, subject real condition of paying for the gable. I think there is difficulty, in of the Lord Ordinary, that it is only on payment that the *pro indiv* passes. No written evidence of payment is required to form part of to the property, and to be recorded as such. The more just view is feuar, who has first built on his ground, can demand, from the second his using the wall, payment of the sum, as being a real condition o affecting the subjects; and his right, as inherently a preferable real c be made effectual as such. And certainly whatever may be said a liability of singular successors, where the feu-contract is silent, and wh is room from lapse of time or intermediate transmissions, for presuming by his authors, the circumstances of this case present no such difficu (1) the house erected by Wilson had not been completed when his b took place and the appellant took possession of the premises under the

; it was only after the mere external shell of the building came into his ession that the house was completed; so that it could not but be that he the property subject to the conditions on which it stood in the bankrupt's on; the subject necessarily vested in him *tantum et tale*. And (2) the ex- stipulations in the feu-contracts declared this obligation amongst others a burden affecting the ground and the buildings erected thereon; and it is for the appellant to resist implement of this obligation contained in the act, which is the foundation of his feudal title, and by which the cost of ting the mutual gable is ordained "to be borne equally by the feuars, to m they shall belong in common."

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am of opinion that the interlocutor of the Lord Ordinary should be adhered

ORD BENHOLME.—There may be some difficulty in point of principle involved ses of this kind. I am inclined to think that in their decisions the Court gone the length of holding that the proprietors of conterminous tenements, whatever hands they fall, are liable to implement the mutual obligations in rd to the gable. But the circumstances of the present case enable us to d all difficulties. The trustee enters into possession of an unfinished e, and clearly stands in the same situation with the original holder of the ce. I am for adhering to the Lord Ordinary's interlocutor.

ORD NEAVES.—I concur in the result proposed, that the Lord Ordinary's locutor should be adhered to. The house was not entirely finished, and fore the trustee could not consider himself as an independent singular sor buying at a full price. That circumstance makes it unnecessary to go the subtleties which have been suggested in the course of the debate. I not prepared to adopt all the Lord Ordinary's views. It is plain that the servi- s which exist in urban tenements are anomalous, and the mutual obligations d and interlaced. The strict rights of property must yield to public con- ience in a burgh. Subjects in a town are not divided, either laterally or rwise, in the same way as lands. Lord Stair well puts the law in his second ; tit. 7, sec. 6; though he says that such things consist not *in faciendo* but *atiendo*. The obligation is of that peculiar kind, which while personal in nse, nevertheless, from the necessity of the case, and for the safety of the , passes to singular successors both of the original debtor and creditor. mutual gable is not exactly in the same position as the roof of one tene- and the floor of another, but I think that the ground occupied or destined occupied by it is common property. A man builds the gable twice the lth of his own part of the *solum*, and gives his neighbour a joint interest in gable. The double halves are both necessary for each party; it is *pro iso* property. But the person benefited is under obligation to contribute. ther in all circumstances the person who has built the gable retains a pre- le right to be reimbursed to the extent of one-half it is not necessary to le. I am inclined to think that the obligation will continue against ular successors until at least from *mora* or other reason the singular successor ntitled to believe that the gable was paid for. The trustee could not think ere. Though nice questions may arise in future cases this case is quite against the trustee.

THE COURT adhered.

WILLIAM MANUEL, S.S.C.—JAMES SOMERVILLE, S.S.C.—Agents.

LTER FRANCIS DUKE OF BUCCLEUCH AND QUEENSBERRY, AND OTHERS, Pursuers.—*Watson—Johnstone.*
LEXANDER COWAN AND OTHERS, Defenders.—*Sol.-Gen. Clark—Asher.*

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wer—Pollution—Verdict—Declaratory conclusions—Motion for Decree.—rian proprietors on a private stream brought an action of declarator and in- ct against the owners and tenants of paper-mills on the stream to prevent

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pollution, and upon issues whether the defenders did by discharging refu the stream pollute the same to the nuisance of the pursuers obtained a ve a jury in 1866. The defenders thereafter, under an agreement with the p conducted experiments with a view to abate the nuisance. In 1873 the p moved for decree. *Held* (1) that they were entitled to declarator; and (a statement by the defenders that they had no proposals to make, that t suers were entitled to interdict.

2D DIVISION. R.

Ante, vol. ii. p. 653; vol. iv. p. 475; vol. v. pp. 214 and 1054.

This was an action of declarator and interdict by the Duke of Buc and others, riparian proprietors on the river Esk, against Messrs Ale Cowan and Sons, and others, paper-makers, to have it declared "t pursuers have good and undoubted right to have the water of the Nor so far as it flows through or by their properties, transmitted in a stat the use and enjoyment of man and beast, and that the said defenders h right to pollute or adulterate the said water, nor to use it or the c of the stream in any way or for any purpose such as to render th water noxious or unwholesome, or unfit for all its natural prima poses to the pursuers, or in any way to destroy the amenity of th stream: And the defenders ought and should be prohibited and dicted from discharging into the said water of Esk, from their res paper-works, any impure stuff or matter of any kind, whereby th water, in its progress through or along the property of the pursuers, of them, may be polluted or rendered unfit for domestic use, or for of cattle, or its amenity in any way diminished, or the rights of th suers therein in any way injured or affected: Or otherwise, it oug should be found and declared that in the event of the said defen any of them, being found entitled to continue the use of the said wa any portion thereof, for all or any of the works above-mentioned, the are bound and obliged to make use of the said water in the manne injurious to the pursuers, and to use all necessary and proper preca by filtration and otherwise, to restore the said water to the stream having been used at the said works respectively, in as pure a stat condition as possible; and to that effect they ought and should be dec and ordained to erect all suitable and necessary filtering ponds and apparatus for rendering the water as pure as possible before being ret back to the stream, and for the removal of all noxious or polluted qua in the refuse or matters necessarily discharged into the said stream in carrying on of their said works; and to this effect, if necessary, a sys of regulations ought to be established at the said respective works on report of men of skill to be named at the sight of the said Lords, in s form and manner as may be deemed reasonable and proper."

The original action was brought in 1841, but the original defen having died or ceased to own the mills two new summonses were brou in 1864 against the existing owners. The three actions were conjoi After various proceedings, including a remit to men of skill, and reg tions framed by them and sanctioned by the Court, the case was trie a jury in July 1866 on the following issues:—"1. Whether, between January 1835 and 1st October 1853, the defenders, the first-mentioned of Alexander Cowan and Sons, did, by discharging refuse or impure m at or near their mills of Bank Mill, Valleyfield Mill, and Low Mill, o of them, pollute the water of the stream or river called the North E the nuisance of the pursuers or their authors as proprietors of their r tive lands aforesaid, or of one or more of them? 2. Whether be 1st October 1853 and 20th May 1864 the defenders, Alexander C and Sons, the present occupiers of said mills, did, by discharging re impure matter at or near their said mills, or any of them, pollu

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er of the said stream or river, to the nuisance of the pursuers or their hors as proprietors of their respective lands aforesaid, or of one or more hem?" Similar issues went to trial against the proprietors and tenants other mills, the only difference between these and the issues above ted being that they applied to different periods.

he jury returned the following verdict:—"Find by a majority of 9 to r the pursuers, the Duke of Buccleuch and Lord Melville, on all the es, and for the pursuers, Dame Mary Eleanor Williams or Drummond others, tutors-nominate of Sir James Hamlyn Williams Drummond of rthornden, on the issues Nos. 1, 2, 3, 4, and 7."

he defenders excepted to certain portions of the charge, but the exions were disallowed.

n 7th March 1867 the Court pronounced this interlocutor:—"Apply verdict of the jury in this case, and in respect thereof find the purs entitled to the expenses of the trial, and remit the same to the itor to tax and to report, and *quoad ultra* supersede in the meantime ter consideration of the cause."

n agreement was thereafter entered into between the pursuers and nders by which a remit was made to Professor Penny, Glasgow, to ect and make such regulations as he should think advisable. On Dr ıy's death the agreement was renewed at various times, and subsisted l 1st March 1873, Mr William Arnot, St Ann's, Lasswade, being subted for Dr Penny.

he pursuers now moved for decree in terms of the conclusions of the mons.

hey argued;—No objection to the motion could be taken on the ground alay. That was granted solely for the benefit of the defenders and r agreement with them. The defenders' experiments had failed, their works were now a greater nuisance than ever. The only remedy decree of declarator and interdict following up the verdict of the . In Rigby v. Beardmore[1] decree was given in nearly the precise s sought here. The pursuers were entitled to decree in general . They were not bound to specify any particular form of pollution. defenders might discover some new process not struck at by a special dict which would be a greater nuisance even than the present. The decided that the river must be left fit for primary uses, and the pur- were entitled to interdict against any and all pollution which un- it for these uses. In England the Courts did not indulge the parties a series of experiments, far less aid them to make such experiments.[2] rty created a nuisance at his own risk, and was bound to discover the of curing it.

e defenders argued;—They had done their best hitherto to mitigate uisance and had greatly abated it. They were still going on experiing, and hoped to be able to cure it altogether. They were willing craved the Court to appoint men of skill to endeavour to do so. If was not done, and if interdict was granted as craved by the pur-, the works must be stopped. It was more reasonable to allow the ance to proceed for a time until the experiments for its removal were usted than to put an end to such important industries. The defenders willing to make every experiment and to carry out every suggestion, if interdict was granted such experiments would be carried on at the of a breach of interdict. It had not been the practice to grant inter-

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[1] March 8, 1872, *ante*, vol. x. 568.

[2] Att.-Gen. v. Colney Hatch Asylum, 1868, 4 Chan. App. p. 153—Lord Cancellor Hatherley.

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dict in such circumstances, and the Lord Justice-Clerk (Inglis) at the trial specially retained power to consider the result which would follow the verdict. The effect of the verdict was only to let in the equitable interference of the Court, and by no means bound them to grant decree in terms of the conclusions of the summons.

At advising,—

LORD COWAN.—I think it is a necessary consequence of the procedure that has hitherto taken place in this case that the pursuers should have decree of declarator in terms of the conclusions of the summons. It seems to me an extraordinary thing to say that, after a verdict upon issues that were so carefully adjusted to try the merits of the whole of this cause, the pursuers are not entitled to such decree.

One of the defenders' pleas was, that the river had been polluted from time immemorial, and had been in fact a ditch or drain receiving all sorts of pollution from its source to its mouth, and that to complain of the defenders' operations having created the nuisance alleged was contrary to clear reason and legal principle. I need not refer to the allegations on record to that effect, because this is not disputed; and there were pleas to the effect that such being the condition of the river in point of fact there was no room for the complaint of nuisance at all. Of course these allegations were denied, and therefore were matters of fact to be tried before the jury. When the issues came to be adjusted it was the subject of discussion whether it was necessary, having regard to the general terms of the issue granted to the pursuers, there should be any separate issue in reference to the defences pleaded. There was a distinct judgment as to that question; and I was therefore surprised to hear it contended that it had not been considered by the Court.

By interlocutor of 10th February 1866 the Court repelled the plea of "acquiescence stated for all the defenders in the three conjoined actions, being the second plea for the defenders Annandale in the first action, and the third plea in law for all the other defenders in all the three conjoined actions, in respect there are no relevant averments on record to support the said plea: Find that it is not necessary to propose or send to the jury any further issues for the purpose of trying any question of fact raised by the defenders." Now, although I cannot find in the report of the case the ground upon which the Court decided that matter when they adjusted the issue I have not the slightest doubt, from looking at the papers now before me, and from my recollection of the anxious discussion which took place, that it was discussed before us whether there should be counter issues or not. Counter issues were proposed, but the Court said that having given a general issue it was unnecessary to have a special issue applicable to the defences stated, because there could not be a verdict of nuisance without taking into view that which was inherently an essential answer to the question of nuisance. That being so, and the case having now come back to us, why is it that we are not to give some effect to the verdict which has been returned on issues adjusted to try the cause? The Solicitor-General stated that the Court were not in the habit of giving an abstract declarator or recognition of a legal right. That is quite true; but when the legal right is *de facto* disputed, and attempted to be destroyed, the Court invariably grant declarator. In this particular case I can well understand that declaratory decree is the more necessary, because of the nature of the defences which went to negative that right, and to set up the right of the defenders to innovate upon it. Therefore it seems to me consistent with principle and with procedure in this Court, as well as the pleadings in this cause, that we should now at this stage find and declare in terms of the declaratory conclusions of the summons.

As regards the conclusion for interdict, I have some difficulty in granting interdict in the general terms in which it is expressed in the summons. It is not exactly in terms of the declaratory conclusion. There is a difference which may or may not be material, and there is a question whether, if granted at all, it should be granted in the terms here asked. But apart from the precise terms in which it should be granted, the question is whether we are now to grant

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or whether, in respect of the statement of the defenders' counsel, we t at least delay pronouncing it. In general, when a right is declared e been innovated upon, that is followed up with interdict; but it is e to overlook the condition of this river as having been used for so long f time by the paper-makers, and the fact of valuable property having ed on the banks of it, which has been a source of industry and profit for riod. A general interdict seems in such circumstances to be a remedy the pursuers are entitled only if the defenders are unable to escape y shewing that they can do something in the way of abating the

That I understand to be the principle of the English cases, and if I d the proposal made by the defenders aright it comes to this, that they o lodge a minute stating that all of them, either conjunctly or severally. g to do certain things which will have the effect of abating the nuisance. hat, before answer, we should have that minute put in. We shall see ated and proposed. Certainly if the proposal merely be that the Court e on themselves the responsibility of remitting to some man of skill to get ; as to what is to be done I do not think the minute would be of much n the way of preventing our granting interdict. But I have to suggest hould allow the defenders to put in a minute stating what they propose abate the nuisance, and what they undertake to do so as to escape from lict which must inevitably follow, unless this minute be sufficient.

BENHOLME.—My opinion is very decided in this case. I think it is a nclusion from the verdict and the procedure that has gone before that ers should get decree in terms of their declarator and their interdict. ted in an English case, and stated I think rightly, that it did not signify y people were interested in maintaining an illegal act, but that if there 00 it was the same thing as if there was one. Now, varying the n, to my mind it is of no consequence whether these defenders have a rest in continuing the nuisance or not. I would grant the interdict reference at all to the amount of interest involved. If it is found that illegal thing for them to pollute this stream I would grant interdict eir doing it.

NEAVES.—I confess I feel a little difficulty about this. So far as regards of it I do not think we can hesitate to give decree in terms of the deconclusion. That is not an abstract decree at all. It was necessary to clarator, because the operations that were struck at were not a very novation, but had been going on for some time, and therefore the right required to be made clear. That has now been done by the ver- I have no hesitation about granting the decree of declarator. I am hat even there the question of amenity should be introduced. In re- e question of interdict, I do not say that Lord Benholme's view is not t one in substance; but the course which I should prefer, particularly o what has been done in other cases, is that we should decern in terms clarator conclusion, whether with or without the reference to the as your Lordships may think right, and that before going further we point or allow the defenders, if so advised, to make such a statement ise that important question. We shall then see what they offer, because their tone has been that this cannot be done. I think that before e should allow them, if so advised, to state what they propose, as a our refusing or modifying the interdict. I confess I think that the t of the pursuers is to have the interdict; but I would not grant interrms of the last line and a-half of what is asked, because it is too vague. lict a party against violating the rights of the pursuer without naming established in the declarator would be irregular and unsatisfactory. be to suspend over a party's head a sword which may fall on him is knowing it.

JUSTICE-CLERK.—I do not object to the suggestion which has been Lord Cowan, and mainly on this ground, that the matter of interdict is

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a question of possession. Possession has lain over a very long time si verdict, and I do not see that any substantial injury will accrue to eith by our having a specific statement made on the part of the defenders, of them, as to what they have done, or what they are ready to oblige the to do, in the way of abating this nuisance. I am entirely of opinion t amount of interest involved should not affect the question, and I hav been able to understand how, upon a question of this kind, it can possibl the legal right that by doing an illegal act other parties have acquired large and substantial interest in doing it. That all goes to the relevanc action; but that has been conclusively fixed, and it has also been fixed opinion, that the issue is an issue to try the questions raised in controv the conclusions of the summons—to try the whole of these questions an nothing else. A good deal has been founded on what is said to have bee to the jury. These statements are not before us judicially, and I do not express any opinion on that matter; but it does not appear to me that e the views stated was matter for the jury's consideration at all. They w ing a question of fact, and the legal result of that fact when found was for the Court. Nor could it affect the jury's decision what the legal resul be after the fact was found; and therefore, although this may be called plication to the equitable jurisdiction of the Court, it is only so in thi that every application for interdict is an application to the equitable juris of the Court. If we declare the right and find that the right has been v the conclusion for interdict follows as a matter of course, unless there l clear mode of vindicating the right which has been already declared. whole matter, I am for giving decree in terms of the declaratory conc and as regards the interdict, which is a mere question of possession, I see that we are at all fettered, or that we have our hands tied by allow parties to make a statement which may, even if interposed between th the verdict, be of material importance, if any question of breach of i should afterwards have to be considered.

On 3d June the Court pronounced this interlocutor:—"Having, motion of the pursuers, heard counsel in the conjoined actions of dec find and declare, in terms of the leading declaratory conclusions in the three summonses at the instance of the respective pursuers agai respective defenders thereof, 'that the pursuers have good and und right to have the water of the North Esk, so far as it flows thr by their properties, transmitted in a state fit for the use and enjoyr man and beast, and that the said defenders have no right to po adulterate the said water, nor to use it or the channel of the st any way, or for any purpose, such as to render the said water no unwholesome, or unfit for all its natural primary purposes to the p or in any way to destroy the amenity of the said stream:' *Quoa* continue the cause, and decern."

The defenders having thereafter stated that they had no pro make,—

LORD JUSTICE-CLERK.—I am not sure that the interdict should not fo issues. It would then be substantially against discharging refuse mat near the mills, and thereby polluting the water of the said stream, to the or injury of the pursuers. No doubt that is a general interdict, but I d that we can very well prevent that.

LORD BENHOLME.—I quite agree.

LORD NEAVES.—I do not think it can be said to be improperly general, the issue is in these terms. But the difficulty is, they are not in t clusions.

LORD JUSTICE-CLERK.—It is deduced from the conclusions as being t

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s of them. I think the interdict should simply follow the terms affirmed e jury. It does not follow that the Court meant to grant an issue up to e conclusions of the summons. I will frame an interlocutor granting the lict as near as may be in the terms found by the jury.

THE COURT pronounced this interlocutor:—"The Lords, having resumed consideration of the cause, allow the pursuers to amend the conclusions of the respective summonses in the conjoined actions by striking out the words 'or the rights of the pursuers therein in any way injured or affected,' and the defenders having stated that they had no proposal to make for abating the nuisance complained of, and did not move for any further inquiry, prohibit and interdict the defenders from discharging into the water of the stream or river of North Esk, from their respective paper-works, any impure stuff or matter of any kind whereby the said water in its progress through or along the properties of the pursuers or any of them may be polluted or rendered unfit for domestic use, or for the use of cattle, and decern: Find the defenders liable in expenses since the 14th March 1867."

SON & STRATHERN, W.S.—WHITE-MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

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June 12, 1873.
Mackenzie v. Mackenzie's Trustees.

NNETH MACKENZIE AND OTHERS, Pursuers.—*Millar—W. F. Hunter.*
ONALD BEITH AND OTHERS (the Trustees and Executors of Hugh Mackenzie), Defenders.—*Fraser—Duncan.*

ra—Taciturnity—Acquiescence—Jus relictæ.—A widow was maintained g the eleven years of her viduity by her eldest son, who was her husband's tor, during which time she made no claim for *jus relictæ*. In an action ht by her representatives fifteen years after her death against the represen- s of her son, *held* (1) that the claim was not barred by *mora* and acqui- ce; but (2) that sums expended by the son in the widow's maintenance o be set off against the claim for *jus relictæ*.

1ST DIVISION. Ld. Mackenzie. B.

URDO MACKENZIE of Dundonnell died on 9th May 1845, survived by wife, Mrs Christian Ross or Mackenzie, and seven children of the iage between them.

e widow died in June 1856, two of the seven children having pre- ased.

a 14th July 1838 the said Murdo Mackenzie executed an entail is estate of Dundonnell in favour of his eldest son, Hugh Mackenzie, ving the whole effect of any trust-deed which might be executed by for the puspose of making provision for his younger children, or for r purposes.

e afterwards executed a trust-disposition dated 5th March 1844, and cil dated 1st April 1845, whereby he disponed to certain parties, of m his eldest son Hugh was one, "all and whatsoever bonds, personal heritable, bills, mortgages," &c. "which I shall have right to at the e of my decease," "and also the rents of my whole lands and estates ch shall fall due and be payable at the first term of Martinmas after death," in trust for certain purposes.

he trustees were directed to pay certain legacies, amounting in all to ut £8300, including legacies of considerable amount to the three dren who were pursuers of the present action.

he said deed contained the following clause,—"And should the funds sby conveyed as aforesaid to my trustees be found, contrary to my ectation, insufficient for the above payments, considering that in the

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entail which I have made of my lands and estate I have reserved p to burden the same to such extent as I shall deem necessary, with r ence to provisions for my younger children, I hereby farther assign convey to my said trustees the yearly rents of the whole lands salmon-fishings which I have purchased lately belonging to the fami Cromertie, until all the aforesaid payments shall have been made satisfied. Moreover, I hereby farther assign, dispone, and convey t said trustees in trust certain lands called Ardross." At his death in Murdo Mackenzie was possessed of free personal estate amountin £7745, 14s. 11d.

Mr Mackenzie had made no provision for his widow, and at his d she became entitled to *jus relictæ*. No payment of any kind was ma her on her husband's death, and she was supported by her eldest Hugh until her death in 1856.

Hugh Mackenzie, after payment of the legacies mentioned in his fat deed of settlement, and also certain of his father's debts, retained po sion of the residue, both heritable and moveable. He died in 1 having executed a trust-disposition and settlement whereby he disp his whole property, heritable and moveable, to trustees for behoof c daughter.

In these circumstances, on 18th January 1872, three of the you children of Murdo Mackenzie, and his wife Mrs Christian Ross or M kenzie, and as such heirs *in mobilibus* of their mother, raised this a against the sole surviving trustee of Hugh Mackenzie, and also ag his representatives, concluding for payment to them of their propo of the *jus relictæ* due to their deceased mother at the date of the dis tion of her marriage.

The defender pleaded;—(3) The settlement of Murdo Mackenzie b one by which he gave to the pursuers legacies in full of all they c claim from his estate they are barred from now insisting, as in rig their mother, to a claim for *jus relictæ*, which she never made, and w if allowed, would upset the testamentary arrangements as to his e made by Murdo Mackenzie. (4) The direction to appropriate any of the rents of the heritable estate itself to the payment of legacies ing been made by Murdo Mackenzie on the footing that no part o personal estate was to satisfy a claim for *jus relictæ*, any sums taken these rents or from heritable bonds, wherewith to pay these legacies, be repaid to the defenders as the representatives of Hugh Mackenzi heir in heritage, and the balance only of the personal estate, after s fying the *jus relictæ*, be appropriated to the payment of legacies; an defenders are entitled to an accounting on this footing with the pur in this action. (5) The present action is excluded by lapse of tim by *mora* or taciturnity on the part of the pursuers.

The Lord Ordinary pronounced this interlocutor:—"Finds tha late Murdo Mackenzie of Dundonnell died on 9th May 1845, sur by his wife, Mrs Christy or Christian Ross or Mackenzie, and by children of the marriage between them: Finds that upon the dissol of the said marriage one-third part of the goods then in comm between the said spouses vested in the said Mrs Christy or Chr Ross or Mackenzie as *jus relictæ*: Finds that Mrs Christy or Chr Ross or Mackenzie died in June 1856, survived by five of her children, and that two of the said children predeceased her without Finds that the claim now made for payment of the sum which ves and belonged to the said Mrs Christy or Christian Ross or Macken *jus relictæ*, and of the interest thereof since her husband's death, excluded or discharged by the trust-disposition and settlement of th

Mackenzie, dated 5th March 1844, or by payment to or acceptance children of the sums or legacies provided to them in said deed." *

NOTE.—The Lord Ordinary considers the points which he has now de- be free from difficulty. Upon the death of Murdo Mackenzie of Dun-, survived by his wife and the children of their marriage, his wife became l to one-third of the goods then in communion between them, as there renunciation of her *jus relictæ* by marriage-contract or otherwise, and the ested in her *ipso jure* upon her survivance of her husband. If that claim *relictæ* has not been paid or discharged, or otherwise satisfied or departed r if it is not barred by *mora* and taciturnity, it transmitted on her death ive children who survived her.

e defenders plead in answer to the claim now made in the action at the e of three of Mrs Mackenzie's children for their shares of the goods in nion falling under her *jus relictæ*, that the same is excluded by the trust- tion and settlement of Mr Murdo Mackenzie, and by payment to these n of the legacies thereby left to them.

ere are no provisions whatever in that trust-disposition and settlement in of Mrs Mackenzie. There is not one word in it with reference to her *jus* , or from which that claim can be held as discharged or excluded. No n is made therein either of her or of her legal rights. The sole trust-pur- f that deed—in addition to those for payment of debts and of some small s to his niece, to a person brought up by him, and to his trustees, and for ance of the testator's lands in Canada to two of his sons—are for payment ain specified sums or legacies to each of his children. It is no doubt d by the trust-settlement that these payments to his children 'shall be d by them as in full satisfaction to them of all bairns' part of gear, legitim, erything else that they could ask or claim by and through my decease.' e only claim competent to the children by and through their father's de- -their mother being alive—was that for legitim. The acceptance of these ons excluded therefore all claim for legitim. But it it did not affect in y their mother's claim for *jus relictæ*, on which the testator could not h, and did not even attempt by his trust-settlement to encroach. Im- ely upon her husband's death that claim for *jus relictæ* emerged, and *ipso jure* in her, and, if not discharged or otherwise satisfied, it, upon her in June 1856, transmitted to her children then surviving.

e legacies left by the trust-settlement to the children and paid to them d to have exhausted the whole moveable estate. If this had been the nd or estate from which these legacies to children were directed to be hen, if the whole moveable estate, including the *jus relictæ*, had been the children, the claim now made by three of these children for their of their mother's *jus relictæ* might be excluded. But the trust-settlement ed other funds for payment of the children's provisions, in the event of veable estate and heritable bonds and rents falling due at the first term rtinmas after the testator's death, which were thereby conveyed, being insufficient for that purpose.

he testator had executed in 1838 a deed of entail in favour of Hugh Mac- , his eldest son, and the other heirs of tailzie therein mentioned, which corded in the Register of Tailzies in 1838, and in the Books of Council ession in 1839. But no infeftment was taken upon that deed until after anter's death. By that tailzie Mr Murdo Mackenzie reserved full power, hough it should be recorded, to alter, innovate, or revoke the same, or to e a new deed of tailzie and settlement; and he further reserved 'the effect of any trust-deed which may be executed by me for the purpose of g provisions for my younger children, or for other purposes.' In his trust- ition and settlement, which was executed in 1844, several years after the ailzie, there is contained the following clause, which is inserted immediately he directions to pay the legacies to the children and others:—"And should nds hereby conveyed as aforesaid to my trustees be found, contrary to my

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The defenders obtained leave to reclaim, and argued;—Eve claim of the present pursuers were not barred by the terms o Mackenzie's settlement, and the acceptance by them of the legacie bequeathed to them, it would be barred by the mere lapse of ti which it must be presumed that the widow's claim of *jus relictæ* settled to her satisfaction.

Supposing the widow had never been aware of and had n charged this claim during her lifetime, it was not an estate whi transmit to her heirs as if it had been a vested right. Further, t of the free executry left by Murdo Mackenzie had been exha payment of his debts and the legacies left by him in his trust-d there were therefore no funds out of which the claim for *jus reli* be paid. In any view the sums paid for the widow's maintenanc

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expectation, insufficient for the above payments, considering that in which I have made of my lands and estates I have reserved power t the same to such extent as I shall deem necessary with reference to for my younger children, I hereby farther assign and convey to my sai the yearly rents of the whole lands and salmon-fishings which I have lately, belonging to the family of Cromertie, until all the aforesaid shall have been made and satisfied.' It is not disputed that the said re have been received by Hugh Mackenzie, one of and the survivor of trustees, who was also the institute under the tailzie, are more than su pay the portion of the legacies left to his children by Murdo Mackenz the free moveable estate, available for that purpose after deduction of *ju* was insufficient to satisfy.

"It was maintained by the defenders, first, that after recording the t Murdo Mackenzie could not exercise the reserved power of making prov favour of his younger children; and second, that the said power was no exercised by him. The Lord Ordinary is of opinion that these objec untenable. The tailzie was granted, not only under that express reserve but also under reservation of the power to alter or revoke the same; a although it had been feudalised in the granter's lifetime, he was en exercise these powers to as great an extent as he thought proper. Wha in the trust-settlement bears expressly to be in exercise of the reserved make provisions for younger children. The rents of a specified part of conveyed in the tailzie are thereby validly assigned to his trustees unt children's provisions should be paid and satisfied. Although that as would not be effectual in competition with a singular successor of th it is good against Hugh Mackenzie, to whom, as institute, these lands veyed by the tailzie under the burden of that reserved power.

"The setting apart or payment of the *jus relictæ*, to which Mrs M had right, which was the duty of Mr Murdo Mackenzie's trustees and e would have the effect of throwing the burden of payment of the child visions to a considerable extent upon the rents of the Cromertie lands ings assigned. But that cannot affect either the widow's claim to *jus* the rights of the children to demand full payment of their provisions or because the widow's *jus relictæ* is not in any way encroached upon by settlement, and the children's legacies are not thereby made contingen discharge of the *jus relictæ*. The former fell to be set apart or paid o first of the moveable estate, and the latter to be paid out of the rem that estate, in so far as it was sufficient to satisfy them, and as regards paid balance, out of the assigned rents as these accrued in the hand trustees, and of Hugh Mackenzie, the survivor of them. The childre sions, which have been paid to them, must, the Lord Ordinary conc held to have been satisfied out of the proper funds provided by the te that purpose, altogether irrespective of the *jus relictæ* which it was the Murdo Mackenzie's trustees and executors to retain in their hands for b or to pay to his widow."

ars of viduity must be deducted from the amount ascertained to be *jus relictæ*.[1] No. 117.

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e pursuers argued;—The widow was in ignorance of her rights, and discharged her claim to *jus relictæ*, which was transmitted to her The executor was *locupletior* by reason of his failure to pay it.[2]

advising,—

D PRESIDENT.—My Lords, now that we have come to the bottom of this is not attended with difficulty. Murdo Mackenzie of Dundonnell died in leaving a widow, and five sons, and two daughters. The eldest son, Hugh nzie, entered into possession of the estate of Dundonnell under an entail Murdo Mackenzie had himself executed. He had also made provision s younger children by the settlement before us, by which he bequeathed s to the extent of £8305. In order to provide for these legacies and any which might remain unpaid he conveyed to trustees not only his personal but all bonds, heritable or personal, &c., with power to uplift the same, lso the rents of his whole lands and estates which should fall due and be le at the first term of Martinmas after his death.

r, if the funds thus conveyed to the trustees and executors were sufficient debts and discharge the legacies, and also to satisfy the claim of the widow r *jus relictæ*, there is no longer any difficulty in the case. But further ion was made in the anticipation that the funds might not be sufficient s purposes of the trust. This provision is that in the event of the funds y conveyed proving insufficient he assigned and conveyed to the trustees arly rents of the whole lands and salmon-fishings of a portion of the estate ndonnell, until these payments had been made and satisfied. It is very le, and indeed very probable from what we see on the face of the deed, om the circumstances generally, that Murdo Mackenzie had not in view gal provision for his wife. But the fact that he does not make any pro- for her under the deed cannot affect her legal right, and therefore, when Mackenzie died his trustees and executors were under a legal obligation to her one-third of the sum of £7745, 14s. 11d. It is alleged that, in as affects the widow, they failed to make this payment, or to make any pt to satisfy her claim.

widow survived for eleven years, and died in 1856 without, as it seems, g made the claim for *jus relictæ*. Being a person who was originally umble station in life, she seems to have lived with her eldest son Hugh at onnell, and afterwards elsewhere, maintained by him, quite contentedly, eemingly not in the knowledge of her legal rights. That fact, however, t affect the legality of her claim.

en she died she was survived by four children, three of whom claim three- of the sum to which their mother was entitled as *jus relictæ*.

s claim is met with the objection that there were no funds to satisfy d that it would be hard on the representatives of Hugh Mackenzie to his claim brought up at this period of time. No doubt it appears hard, ither hardship nor lapse of time can prevail as an answer to this legal

nnot see in this case anything to justify us in holding that the widow has nything to forfeit or discharge her claim.

hardship becomes less when we look at the state of the trust-funds brought r the accountant, which, it is true, is not accurate, but as nearly correct as aterials would permit. There we find that the amount of the free executry 7745, 14s. 11d.

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efenders' Authorities.—Hume v. Huntly, Dec. 13, 1628, M. 2764; Robson water, March 16, 1870, *ante*, vol. viii. 757; Pringle v. Pringle's Executors, 2, 1870, *ante*, vol. viii. 722.

ursuers' Authorities.—Hope v. Dickson, Dec. 17, 1833, 12 Sh. 222; 's Trustees v. Keith, July 17, 1857, 19 D. 1040.

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If Hugh Mackenzie, the acting trustee, had set aside one-third of that, or £2580 odds, he would still have had left £5165 odds to meet the legacies. Besides that, the trustees had extra funds conveyed to them. There was £2000 in the Millbank bond, and they were entitled to the half year's rents of the estate which were provided to meet these legacies, and not to go to the heir. Say that these amounted, as contended for the claimants, to £1500—even if they were not enough he could go against the rents of the portions of the estate which were specially assigned until he had got enough realised to meet all claims. But it appears that the funds actually in the hands of Hugh Mackenzie and his co-trustee, after the death of Murdo Mackenzie, were more than sufficient to meet all charges on the estate, even on the assumption that enough had been set aside to meet the *jus relictæ*. That being so, what is the result? The sum that would have met this claim remained in the hands of Hugh Mackenzie, and may have been spent, but an account of it is now called for. Where, then, is the hardship here? In so far as any claim was not satisfied, such as this for *jus relictæ*, he was *locupletior*. If he had been the residuary legatee he might have said that it was a great hardship that having taken this as the free balance of the trust-estate and spent it he had now to refund. But he could not say that here, because any surplus belonged to the younger brothers and sisters along with himself. This is not a case of hardship at all, and the mere lapse of time is quite immaterial from a legal point of view. It is alleged that Hugh Mackenzie spent the sum the widow could claim in maintaining her, and if that be so he is entitled to set whatever was so expended off against this claim for *jus relictæ*; and therefore, though I am prepared to adhere to the Lord Ordinary's interlocutor, I think the trustee should be allowed to establish what moneys were so spent, and to get credit for them.

Lord Deas.—The first thing here is to see how matters stood at the death of Murdo Mackenzie in 1845. Had his widow at that time a good claim to *jus relictæ*? If she had, the only other question will be whether her representatives have now lost that claim.

Mr Mackenzie's settlements consisted of two deeds—one a deed of entail in favour of his eldest son Hugh and certain other parties of the lands therein described. That deed is dated in 1838, and in it he reserves full power to alter or innovate it at pleasure, and he specially reserves power to grant deeds providing for his younger children. It is plain that this deed was merely testamentary. It was made on a footing which left him entitled to dispose of his heritable estate by any subsequent deed.

By his deed of 1844 he conveyed his whole estate, heritable and moveable, to his eldest son Hugh and others, as trustees, for the purpose of paying his debts, real and personal, and certain special provisions to each of his younger children in full of legitim, and of everything else which they could claim from or through him. It appears that the truster left a widow, of whom he makes no mention, and for whom he makes no provision in this or any other deed. It is plain, therefore, that in 1845, on the death of her husband, the widow was entitled to her *jus relictæ*, and that, if nothing to the contrary intervened, the right to it passed, upon her dying intestate, to her surviving children.

It is said on plausible grounds that, apart from his heritable estate, Murdo Mackenzie left sufficient personal estate to pay all the legacies, and also to satisfy the widow's claim for *jus relictæ*. But whether that was so or not does not appear to me to be material, because the effect of Mr Murdo Mackenzie's two deeds taken together was to make the rents of his heritable property equally liable with his personal means and estate for payment of his debts and onerous obligations.

The widow died in 1856, and three out of her four surviving children, as her representatives, claim her *jus relictæ* in this action. The only answer which is made is that the truster, Murdo Mackenzie, had not in view the legal claim competent to his widow, and probably was ignorant of its competency and existence. But it does not make the claim the less an onerous obligation against him that he was ignorant of it. The obligation therefore existed at Murdo Mackenzie's

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h, and the only other question is, has anything occurred since then to make obligation no longer exigible.
r eleven years the widow survived and made no claim, and for a further d of fifteen years her representatives also remained silent. But the right to *relictæ* cannot be lost by mere lapse of time, if the period of prescription inable has not run. Except the lapse of time—which is short of forty years e only other thing said against the claim is that during the widow's sur- nce she was maintained by her son Hugh. But unless this amounts to an rtion of an implied contract, that she was so maintained on the condition her claim to *jus relictæ* was abandoned, it is not a good answer.
a the case of Robson v. Bywater it required all the circumstances taken ther to make out the abandonment of the claim. But the circumstances of case were very different from those here. I therefore think that the inter- tor of the Lord Ordinary is well founded. At same time I see no objection serting the reservation proposed by your Lordship. If it does appear that h maintained his mother it is quite possible that he may be entitled to credit the expense of that maintenance, although it does not amount to an implied donment of the claim for *jus relictæ*.

ORD ARDMILLAN.—This claim is now made after the lapse of a long period ime. But it is well settled, and settled before the case of Robson v. By- r, that mere taciturnity, the mere lapse of a long period of time without the m being made, will not be held of itself to imply dereliction, or abandonment, discharge. In the case of Bywater lapse of time was not held sufficient of lf, but taken in connection with the real evidence afforded by the conduct actings of the parties abandonment or discharge of claim was held to be lied. In the case of Pringle the Court again decided that the mere silence the widow was not enough. But silence in the circumstances which that disclosed amounted to an election by her to take the annuity which was n to her by her husband's settlement in place of her legal right of terce. In case there has no doubt been silence for a very long period; but I see no cient augmentation furnished by the actings of the parties here to the pre- ption suggested by this lapse of time. I see no real evidence coming in aid aciturnity which will imply discharge. I have only to add that I agree in propriety of the reservation which is proposed; because if Hugh supported mother, and supplied her with funds during the period after her husband's h, then, in a question of accounting, he is fairly entitled to credit for these nces. But that remains to be considered, and in any view it is not a trans- n from which discharge or abandonment can be implied.

ORD JERVISWOODE concurred.

THIS interlocutor was pronounced:—"Adhere to the said interlocutor, but under reservation of the claim of Hugh Mackenzie's trustee to set off against the amount of the *jus relictæ* any sums which he can shew that Hugh Mackenzie expended on the maintenance of the widow during her viduity: Find the respondents, the pursuers of the second action, entitled to expenses since the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax the amount of said expenses, and report to the Lord Ordinary, and remit," &c.

KENE, WEBSTER, & PEACOCK, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

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June 13, 1873.
Lord Advocate v. M'Douall.

THE RIGHT HON. THE LORD ADVOCATE (on behalf of the Commissioners of Woods and Forests), Pursuers.—*Sol.-Gen. Clark—Ivory.*
JAMES M'DOUALL, Defender.—*Millar—Blair.*

Salmon-fishing—Prescription—Possession.—Circumstances in which *held* that a proprietor of a barony and of lands held under a Crown grant *cum piscationibus*, had not had such prescriptive possession of salmon-fishings in the sea as to instruct a right of salmon-fishing.

1ST DIVISION. Ld. Ormidale. B.

THIS action was raised at the instance of the Lord Advocate against James M'Douall, the proprietor of the estate of Logan in Wigtownshire, concluding for declarator that the salmon-fishings in the sea *ex adverso* of the lands of the defender, in the parishes of Kirkmaiden and Stoneykirk, specified in the summons, belonged to the Crown, and that the defender had no right to fish for salmon, grilse, or salmon trout in the sea *ex adverso* of his said lands by stake or bag-nets, or by net or coble, or in any other way, or to grant leases of such salmon-fishings.

The lands in question were held partly under a barony title, without any mention of salmon or other fishings, and partly under crown charters *cum piscationibus.*

The pursuers averred that the defender and his predecessors had not under their titles fished for salmon, grilse, or salmon-trout *ex adverso* of the said lands for such a time or in such a way as to give them a prescriptive right to the salmon-fishings in the sea.

The defender averred that he had exercised such an exclusive right of salmon-fishing for time immemorial.

The pursuer pleaded;—(1) The right of salmon-fishing in Scotland or in the sea round its coasts, and in the navigable estuaries, bays, and rivers thereof, so far as the same has not been granted out by the Crown by charter or otherwise, belongs exclusively to the Crown, and forms part of its hereditary revenue. (2) The Crown having never granted to the defender or his predecessors any such right, the said defender has no right by virtue of his titles to fish for salmon, grilse, or salmon trout in the sea *ex adverso* of the said lands or any part of the same, nor to grant leases of the whole of said salmon-fishings or any part thereof. (3) The titles to the lands secondly, thirdly, and fourthly described in the summons conclusions containing no grant of 'fishings,' and the lands themselves forming no part of a barony, the defender has no right under his titles and has no basis for acquiring a right by prescription, to the salmon-fishings in the sea *ex adverso* of these lands. (4) The titles of the said defender to the lands forming the barony of Logan, and to the five-merk lands of Crichen and of Carrachtree, containing no express grant of salmon-fishings, and the salmon-fishings *ex adverso* of these lands not having been possessed by the said defender or his predecessors for the prescriptive period under and by virtue of said titles, the said defender has no right thereto.

The defender pleaded;—(1) The defender, in virtue of his writs and title-deeds, and the possession following thereon, is in right of the salmon-fishing in the sea *ex adverso* of the barony of Logan, including therein the lands of Crichen and Carrachtree. (2) The defender and his predecessors, having for upwards of forty years, or from time immemorial, possessed, enjoyed, and exercised the exclusive right of salmon-fishing in the sea *ex adverso* of the lands of the barony of Logan, and of the said lands of Crichen and Carrachtree, the defender has a valid and indefeasible right to the said fishings. (3) The defender having a good title to the salmon-fishings above mentioned, the claim now made on behalf of the Crown

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thereto is excluded; and the other fishings referred to in the summons not being claimed by the defender he is entitled to absolvitor, with expenses.

A proof was taken, the import of which is given in the opinion of Lord Ardmillan.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, finds it has been sufficiently proved that the defender and his predecessors have for more than forty years, or for time immemorial prior to the institution of this action, enjoyed and exercised, under and in virtue of good and habile titles, the exclusive right of fishing for salmon, grilse, and salmon trout in the sea *ex adverso* of the following lands belonging to them mentioned in the conclusions of the summons, viz.,—All and Whole the lands forming or embraced in the barony of Logan, situated in the parish of Kirkmaiden and county of Wigtown, bounded by the sea, extending, the coast of the said barony, on the Irish Channel or western side, from Drumbreddan Bay on the north to Crummag Head on the south, and on the Bay of Luce or eastern side from Chapel Rossan on the north to Kilstay or Palnimrick Burn on the south, and the five merk lands of Crichen, and the ten merk lands of Carrachtree, also lying within the said parish of Kirkmaiden and county of Wigtown: Therefore, *quoad* the right of fishing for salmon, grilse, and salmon trout in the sea *ex adverso* of said lands, assoilzies the defender from the conclusions of the summons, and decerns; and in respect the defender does not claim and has not attempted to prove a right to fish for salmon, grilse, or salmon trout in the sea *ex adverso* of the following lands mentioned in the conclusions of the summons, viz.,—the five merk lands of old extent of Mool, the croft of land commonly called Croft Gregnan, the croft of land called Cove Croft in Mool, the ten merk lands of old extent of Altown, now commonly called Maryport, the five merk lands of Corgie, all lying in the parish of Kirkmaiden and county of Wigtown; the twenty shillings land of Genoch, five merk lands of Nether Torrys, forty-six shillings and eight-penny lands of Over Torrys, and twenty shilling lands of Whytercrook and Croftling, lying within the parish of Old Luce and sheriffdom of Wigtown: Therefore, *quoad* these last-mentioned lands, finds, decerns, and declares in terms of the conclusions of the summons: Finds that the other lands mentioned in the conclusions of the summons are not to any extent bounded by the sea: Therefore, *quoad* these other lands assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, allows an account thereof," &c. *

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* "NOTE.—The Lord Ordinary does not think that to the extent to which absolvitor has now been pronounced any serious difficulty can be entertained on the proof; and in regard to that part of the conclusions of the summons for which decree has been pronounced in favour of the pursuer there could of course be no difficulty, as no dispute was raised in relation to it.

"All the lands, *ex adverso* of which the defender has now been found to have proved a prescriptive right to the salmon-fishing, are admittedly component parts of the barony of Logan, with the exception of the lands of Crichen and Carrachtree, about which it is said to be not quite clear whether they form parts of the barony or not. This matter, however, is of no practical importance, because, whether they are to be held as forming part of the barony or not, they are held under crown charters *cum piscationibus*, which is sufficient to found a title by possession for the prescriptive period to salmon-fishings; and as a barony title is sufficient for the same purpose there can be no question, and

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The pursuer reclaimed, and argued that the possession founded on by the defender was not of such a character as had ever, in a question

none was raised, as to the defender's titles, *quoad* the whole lands in regard to which he has been found successful, being good and habile, if fortified by possession for the prescriptive period, to give him a right to salmon-fishings—Nicol and Others (Milne's Trustees) v. Lord Advocate, July 1, 1868, 6 Macph., p. 972.

"Accordingly, the only disputed question between the parties in this case related to the import and effect of the proof;—the defender, who had undertaken the *onus probandi*, contending that it was ample and sufficient to support the right of salmon-fishing claimed by him; while on the part of the pursuer it was argued that it was not so, but, on the contrary, that it merely shewed that, although a few fish of the salmon kind were occasionally caught by or for the defender and his predecessors, that occurred accidentally in the course of prosecution of white or other fishing, in such a way as to be incapable of establishing a right of salmon-fishing. The Lord Ordinary has been unable to give effect to this argument for the Crown. He has, indeed, had very little if any difficulty in giving effect to the contention of the defender.

"The proof will require to be read and considered as a whole in order to form a just and sound appreciation of it. The Lord Ordinary has, after a careful consideration of it, to observe that it appears to him to contain all the elements necessary to support the defender's case. (1) Whether the salmon-fishing exercised by the defender and his predecessors was of a character and description sufficient in itself is a matter which will be immediately noticed; but that, such as it was, it extended over the requisite period is so entirely beyond all question on the proof that it is quite unnecessary to dwell upon the point. (2) Nor does the Lord Ordinary think that the catching of salmon was merely a casual and accidental thing, occurring in the course of the prosecution of white or other fishing. On the contrary, it appears to him to be sufficiently proved that catching fish of the salmon kind has always been considered, if not the chief, at least an important object of the fishermen as well as of all the other parties concerned. There is abundant evidence to this effect. (3) The mode of fishing which seems to have been adopted was also suitable and appropriate for the catching of fish of the salmon kind. Net and coble were substantially the means employed. And at any rate, having regard to the means employed as described by the witnesses, and among others by M'Craken (proof, p. 21, F G), M'Creadie (p. 30, E F G, and p. 31, F G), and James Goudie (p. 33, B C), there can be no doubt the mode or means resorted to were efficient for the purpose. (4) Not only was leave to fish almost always asked and considered to be necessary from the defender and his predecessors, but all persons not having such leave were prevented from fishing. The proof is clearly to this effect as applicable to the whole prescriptive period. And (5) it has also been well established that for leave to fish a consideration was always exacted by the defender and his predecessors, consisting, for the greater part of the prescriptive period, of the best salmon or other fish caught, and latterly of a money rent.

"If the Lord Ordinary be right in holding these to be clearly established points by the proof it is difficult to understand how the defender's contention could well be resisted. But it seemed to be maintained on the part of the pursuer that in no correct view could the defender's claim be sustained, except as regards some limited places *ex adverso* of his lands; but these places were not, so far as the Lord Ordinary noticed, exactly condescended on by the pursuer. He at any rate thinks that the proof is applicable alike to at least all the places *ex adverso* of which the defender's claim to the salmon-fishing has now been sustained. The more important of the witnesses state very distinctly that the fishing was exercised all along both sides of the Mull of Galloway opposite the defender's lands, the Luce Bay side, and also the Irish Channel side, just as it was found suitable and convenient; and, in particular, reference on this point may be made to the testimony of the witnesses Murray (p. 11, E to G), M'Cra-

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h the Crown, been held sufficient to establish a right of salmon-ning. The greater part of the defender's proof only went to shew t a few fish of the salmon kind had occasionally been caught by or the proprietors of Logan in the prosecution of the white fishing by ught nets, and that they had endeavoured to arrogate to themselves altogether illegal and unfounded right to the possession or control not rely of the salmon-fishing, but of all the sea-fishing along the coast their estate.[1]

The defender argued that the possession, clearly proved by fishing with draught net for salmon for the table at Logan House, and supplying fish-pond, was ample and sufficient to support the right claimed under titles; and that the proprietors of Logan had also possessed through ir tenants and others, who had invariably obtained their leave to fish ng the coast.[2]

At advising,—

LORD ARDMILLAN.—I do not think that this case is attended with any peculiar ficulty, either in point of law or point of fact. We are in a question between Lord Advocate, as representing Her Majesty, and Mr M'Douall of Logan, claims a right of salmon-fishing *ex adverso* of his lands of Logan and others Wigtonshire. The lands of Logan are held under a barony title; and certain er lands mentioned in the record are held under a crown grant *cum piscationibus*, but without mention of salmon.

Salmon-fishings are *inter regalia*, and no one can have a valid right to salmon-hing who cannot instruct a grant from the Crown. A barony title, where there no grant of salmon-fishing, does not, without prescriptive possession, support claim to a right of salmon-fishing. But a barony title, or a title to lands *cum cationibus* (though not *piscationibus salmonum*), is a sufficient foundation on hich a claim to salmon-fishing may be built, and a right may be acquired by scriptive possession. In such a case possession is not a mode of indicating title, but is a mode of acquiring it. In the present case it is not alleged that r M'Douall has an express title from the Crown to salmon-fishing. He has a le to the barony of Logan, and he has, in regard to two separate portions of nd, a title *cum piscationibus*, but without mention of salmon. These titles, ntaining no royal grant of salmon-fishing, do not of themselves instruct a right salmon-fishing, or support the claim to salmon-fishing in a question with the own. But a satisfactory proof of prescriptive possession of salmon-fishing by e proprietor of Logan,—a possession clear, continued, unequivocal, and exclu-ve,—may have the effect of extending the scope and meaning of the charter, d thus of sustaining the claim.

In a question with the Crown the burden of proof lies entirely upon the de-nder; and if the proof fails in regard to any of those necessary qualities of pos-sion to which I have adverted the effect of such failure must be the loss of e case.

It is necessary to bear in mind the distinction between that possession which urged merely in order to instruct the exercise of a right constituted by charter, d the possession which is urged for the purpose of extending the construction the title, and including within it a right which has not been specially con-

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16, D to G, and p. 19, E to G), John Robb (p. 23, F G, and p. 24, F G), and mes Robb (p. 28, F).

"These are the grounds upon which the Lord Ordinary has proceeded in ing judgment in this case."

[1] Stuart v. M'Barnet, July 21, 1868, *ante*, vol. vi., H. L. 123; Lord-Adv. v. nclair, June 14, 1865, *ante*, vol. iii. 981, aff. June 7, 1867, *ante*, vol. v. H. L. 97.

[2] Lord-Adv. v. Cathcart, May 19, 1871, *ante*, vol. ix. p. 744; D. of Sutherland Ross, June 11, 1836, 14 S. 960, and Smollett v. Colquhoun, 1779, *ibi. cit.*; rd-Adv. v. Hall, Nov. 9, 1869, 7 S. L. R. 62; Lord-Adv. v. Milne's Trs., ly 1, 1868, *ante*, vol. vi. p. 972.

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ferred. In regard to this last kind of possession the law demands that it be of the strongest and most unequivocal character; and such a possession Mr M'Douall must instruct in the present case. This is quite settled by authority. I need only mention the case of the Duke of Sutherland v. Ross, 11th June 1836, and the case of the Lord Advocate v. Sinclair, decided in this Court on 14th June 1865, and affirmed in the House of Lords on 7th June 1867. That case of Sinclair was decided on the proof in favour of the proprietor; but the law was laid down, both here and in the House of Lords, in accordance with what I have now stated. The same statement of the law in regard to possession on a barony title was given in the case of the Duke of Richmond v. Lord Seafield, 16th Feb. 1870, 8 Macph. 530, where complete proof of possession of the character which I have described was required, though the proprietor had a barony title with a grant *cum piscationibus*. The recent case of the Lord Advocate v. Hall on 9th November 1869, where the nature of the required possession was carefully considered, is a further authority; and, for my own part, I adhere to the views of the law which I expressed in that case.

The proof of possession in the present case is, in my opinion, altogether inadequate to support the claim of Mr M'Douall to a right of salmon-fishing.

The ordinary and well understood mode of fishing salmon in the sea *ex adverso* of the Logan estate was certainly introduced for the first time in 1856, about seventeen years ago. We know that such fishing was first introduced on the coast of Ayrshire a good many years before that date, I think about 1838, but not so long ago as to amount to prescriptive possession. This was ascertained in the case of Carlton. Therefore, unless Mr M'Douall has been able to instruct some kind of possession different from the usual and appropriate and recognised mode of fishing by net and coble, he cannot carry back his possession to a period earlier than 1856. We have here no case of salmon-fishing till within twenty years, and no salmon-fishing distinct from other fishing. We have, indeed, had a great deal of evidence about fishing in the sea with common draught nets, and for a long period. But that was not primarily or properly salmon-fishing. I am quite satisfied that, apart from the question of leave, to which I shall afterwards advert, this fishing with a common draught net in the sea, the fisher occasionally catching a salmon, was not a sufficient act of possession in exercise and assertion of a right of salmon-fishing. Fishing in the sea with a draught net, in the manner described by these witnesses, is not primarily and principally salmon-fishing, and does not become salmon-fishing because a salmon is occasionally caught.

I need not enlarge on this point. I think it free from doubt; and I concur in the remarks which have been made in the case of the Duke of Sutherland v. Ross and other cases as to requiring proof of possession by the recognised and appropriate mode of fishing.

But it is said (first) that the proprietor of Logan has instructed sufficient possession by proving that he and his servants fished for salmon with a draught net for his table and for his pond; and (secondly), that he possessed through his tenants, to whom he gave leave to fish salmon and other fish along the coast. The proof of personal possession by the proprietor and his servants, taken by itself, is so inadequate and so limited, both as regards the locality of the fishing, the time of the fishing, and the manner and purpose of the fishing, that really little weight can be given to it, apart from the proof of fishing by tenants on leave granted by the proprietor.

The question raised in regard to fishing with this leave is important; and the defender's claim has been strongly maintained on that ground. I have given my best attention to the argument on this point, and I have again and again perused the proof, and I have arrived at the conclusion that there is no satisfactory evidence of leave being granted to fish salmon as distinguished from leave to fish generally. It seems that the proprietor of Logan fancied that he had a right to prohibit all fishing in the sea opposite his estate. That this notion existed on the part of the proprietor is admitted by several of the witnesses for Mr M'Douall, and at least one of them expressly says that "nobody was entitled to fish without leave from the laird, either for white fish or anything else." This was the pre-

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etor's view. On this view he possessed. He prohibited generally, and he re leave occasionally and exceptionally. Now, either that prohibition of all ught net fishing in the sea opposite his lands was legal or illegal;—it was her a lawful exercise of right, or it was a usurpation of right.

The counsel for Mr M'Douall seemed to maintain that the general prohibition draught fishing in the sea was lawful; and that the laird had the right to ohibit the whole fishing on his coast. I am clearly of opinion that it was not wful. The fishing of white fish in the sea with a draught net could not, my opinion, be lawfully prohibited by the proprietor, even on the plea that a lmon might occasionally be caught in the net. The great authority of Lord air is conclusive on this point, and the authority of more recent writers might quoted if necessary—(Stair, i. 1, 5; Bankton, ii. 1, 1; Bell's Prin., par. 646; amsay v. Kellies, 22d November 1776, 5 Brown's Sup., 445.)

If the prohibition was unlawful, and a usurpation of right, as I hold it to be, en the leave given to a few, being an exception from that prohibition, can have effect as an act of possession in this case. The leave was general—applicable all fish—just as the prohibition was general. The party to whom the leave as granted had no better right than the whole fishermen would have had but r the prohibition,—no better right than the whole fishermen were entitled to ve. The making the man who had the leave an exception from a prohibition forced against others was a wrong to the remainder; and the doing of a wrong nnot be recognised as the lawful assertion of a right.

In any view the fishing with draught net under such a leave cannot be conidered as exclusive. It was not exclusive in point of fact, for it is proved that ny fished who had no leave; and it could not be exclusive in point of law, ecause being simply an exception from an illegal prohibition its exclusiveness pended on the lawfulness of the prohibition, and cannot be recognised.

But further, it is proved that the fishing with draught net, such as has been scribed, being white-fishing with the chance of taking an occasional salmon, s been continued since the lease of the salmon-fishing to M'Creadie, and afterrds to Glendinning. Now, both of these men were in succession tenants of e whole salmon-fishing. M'Creadie states that he had the exclusive right to h salmon; and the lease to Glendinning, who succeeded him, is to the same fect. But Mr M'Douall's witnesses—M'Cracken and Robb—state that they ntinued, after and in knowledge of the lease to M'Creadie, their fishing with e draught net under what they called their leave from the proprietor. There as in this lease no reservation of any such privilege. If their fishing was inconistent with the fishing by M'Creadie, the tenant to whom the right of salmonshing had been let, then it was just a trespass and a wrong; and if it was conistent with M'Creadie's fishing, then it was not proper salmon-fishing, for all roper salmon-fishing in that locality, and *ex adverso* of the Logan estate, had en let to M'Creadie. But on their own admission the character or quality of eir mode of fishing, and consequently of any possession instructed by such ode of fishing, was the same after 1856 as it had previously been, and therefore never was an exercise of a proper right of salmon-fishing.

On considering the whole proof of possession on the part of the proprietor of Logan, with reference to the time, the manner, the instrument, and the character f the only fishing which has been proved down to 1856, I am of opinion that uch possession of the right of salmon-fishing as law requires has not been nstructed prior to 1856, and that is conclusive. I therefore suggest to your Lordships that we recall the interlocutor of the Lord Ordinary, and decern in rms of the conclusions of this action.

Lord Deas.—I am of the opinion expressed by Lord Ardmillan, and I do not hink it necessary to go into detail. I think that up to the time that these shings were let in 1856 the consideration was much more for the use of the , and for what was supposed to be a concession for the use of the shore, than r the salmon-fishings.

Lord Jerviswoode concurred.

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LORD PRESIDENT.—I am of the same opinion, upon this simple ground, that the possession which has been proved for the last forty years in this case is not of such a kind as is in law sufficient, in combination with a barony title, or a grant *cum piscationibus*, to instruct a right of salmon-fishings.

THE following interlocutor was pronounced:—"Recall the interlocutor: Find that the defender's two merk and one-half merk land of old extent of Balziellan otherwise Logan; two merk and one-half merk lands of old extent of Balziellan-M'Kellie; two merk and one-half merk lands of Cairn, and five merk lands of Carachtree, all lying within the parish of Kirkmaiden and sheriffdom of Wigtown; as also the following lands belonging to the defender in the united parishes of Clashant and Stoneykirk and sheriffdom aforesaid, viz., the five merk lands of Culgroat and Alteteog, and the five merk lands of old extent of Culgrotte, with the croft of land called St John's Croft *alias* Altichoge or Alteteog adjacent thereto, the town and lands of Elrig or Eldrick, commonly called the ten shilling land of Elrig, with the mill and mill lands of Kirkmagill and pertinents thereof, and All and Whole the three merk land and merk land of Meikle and Little Glentriploch or Glentribloch, with the pertinents thereof, are inland lands, and have no sea boundary; and therefore, *quoad* the right of fishing for salmon, grilse, or salmon-trout, concluded for as *ex adverso* of the said lands, dismiss the action, and decern: *Quoad ultra* repel the defences: Find, declare, and decern in terms of the conclusions of the summons: Find the defender liable in expenses, and remit," &c.

DONALD BEITH, W.S.—HUNTER, BLAIR, & COWAN, W.S.—Agents.

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Hay's Trustees v. Hay Miln.

ROBERT HENDERSON ARKLEY AND OTHERS (Hay's Trustees), Petitioners—*Sol.-Gen. Clark—Mackay.*
ALEXANDER HAY MILN, Respondent.—*Watson.*

Trust—Sale of Trust-estate—Trusts (Scotland) Act, 1867 (30 *and* 31 *Vict.* cap. 97, *sec.* 3).—The Trusts Act, 1867, sec. 3, empowers the Court of Session to grant authority to trustees to sell the trust-estate, or part thereof, "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." A truster directed his trustees to hold certain estates for payment of his debts, and in any event for twenty-one years, and for payment of an annuity, also secured by a separate bond, to his nephew, upon whom, and a series of heirs, they were directed to entail the estates when the debt should all be paid off. The trustees were expressly forbidden to sell any part of the landed estates in question. At the truster's death the annual burdens and interest of debts exceeded the rental by £106. *Held* (*rev.* judgment of Lord Gifford) that the Act did not authorise the Court to grant authority to sell any part of the estate.

1ST DIVISION.
Lord Gifford.
M.

JOHN HAY, Esq. of Letham, died on 23d May 1869, possessed of considerable fee-simple estates in the counties of Forfar and Perth, but burdened with a large amount of debt. He left a trust-disposition and settlement, dated 12th April 1867, by which he conveyed his whole property, real and personal, to trustees. The trustees were directed (1) to realise his estate, other than the landed estates before mentioned, and to apply the proceeds thus obtained, and the rents of the landed estates, in payment of the truster's debts, including an annuity after mentioned. (2) They were expressly forbidden to sell any part of his landed estates in the counties of Forfar and Perth, therein enumerated, but were directed

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ıold the same until his debts were all paid, and, in any event, for nty-one years at least; provision being made for the application of the plus in the purchase of additional lands, if the debts should have been d off before the expiry of the twenty-one years. (3) During the exist- e of the trust his nephew, Alexander Hay Miln, and, failing him, a es of heirs enumerated, were to receive an annuity of £750 under the d of annuity after expressed, but so that this annuity should never eed one-third of the free rental of the estates held by the trustees at time, after deducting burdens and the interest of the debt. (4) The d, in the first instance, fixed the duration of the trust as above men- ed, but afterwards, by a codicil, Mr Hay directed that the trustees uld extinguish the debts by an annuity arrangement with an insurance pany, to expire in not more than fifty years, or less than forty years. When the debt should all be paid off, the trustees were directed, if xander Hay Miln should be then alive, to hold the trust for his behoof, f he should be dead, or otherwise upon his death, to execute an entail the lands in favour of the son of the said Alexander Hay Miln, and a es of heirs.

3y separate bond of annuity, of even date with the trust-deed, Mr Hay nd himself, and his heirs and successors, for an annuity of £750 to be d to his nephew, the said Alexander Hay Miln, whom failing, to Mr ln's son and the same series of heirs as were called as heirs of entail under deed of entail directed to be executed by the trust-deed. This annuity s granted under the special declaration before mentioned. Clauses were roduced in the trust-deed and the bond of annuity to the effect that if Hay Miln or any of the heirs of entail should attempt to challenge or aside the settlements, or even avail themselves of the powers of the tail Amendment Act, they should forfeit all right under the deeds.

Having realised the estate so far as they were permitted by the trust- d to do so the trustees found themselves in possession of estates lding a gross rental of £5035, while the burdens, interest of debt, and er charges payable by them, amounted to £5141, leaving an annual iciency of £106.

As there was thus no prospect of the trustees being able, without addi- nal powers, to pay off the debts, or pay any part of the annuity to Mr y Miln, they presented this petition, under sec. 3 of the Trusts Scotland t, 1867 (30 and 31 Vict. cap. 97), praying the Court to "authorise them sell by public roup such part or parts of the estate as they shall consider st expedient, but not exceeding in amount the sum of £2500 of rental, free proceeds to be applied by them in extinction *pro tanto* of the ritable debt presently affecting the lands, and to authorise them to pay expense of the application out of the trust-estate under their charge." swers were lodged for Mr Miln, in which he concurred in the statements fact given in the petition, but stated, "if lands were sold to the extent a rental of £2000, being the smallest alternative amount suggested in e petition, the proceeds, say about £60,000, would enable the trustees reduce the debt to about £37,500, and would leave a surplus rental, suming the present rental to be maintained, of about £880. This surplus ital would, were the trustees to transact with an insurance company, directed by the truster, for paying off the debt by way of annuity, do le more than accomplish that object in forty years, that period being minimum time provided by the truster for paying off his debts by way annuity. Thus the respondent, who is the beneficiary first in order ended to be benefited by the trust, and who has been constituted a ditor on the estate by the truster, would never derive any advantage m the trust whatever. A considerably larger sale of lands therefore

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than that contemplated by the petition must be effected to meet the respondent's just claim. He therefore, while concurring in the necessity for a sale, does so on the footing that his annuity will be provided for out of the proceeds of such sale."

The third section of the Trusts Act authorises the Court on the petition of the trustees under any trust-deed to grant them authority, "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof," *inter alia*, "to sell the trust-estate or any part thereof."

The first purpose of the trust-deed provided that the trustees should, "with all convenient speed apply the trust property, excepting my landed estates particularly above named, no part whereof they shall have liberty to sell, and also excepting the furniture," &c. . . . "but including the rents and yearly produce of my said landed estates, in payment of all my debts, including the sums falling due under the bond of annuity granted by me of even date with these presents in favour of my nephew, Alexander Hay Miln of Woodhill and others, my deathbed and funeral expenses, and the expenses of executing this trust; and in carrying out this direction they shall have power to realise my estate as far as permitted to be sold in such manner, at such times, and in such order as they may consider most expedient, the fullest powers of administration and management being hereby given to them for this purpose."

A codicil dated 15th May 1867, and consisting chiefly of special legacies, contained this declaration:—"I declare my sole wish is to pay off my debts, and entail the lands mentioned in my trust-deed, and revoke all former codicils."

The Lord Ordinary remitted to Mr T. G. Murray, W.S., to inquire into the facts and circumstances set forth in the petition, and to report, and afterwards, upon consideration of the report, pronounced this interlocutor:—"Grants to the petitioners the powers craved by them in terms of the whole prayer of the petition; and authorises the petitioners to pay the expense of the present application, and of the whole procedure thereon incurred by them, and as the same may be taxed by the Auditor of Court, out of the trust-estate under their management, and decerns."*

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* "NOTE.—This case is attended with some nicety, both as to the question whether the provisions of the Trusts (Scotland) Act, 1867, really apply or are available to the petitioners, and as to the extent to which, supposing the Act to apply, powers should be granted to the petitioners.

"The Lord Ordinary has had the advantage of a very full and careful report by Mr T. G. Murray, W.S., to whom the parties and the Court are much indebted for the attention which he has bestowed on the case. On this report, and on the whole details, the Lord Ordinary has also had full explanations from counsel.

"On the whole, the Lord Ordinary has come to be of opinion that the provisions of the Trusts (Scotland) Act, 1867, apply, and that it is competent under that statute to grant to the trustees the powers which they crave in the present petition.

"There is no doubt very great weight due to the considerations which Mr Murray states in his report, and it is not without some hesitation that the Lord Ordinary has come to the conclusion that powers may be granted under the Act, and that a private Act of Parliament is not necessary. The powers sought in the present case are required truly and fairly to carry out the intentions of the truster; and if these powers were not granted, the result would be that, apart from the extraordinary remedy of a private Act of Parliament, the whole estate

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' Alexander Hay Miln reclaimed, and argued that a larger proporf the lands ought to be sold than the petitioners proposed.
e petitioners argued in support of the interlocutor of the Lord ıary.[1]
advising,—

ıD PRESIDENT.—This is an application by the trustees of the late Mr Hay ham Grange for authority to sell a part of the heritable estate held by

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testator would be adjudged for the debts, and the purposes of the trust y defeated.
he sale of a portion of the estates, if absolutely necessary, as it really apto be, is not inconsistent with the intention of the testator.
o doubt his wish was, if possible, to preserve the whole for the purpose of entailed; but if this cannot be done he certainly did not intend that should be no entail at all, but that the whole lands should be sacrificed.
he 19th section of the statute, which raises the chief difficulty, may, it is ht, be construed in accordance with the view now taken. The powers by the Act itself to trustees—that is, given by the Act *eo ipso*, and withıy application to the Court—shall not take effect in opposition to a declaraf the deed; but there seems nothing to prevent the Court from giving a to sell, where it can be shewn that without such power the whole trust ıe defeated.
he Act is a remedial one, and must receive a liberal or at least a favourable retation; and the Lord Ordinary thinks that in granting the powers as he ow done he is acting in conformity with the spirit and meaning of the e.
he next question is whether the Lord Ordinary or the Court should nine the precise portions or parts of the lands which are to be sold, or l attempt to fix the precise extent or conditions of the sale.
he Lord Ordinary is of opinion that these details may safely be left to the tion of the trustees, a limit being prescribed beyond which the sale shall ttend. Any other course would involve the Court taking upon itself the ons and duties of the trustees. The Court could not do so without a very ınd careful inquiry, and without the assistance probably of land valuators n of skill. The trustees nominated by the testator are gentlemen in whom stator himself had the fullest confidence, and the Lord Ordinary does not that they will proceed in the most prudent manner, and with a careful l to the joint interests of all the beneficiaries.
he Lord Ordinary has therefore ventured to dispense with further reports, ıg it to the trustees to make what investigations or inquiries they may deem ary to enable them fairly and equitably, and to the utmost possible extent, ry out the intentions of the testator.
he respondent, Mr Alexander Hay Miln, does not object to the proposed but he thinks that the trustees are not going far enough, and are asking ımited powers. He urges that a larger portion of land should be sold than proposed in the petition.
he Lord Ordinary does not think that he can, under the present petition, any larger power than that asked by the trustees, nor is such a petition as esent the proper form in which to determine the respective rights of Mr ınd the remoter beneficiaries. In so far as these rights depend, or may be d by the exercise of discretionary powers conferred by the truster upon ıstees, the Court probably would not interfere at all. If Mr Miln, howas any absolute rights under the trust which he thinks are injured by the of the trustees, he would require to make them good by a declarator, with riate conclusions; but on all these points the Lord Ordinary gives no ı whatever. He can only deal with the present petition as simply a petir powers."

[1] ınderson v. Somerville, June 22, 1841, 3 D. 1049; Preston v. Melville, 1838, 16 S. 456—2 Rob. 45, and 8 Cl. and Fin. 16.

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that gentleman to the extent of about one-half; and the petition is h the 3d section of the Trusts (Scotland) Act of 1867. The circum somewhat peculiar. Mr Hay left a trust-disposition and two codicils, effect of which was that he directed his trustees to pay all his debts estate left by him other than his landed estate in Forfar and Perth; pressly prohibited them from selling any part of that landed estate. an express prohibition, although it occurs as it were in a dependent a sentence in the trust-deed, for it is thus expressed—"My trustees all convenient speed apply the trust property, excepting my landed ticularly above-named, no part whereof they shall have liberty to sel excepting furniture, &c., in payment of all my debts," and so forth. provided that his nephew, Mr Alexander Hay Miln, the respondent appears to have been his nearest relative, should during the subsist trust receive an annuity of £750, which was also secured by a separ the form of a bond of annuity. The trust is fixed to endure for at le one years, and the granter obviously hoped and believed that in the that time the property, other than his landed estate, and the rents of estate, would be sufficient to clear off all his debts. But in this exp was too sanguine, because it turns out that the income of the lande not sufficient to pay the burdens upon it, and to keep down the inte debt. Even after applying all the rest of the property in payment o there is a deficiency, according to the reporter, to the extent of £1 The expediency, and indeed the necessity of selling a portion of th therefore clear enough; indeed, the trust is quite unworkable unless t obtain such a power.

But the first question for us to consider, and one of considerabl is whether this object can be attained under the authority of the of the Trusts Act, or whether it will be necessary for the trustees t Parliament for a private Act to enable them to do so. Now, th doubt that the Act which was passed in the year 1867 to facilitate th tration of trusts in Scotland was intended, particularly in this 3d save the necessity of going to Parliament for powers not given by deed; and I should be prepared, generally speaking, to give as ex interpretation as possible to an Act passed for so beneficial a purpose. words of the 3d clause appear to me to create some difficulty, and it i 3d clause alone that, in my opinion, the difficulty arises. I do not, Lord Ordinary, think that any difficulty arises from the 19th section c because I think it applies entirely to the powers conferred on trust statute itself in the 2d section, and not to the powers which the authorised to give under the 3d section. But the 3d section itself the Court to grant certain powers, and particularly the power here selling the estate, or a portion of it, upon a certain condition,—"on b fied that the same is expedient for the execution of the trust, and sistent with the intention thereof." That it would be expedient in t tion of this trust that the trustees should have a power of sale, for th already stated, I do not doubt. But the question is, whether the gr this power is not "inconsistent with the intention thereof," that is, a stand, the intention of the trust, or in other words, the intention of th Now, the intention of the truster is very clearly expressed. The estate be sold, but is to be freed from its debt by the operation of the tru very reason of making the trust and giving the estate to these truste they may redeem the estate of the debt, and it is inconsistent with that that the estate, or any considerable part of it, should be sold. But still the words which I have quoted from the trust-deed appear to me to b press and distinct prohibition against the trustees selling any part of th And therefore the inconsistency of selling this estate with the intention truster is abundantly evident. The Lord Ordinary suggests that the tru two purposes. One was to pay his debts, and the other to entail the and he himself says in his codicil, in so many words, that that was h object. The Lord Ordinary suggests that, as that object cannot be car

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ly as he wished, and so as to keep the whole estate, the next best thing, e most consistent with the probable intention of the truster, is that half estate should be retained. But it appears to me that that is a mere guess hat would have been the intention of the truster if he had known what e condition of his affairs was, and I do not think we are entitled to sub- a conjecture of what the truster would have done as things have now out in place of that clear and distinct expression of his purpose which he t in his trust-deed in the form of a prohibition against selling any part of tate. And therefore I am of opinion that this petition must be refused.

D DEAS.—In order to bring this application within the Act of Parliament st be satisfied of two things,—in the first place, that the power which is is expedient for the execution of the trust, and, in the second place, that ot inconsistent with the intention of the trust-deed. I am not satisfied e plan proposed here is expedient for the execution of the trust. It would rty years, according to the shewing of the trustees, to effect that object. agree in opinion with your Lordship that it would be inconsistent with tention of the trust-deed, and therefore I entirely agree in the result at your Lordship has arrived.

D ARDMILLAN.—I have nothing to add. It is obviously for the interest trustees to get this carried through if possible, but I agree in opinion with ordship.

D JERVISWOODE concurred.

THIS interlocutor was pronounced:—"Recall the interlocutor, and refuse the petition, and decern, and authorise the petitioners to pay out of the trust-funds the expenses of both parties, as the same may be taxed; appoint accounts of said expenses to be given in, and remit," &c.

ALEX. HOWE, W.S.—DUNDAS & WILSON, C.S.—Agents.

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June 13, 1873.
Johnston v. Wallace.

N JOHNSTON (Inspector of Poor of the Parish of Campsie), Pursuer and Respondent.—*Fraser—Burnet.*

EW WALLACE (Inspector of Poor of the Parish of Govan), Defender and Appellant.—*Sol.-Gen. Clark—W. A. Brown.*

r—Settlement—Husband and Wife.—An Irishman residing in Scotland, he had no settlement, deserted his wife, who was a Scotchwoman, and to reside in another part of Scotland, concealing his place of residence, ontributing nothing to the support of his wife and family. The wife e insane, and she and the family were supported by the parish in which were found. *Held* that the wife's birth parish was bound to relieve that of the sums expended, although the husband was able-bodied and resident otland.

1ST DIVISION.
Sheriff of Lanarkshire.
M.

IS action of relief was brought in the Sheriff-court of Lanarkshire by ew Wallace, inspector of poor of the parish of Govan, against John ston, inspector of poor of the parish of Campsie. The pursuer con- d for repetition of certain sums of money expended by him in main- g Elizabeth Murphy or Carson, wife of Andrew Carson, an Irishman, ane and Elizabeth, their pupil children.

proof was taken in the Sheriff-court from which it appeared that ew Carson came from Ireland in 1847. He worked as a miner in rkshire for nearly ten years. In 1847 he married Elizabeth Murphy, ive of Govan. If he ever acquired a residential settlement he lost it oving about to different parishes. Mrs Carson became insane, and

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in 1865 her husband left her and her children, who were taken poorhouse in 1866. The husband returned during the winter of and lived one month with his wife. He then left his wife, and w reside in several different places, where he maintained himself work, but never sent any money to his wife and children, and co be found by the authorities till the end of 1869, when he took his c away from the Campsie Poorhouse.

In August 1868 Mrs Carson was found in Campsie, and was r by that parish, and sent to a lunatic asylum about a month after statutory notice of chargeability was duly given to the inspector of on 31st August 1868.

The pursuer pleaded;—(1) Having been, on said 29th Augus deserted by Andrew Carson, their husband and father, and in dest the said Elizabeth Murphy and her said children were proper ob parochial relief. (2) The parochial settlement of the said Elizabeth M or Carson and her said children during the period of their charge to Campsie parish was in the parish of Govan, in respect that El Murphy was born in Govan, and her husband, Andrew Carso foreigner, who had no parochial settlement in Scotland, and had d them.

The defender pleaded;—(1) The averments in the summons a relevant or sufficient to support its conclusions, in respect that *matrimonio*, a married woman, even although deserted, cannot have a ment in her own right. (2) Carson's wife and children not havin deserted by him, at least not having been in a state of desertion time of chargeability libelled, the parish of Govan is not bound to the parish of Campsie of their support. (3) On the assumptio Andrew Carson had no settlement in Scotland he was liable in t cumstances stated on record to be removed with his wife and chil Ireland, and the pursuer having failed to take the necessary st effecting such removal is not entitled to the recourse which h against the defender.

The Sheriff-substitute (Lawrie), after findings in fact, found "i of law that Carson's neglect of his wife and family had not the e reviving her settlement of birth, and of making her birth parish li the support of her and her family: Therefore assoilzies the defend the whole conclusions of the summons, and decerns: Finds the p liable to the defender in expenses; allows an account," &c.

The Sheriff (Bell) after findings in fact, "finds, in point of law is settled by the cases of Hay, June 13, 1850, and Carmichael, Fe 28, 1863, that a wife and children left destitute by the desertion husband and father, who is a foreigner, and has no settlement in Sc fall to be supported by the parish of the mother's birth, that be maiden settlement: Therefore, and under reference to the annexe recalls the interlocutor appealed against: Finds that the paupers have been deserted by Andrew Carson, who is an Irishman without a settl in this country, the parish of Campsie, as the parish in which the pened to be residing when they became destitute, is entitled to be re of its disbursements on their account by the parish of Govan, as the parish of Elizabeth Murphy or Carson: Finds . . . . . decerns a the defender for the sum of £126, 5s. 2d. sterling, and otherwise, in of the first conclusion of the summons."

The defender appealed. He argued;—The husband in this case very good reason for withdrawing from his wife's society, as she was i and his life was in danger. There was a proper motive for his l and he could not be said to desert his wife. Besides, a wife is not d

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en her husband remains in the country. The parish which gave relief the wife was bound to inquire and find out where her husband was. long as the husband was in the country the law would compel him to port his wife.[1]
t advising,—

ORD PRESIDENT.—It has been settled in the case of Carmichael v. Adamson where a wife has been deserted by her husband, and has become an object rochial relief, that the parish which is liable to support her is the parish of own birth settlement. I cannot say that that decision obtained any support me, but it is now a settled rule, and all we have to do in this case is to y it.

rs Carson and her two children became objects of parochial relief in August . They were then relieved by the parish of Campsie. After some time, one month after she first became chargeable, she turned quite insane, and sent to an asylum, and ever since has remained in confinement there.

he question, and the only question in this case is, whether at the date of her ming chargeable she was deserted by her husband, and whether, from that till she was lodged in the asylum she continued to be so deserted. Both are of importance. If she were deserted when first relieved, but ceased to serted when sent to the asylum then the relieving parish could not recover the parish of her birth settlement. I think, however, that if she was in a of desertion in August she was equally in a state of desertion in September, she was sent to the asylum.

he question as to desertion is a somewhat knotty one, because undoubtedly is absent from this case what was in all the previous cases, viz., the hus- did not here leave the country. The appellant contends that that is essential al desertion. He further maintains that even if running away could con- te desertion the husband in this case was justified in running away, because s in fear of his life.

he question comes to be, if that is a relevant defence. If a man leaves his for his own safety he may be justified in running away, but not without ing provision for her maintenance. This justification is not complete here. uly 1866 he ran away, it may be for fear of his wife, but he did nothing to tain his wife and children. He came back in the end of 1866 and stayed nth, after which he went away again in exactly the same way as before, out making any provision for his wife and family. He never returned till had become subjects of parochial relief in Campsie. The history of the cir- tances is necessary to shew whether desertion took place or not. The hus- , while said to be in desertion, was working and earning wages, and it turns he was accessible and might have been found, but he was very difficult to . It was not known to the parties anxious to find him that he was a private e of the Lanarkshire Militia regiments. Had that been known he could have been traced. He took every precaution he could to prevent the dis- y of where he was. His wife became chargeable very soon after he left her e parish of Kilsyth, and remained chargeable there until August 1867.

en in February 1868 she was relieved by the parish of Rutherglen, though r very long. After that by the parish of Kirkintilloch at a date which has en exactly fixed. The inspector of Kirkintilloch made vigorous attempts cover the husband. He took out a warrant for his apprehension, but did ucceed in getting him, though he made two attempts, once at Annbank yrshire, and again in Rutherglen, in both of which places he had been ing.

is quite, clear, therefore, on the one hand, that the husband went away de-

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ay v. Skene, June 13, 1850, 12 D. p. 1019; Carmichael v. Adamson, Feb. 863, *ante*, vol. i. p. 452; M'Rorie v. Cowan, March 7, 1862, 24 D. p. 723; ee v. Turnbull, *ante*, vol. x. p. 675; Palmer v. Russel, Dec. 1, 1871, *ante*, l. p. 185.

the parish liable for her maintenance. I have no doubt that a husl held to have deserted his wife although he has not left the kingdc were not so, the punishment which the statute provides for husband their wives would be of no use, because it could not be enforced.

This man left his wife for upwards of two years with the excep month. During the whole of that absence, although he was making he never sent his wife any money for her support. He did not inqu welfare or that of her family. He may possibly have had a reaso for leaving his wife, but he could have no excuse for not contrib support and that of his children. It is not necessary to consider wl might be held, in the sense of the Poor-Law Act, to have deserted l when living with her. But the failure to contribute to her maint tainly of more importance than his leaving her. When the woman a lunatic she fell to be maintained by the parish, whether she was t able-bodied man or not; but the time at which she must be held to entitled to relief as a pauper lunatic is the time when she was sent t She may have been previously in a state of lunacy, but we cannot t account. There may be either husbands or wives in a state of luna law must still regard as sane persons. But at the time this wom proper subject of relief she was deserted by her husband, and I an opinion that her maiden settlement is liable.

Lord Ardmillan.—On the question of the effect produced on a ment by the desertion of her husband I was very much impr opinion of Lord Moncreiff in the case of Hay v. Skene, and I c opinion as long as I could, having been, along with your Lordship, in in the case of Carmichael. But in that case of Carmichael it was a settled that the maiden parish was liable for the maintenance of a and if desertion is here proved that fact must, on the authority of be conclusive of this question.

The real question is, whether what is known as desertion took pl on that point I have had some difficulty. But taking in combinati quitting of the wife by the husband, the concealment of his resi whole time, and the failure to supply her with the means of obtaini saries of life, I am disposed to concur in holding that desertion has

till the 24th of September 1868, when she was sent by the parish of Govan to a lunatic asylum as a pauper lunatic: Find that on and after the said 29th of August, and on the said 24th of September, the said pauper and her children were deserted by her husband and their father: Therefore refuse the appeal, and decern," &c.

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MITCHELL & BAXTER, W.S.—J. & R. D. ROSS, W.S.—Agents.

XANDER JAMESON, Pursuer and Appellant.—*Campbell Smith—Rhind.* ALEXANDER BONTHRONE, Defender and Respondent.—*Watson—Balfour.*

No. 121.
June 13, 1873.
Jameson v. Bonthrone.

eparation—Slander.—In an action of damages for slander *held* that the ds "damned puppy" were not actionable.

HIS was an action of damages for slander brought in the Sheriff-court ifeshire by Alexander Jameson, procurator-fiscal of the burgh of Auchnuchty, against Alexander Bonthrone, distiller and maltster, who was vost of the burgh. The pursuer's allegation was that at an adjourned ting of the magistrates, called for the purpose of granting licenses, the nder had said that the pursuer was a "damned puppy" and a "low kguard." "Whereby the defender represented him as a degraded, ertinent, base, vile, querulous, vicious, ill-conducted fellow, and utterly vorthy and incapable of holding the honourable and exalted office of curator-fiscal of the burgh of Auchtermuchty."

1ST DIVISION. Sheriff of Fifeshire. M.

he defender admitted having used the words "damned puppy" and ressed his regret for having done so. He denied having used the ds "low blackguard."

proof was taken in the Sheriff-court, the import of which is given in following interlocutor pronounced by the Sheriff-substitute (Beatson l):—"(1) That the defender is provost of the burgh of Auchtermuchty, the pursuer held the office of fiscal of the Burgh Court for the year end- in November 1872; (2) That on 23d April 1872 an adjourned licensing rt was held by the magistrates of the burgh, which was presided over the two bailies, the defender being disqualified as a maltster from ing in such a Court; (3) That at the Court, of which that of 23d April s an adjournment, the magistrates had expressed an opinion that doors ommunication between licensed premises and dwelling-houses ought be shut up, and had instructed the burgh-officer and constable to report ether this had been done; (4) That at said adjourned Court the de- der was present as a proprietor of premises affected by this resolution, , on the constable reporting, was proceeding to make some observations he bench, when the pursuer said to him, 'Sit down, sir, you have no t to speak here;' to which the defender replied, 'I have as much right peak here as you, you damned puppy;' (5) That it is not proved that defender used to the pursuer the words 'low blackguard,' as averred the pursuer: Finds in point of law that the words used by the de- der in the circumstances above set forth are not actionable; and, *ratim*, that the pursuer having failed to prove the utterance by the de- der of an essential part of the expressions complained of by him as a ole is not entitled to recover damages: Therefore, assoilzies the defender n the conclusions of the action, and decerns," &c.

n appeal the Sheriff (Crichton) pronounced an interlocutor with lings in fact similar to those of the Sheriff-substitute's interlocutor, and her "finds in point of law that the words used by the defender in the

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circumstances above set forth are not in themselves actionable: Finds that the pursuer has failed to prove the innuendo set forth in the summons and that therefore he is not entitled to recover damages: Dismisses the appeal taken on the part of the pursuer."

The pursuer appealed, and argued;—The word "puppy" was an expression of contempt, and was intensified by the word "damned." Any word which was calculated to wound the feelings and render a man contemptible in the eyes of his fellowmen was actionable. The word "blackguard"[1] had already been held actionable, although it did not necessarily imply moral depravity. It was further contended that the proof shewed that the defender had made use of the expression "low blackguard."[2]

The defender's counsel were not called on for a reply.

At advising,—

LORD PRESIDENT.—In this case there are two expressions said to have been used, "low blackguard" and "damned puppy." There is no doubt that the first of these expressions is actionable. This was decided by the case of Brownlie v. Thomson, 21 D. 480, 11th February 1859. I do not think that it has ever been proposed to recover damages for calling a man a puppy. The addition of the other word merely expresses the intensity of the speaker's feelings. The question therefore is, whether the word "puppy" is actionable. It merely expresses contempt. But it is not every expression of contempt which is actionable. In the circumstances of the present case an action of damages is out of the question.

The only other question is whether the words "low blackguard" have been proved to be used, and on that point I agree with the Sheriff and his Substitute that the pursuer has failed to prove that these words were used.

LORD DEAS.—It is not proved that the defender here called the pursuer a blackguard or a "low blackguard." No one says so except the pursuer himself, and it is quite possible that he, in his excitement, imagined that he heard some such words applied to him although they were not so. The only thing like corroboration (but which is not sufficient corroboration) is, that the witness Melville says he heard the defender use the words "low blackguard," but he cannot say to whom they were applied. All the other witnesses say they did not hear the words used at all. It is, however, clear,—indeed it is admitted,—that the defender called the pursuer a "puppy," with a profane word prefixed, to which last no one assigns any meaning at all, and to which we cannot therefore attach any slanderous meaning.

I am not disposed to say that "puppy" can never be an actionable epithet. But to make it so there must not only be an *innuendo*, but the *innuendo* must be proved. We have an *innuendo* here, and a long one too, but we have no proof whatever that any one, unless it may have been the pursuer himself, understood the word to have been used in all or any of the senses attributed to it in that *innuendo*.

A "pup" or "puppy" is not always an offensive animal, and, on the contrary, it is sometimes an object of affection. The word becomes offensive only in consequence of certain conventional but varying meanings attached to it when applied to a man. Sometimes it means "a fop;" sometimes an attention to dress short of a fop; very often it simply means that the person is presumptuous. In short, it is not a word which is necessarily slanderous. Everything depends upon circumstances; the position of the person to whom it is applied and the sense in which it is proved to have been understood and consequently to have

[1] Denham v. Ogilvy, March 19, 1827, 4 Murray's Jury Rep. 195.

[2] Graham v. Roy, Feb. 11, 1851, 13 D. 634; Brownlie v. Thomson, Feb. 11, 1859, 21 D. 480; Sheriff v. Wilson, March 1, 1855, 17 D. 528.

a intended by the utterer; but of which we have no proof here, and consently the action must fail. No. 121.

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ORD ARDMILLAN and LORD JERVISWOODE concurred.

THE COURT pronounced the following interlocutor:—"Find in fact that at an adjourned licensing Court held by the magistrates of Auchtermuchty on the 23d April 1872 the defender (respondent) said in the presence and hearing of the said magistrates and others that the pursuer (appellant) was a damned puppy: Find it not proved that he did then and there say that the pursuer was a low blackguard: Find in law that the words damned puppy are not actionable: Therefore refuse the appeal, and decern: Find the appellant liable in expenses," &c.

P. H. CAMERON, S.S.C.—ADAMSON & GULLAND, W.S.—Agents.

ALEXANDER GIBB, Pursuer.—*H. J. Moncreiff.* No. 122.
THE CITY OF EDINBURGH BREWERY COMPANY, Defenders.—*Rhind.*

June 19, 1873.
Gibb v. Edinburgh Brewery Co.

sparation—Wrongous Use of Diligence—Malice—Bill—Issues.—In an a of damages for injury alleged to have been caused by the defenders re- ing a protest for non-payment of a bill, and charging thereon, although the had been previously paid, eight days after it had become due, *held* that a ge was a diligence and not a judicial act, and that therefore it was not sary to put malice in the issue (Lord Benholme *diss.*, on the ground that circumstances shewed fault on the part of the pursuer, and that therefore it not sufficient for him to prove merely a legal wrong).
rm of issue adjusted.

HIS was an action at the instance of Alexander Gibb, wine and spirit chant in Edinburgh, against the City of Edinburgh Brewery Com- y, Limited, concluding for £500 damages in the following circumces:— 2D DIVISION. Lord Shand. M.

he pursuer in the course of his business bought ale from the ders, and on 6th February 1872 he accepted a bill for £23, 10s. payable e months after date drawn upon him by the defenders.

l regard to this bill the pursuer averred that when it "became due th May 1872 it was presented in the afternoon of that day to him he bank with which it was discounted for payment. It being then bank hours, and the pursuer not having enough money in his shop, ill was not paid on that day. The defenders having thereafter retired ill, Mr Wright, their cashier, by arrangement with the pursuer, called e pursuer's house in John's Place on the 17th of May 1872, and the ier there and then made payment to him on behalf of the defenders e sum due under the bill, viz. £23, 10s. Mr Wright had not ght the bill with him, but promised to send it to the pursuer he following day, and in the meantime granted a receipt for the unt. Instead, however, of sending the bill to the pursuer as promised eir cashier, the defenders, on 20th May 1872, caused the same to be sted and recorded, and on the same day caused the pursuer to be d at their instance with a charge for payment of the said bill. Upon 22d May an announcement of the recorded protest of the said bill st the pursuer appeared in the 'Legal Circular' and also in 'Stubbs' ly Gazette.'"

consequence of these proceedings the pursuer brought this action mages for the injury he had received to his reputation and credit.

e defenders admitted that the pursuer paid £23, 10s. to Mr Wright

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on the 17th May 1872, but averred that this payment was not m account of any particular debt, but a general payment, the pursuer at that time admittedly due to the defenders a considerable sum in tion to the amount contained in the bill, and having accepted not charge of the bill but an ordinary receipt. The defenders further a that the publications referred to by the pursuer were not inserted a instance.

The pursuer pleaded;—(2) The defenders having wrongfully re the protest of the said bill, and charged the pursuer as condescend they are liable to the pursuer in the amount of damages conclud with expenses. (3) The defenders having recorded the said prote given the said charge wrongfully, maliciously, and without probable are liable to the pursuer in damages as concluded for, with expense

The defenders pleaded;—(3) The bill in question not having beer the defenders were entitled to do diligence thereon. (4) The proce complained of not having been malicious, the defenders should be asso (5) The defenders are not responsible for any statements which may appeared in the "Legal Circular" or "Stubbs' Weekly Gazette."

The following issues were adjusted and approved of by the Lord nary, who added the subjoined note:*—"It being admitted that about 6th February 1872 the pursuer accepted a bill for £23, 10s. p three months after date drawn on behalf of the defenders by Nisbet, then their interim managing director, Whether, on or about May 1872, the defenders wrongfully caused the said bill to be pro against the pursuer and the pursuer to be charged thereon, notwithsta that payment of the contents of the said bill had been made by the suer on or about the 17th day of May 1872, to the loss, injury damage of the pursuer? Damages laid at £500."

The defenders moved the Court to vary the issue by substitutin following:—"Whether the said bill was paid on or about 17th May and whether, on or about 20th May 1872, the defenders wrong maliciously, and without probable cause, caused the said bill to be tested against the pursuer, and the pursuer to be charged thereon, t loss, injury, and damage of the pursuer?"

Argued for the defenders;—Unless malice were proved the pursuer no ground of action. He had begun by being in the wrong, by not ing the bill when it was due, and then when payment was made he a receipt which did not bear to be a discharge of the bill, and in such cumstances it was necessary that an issue of malice should be laid be the jury. It had been decided that the mere recording of a pro was not actionable unless done maliciously,[1] and again, that illegal prisonment gave ground of action without malicious intention.[2] T case was something between these two, for there had been a cha given. Now, a charge was not itself diligence, but an intimation t diligence would be done if it was not obeyed, and it had been h that a charge wrongfully given was not in itself a good ground

* "NOTE.—The Lord Ordinary being of opinion that the facts, as stated record by the pursuer, do not disclose a case of privilege on the part of the fenders, in obtaining and executing the diligence complained of, has approve the issue in the terms adjusted in No. 14 of process. Should the case, on facts as disclosed at the trial, appear to the Lord Ordinary to be one of privil the Lord Ordinary will then direct the jury that malice and want of prob cause must be proved in order to entitle the pursuer to a verdict in his favo

[1] Gardner v. Martin, June 10, 1864, *ante*, vol. ii. 1183.

[2] Doyle v. Steven, Nov. 14, 1860, 23 D. 13.

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As to the publication in the "Black Lists," the defenders had to do with that, and therefore no action lay against them in that ed for the pursuer;—A charge was the commencement of dili- nd the rule of law was well settled that it was not necessary to alice in a case of wrongous use of diligence.
lvising,—

Cowan.—In this case the Lord Ordinary considers an issue simply pon the fact of the wrongful act of the defenders to be sufficient, whereas nders' counsel desires that the question of malice should be inserted. re exists in this matter an essential distinction between judicial proceed- diligence cannot be doubted. I entirely, on this point, agree with the licated by Lord Neaves during the progress of the discussion. That a n a decree is not diligence but a judicial act I have never heard main- ntil now. A charge is the commencement of diligence. It is the first rein, and the rest of the diligence follows, which may end in the incar- of the debtor. In the Personal Diligence Act, 1838, we find the follow- on,—"Provided always, and be it enacted, that diligence executed under isions of this Act shall have the same effect as if such diligence had been by virtue of letters of horning or letters of caption, or if arrestments dings had been executed under the forms heretofore in use." Formerly, proceeded by charge on letters of horning, and if not complied with caption were expede, also under the Signet, for the apprehension and tion of the debtor. The registration of a decree of a competent Court is sub- for the old form of diligence, but a charge is still the first step. Does there exist this essential difference between judicial procedure and diligence? n be no question of this, and if we look at the consequences following giving of a charge it is clear that by its mere execution a man's credit lestroyed, or at least may be seriously affected. I think, therefore, that rcumstances the simple issue of wrongful is enough. There is no privi- What was done was not judicial procedure, but alleged wrongful diligence. l Ordinary has taken the right course.

Benholme.—I am of a different opinion. This pursuer certainly begins ng in fault. He did not pay his bill when it became due. Then he general payment, the receipt not bearing that it was in extinction of the d he did not get up the bill. In this indefinite state of matters he, doubtedly the party in default in the first instance, asks damages upon le issue that a legal wrong was committed. In these circumstances, going into the refinements which have been suggested between judicial ngs on the one hand and legal diligence on the other, I am decidedly of that the pursuer should be required to prove somewhat more than that s a legal wrong.

Neaves.—I agree with the opinion expressed by Lord Cowan. In the avies the question was whether it was necessary to aver malice, and it down that it was necessary to do so when the ground of action was a proceeding. Lord Curriehill, in dissenting in the case of Davies, only from the other Judges as to whether the proceedings were actually judicial ngs. He says,—"My difficulty is in holding that the decree has the of a judicial proceeding. I think it was an incompetent proceeding. ground, therefore, that that was not a proper judicial proceeding, I hold pursuer is not bound to qualify his issue as proposed by your Lordship." n this point that the other Judges took a different view. Lord Deas

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iston v. Redpath, Brown, and Company, Feb. 24, 1866, *ante*, vol. iv.

ies and Company v. Brown and Lyell, June 8, 1867, *ante*, vol. v. 842.

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says,—"The action which was raised against the pursuers was undoubt judicial proceeding, and remained so to the end, with this variation only, first it was a well founded action, while at last it was not." But all the were agreed upon this, that if it was a judicial proceeding it was priv None of them, however, hint that in the case of diligence there is any su vilege, or any necessity for averring malice.

I think there can be no doubt that a charge is a diligence, looking to t sequences which follow a charge. I think that it has been held that un Act 1621 a charge is begun diligence. It is not a completed diligen arrestment may follow upon it, and no one will deny that arrestment gence.

I agree with Lord Benholme that the pursuer in this action began th but still this is no case of *compensatio injuriarum*, but an injury cause positive act, and if the defenders have any excuse from the pursuer's c the jury will take that into consideration.

I therefore do not think it necessary that an averment of malice should serted in the issue.

LORD JUSTICE-CLERK.—The only question here is whether the proceedi the defenders, on account of which damages are sought, are privileged, s it is necessary to aver malice in order to make the action competent. I think this question depends upon whether the pursuer did or did not p bill when it was due. That does not affect the question at all, but the qu depends upon this further question, whether the proceedings were judici ceedings or diligence. Now, this latter question is attended with some diff but the distinction between judicial proceedings and diligence in refere such questions as that now before us has been broadly laid down. Alt the recording of a protest might be held to be a judicial proceeding there no doubt that a charge is a diligence. So, as far as regards technical form, I the Lord Ordinary is right, but I am anxious that the vital point in thi should be clearly kept open for the trial. The true point of the case is, wh Wright accepted the pursuer's payment as merely a payment to account, o payment of the debt due under the bill, and of that alone. If the defende prove that Wright received the money as a general payment that is a defence to this action. Even if they could prove something short of that shew that he had reasonable ground to believe that the payment was a g payment to account, I think that might be a good defence. So I should b posed to put into the issue words to the effect that the defenders knew tha bill had been paid, and notwithstanding recorded a protest and executed a c against the pursuer.

THE COURT approved of the following issue:—"Whether the said was paid on or about 17th May 1872, and whether, on or a 20th May 1872, the defenders wrongfully, and in the know that the same had been paid, caused a protest on the said bill recorded against the pursuer, and the pursuer to be charged the to the loss, injury, and damage of the pursuer? Damages la £500 sterling."

A. D. MURPHY, S.S.C.—FERGUSON & JUNNER, W.S.—Agents.

No. 123.

June 20, 1873.
Ashley v. Magistrates of Rothesay.

HENRY ASHLEY AND OTHERS, Pursuers.—*Watson—R. V. Campb*
THE MAGISTRATES OF ROTHESAY, Defenders.—*Sol.-Gen. Clark—Orr Paterson.*

Public-House—Certificate—Hours of Opening and Closing—Statu Geo. IV. c. 58 (*Home Drummond Act*); 16 *and* 17 *Vict. c.* 67 (*M Mackenzie Act*, 1853), *secs.* 11, 12; 25 *and* 26 *Vict. c.* 35 (*Public-H Amendment Act*, 1862), *secs.* 4, 2.—The Magistrates of a burgh, at a ing for renewing certificates for the sale of exciseable liquors within

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came to a resolution that, within a particular district, which included he whole burgh and all the inns and public-houses in the burgh, the closing inns and public-houses should be 10 instead of 11 as required bove Acts, and they granted certificates accordingly. By sec. 2 of 25 Vict., the Magistrates are allowed to insert in the certificates a different closing and opening "in any particular locality within any county or equiring other hours for opening and closing." *Held* that the Magisere not entitled to change the hours of closing throughout the whole nd remit made to the clerk to alter the certificates.

liction—25 *and* 26 *Vict. c.* 35.—When an inferior Court exceeds its ie Court of Session may reduce the decree, although bearing to be under hich excludes reduction.

e—25 *and* 26 *Vict. c.* 35, *sec.* 35—*Computation of Time.*—Under a equiring all actions arising from procedure under it to be commenced wo months after the cause of action shall have arisen, *held* that Magisio were sued for damages on account of a decision pronounced on 15th re timeously cited by a summons executed on 15th June following.

1st Division. Lord Gifford. M.

action was brought by Henry Ashley, hotel-keeper, Rothesay, and ree hotel-keepers there, against Daniel Macbeth and others, the ates of Rothesay, and John Wilson, their clerk.

Magistrates met on 15th April 1872 for the purpose of granting ewing certificates for the sale of exciseable liquors within the n accordance with section 1 of the Act 16 and 17 Vict. c. 78. They the following resolution,—"The Magistrates, considering that in icular locality within the burgh, situated within the following viz., Mackinlay Street, ... other hours are required for closing l hotels and public-houses than those specified in the forms of es in schedule A annexed to the Act 25 and 26 Vict. cap. 35, le thereto,—resolve to insert eight of the clock in the morning as for opening, and ten of the clock at night as the hour for closing , in such certificates." The area included the whole of the burgh, ome outlying portions, and included all the hotels, inns, and ouses. On appeal, the Quarter Sessions affirmed the decision of istrates.

ursuers averred;—"It was not the fact that other hours are reor closing in Rothesay within the limits of the said resolution hour of eleven o'clock specified by the Legislature. So far eculiarities exist in Rothesay to distinguish it from other burghs ding steamboat station and a place of summer resort they as to render the usual statutory hour the most convenient. suers' certificates for previous years all contained the usual hours of eight o'clock in the morning for opening, and eleven t night for closing, and they came before the Magistrates of the gh as applicants for renewals of their certificates in April last. resolution complained of was adopted and made before the applications for renewals were taken up and disposed of by the istrates. No difficulty or question was raised as to the propriety ng the pursuers' applications for renewals; but the said Magisgranting the same, intimated their said previous resolution, and the same to be final and binding on themselves in all cases. By ic-House Acts, and specially by section 7 of the 9 Geo. IV., c. 58, ers, who were in attendance, were each entitled to be heard in f their applications for renewals of their certificates in the terms in previous years, and it was illegal and incompetent to fix d, as was done by the said resolution, that in no case would the r for closing be inserted as in previous years. The defenders, istrates present on the said 15th April last, illegally and un-

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warrantably refused to hear and consider the cases of the pursuers individually and separately, with reference to any peculiarities of locality management, or otherwise, bearing on the proper hour for closing; and they illegally and unwarrantably insisted on following the said resolution as a general rule applicable to all cases, without respect or regard to, and without allowing the pursuers individually to be heard upon, the special requirements of their several hotels. Accordingly, the said Magistrates, in terms of their said resolution, illegally inserted in the certificates granted to the pursuers for the current year a condition, whereby the pursuers are required not to keep open house after ten of the clock at night of any day, all as the said certificates made out by the defender, John Wilson, the clerk of the said Magistrates, in themselves more fully bear."

The conclusions of the action were for reduction of the resolution of the Magistrates, and the certificates issued by the clerk in terms of the resolution, for declarator that the certificates should be as valid as if the condition had not been inserted, for an order on the clerk to delete the hour of ten as the hour for closing, and insert the hour eleven instead, and for £200 of damages.

By the Act 9 Geo. IV., c. 58 (the Home Drummond Act), the only restriction as to the time during which public-houses and inns are to be kept open is contained in the form of certificate appended to the Act, which provides that the person to whom a certificate is granted shall not keep his house open at "unseasonable hours." The 11th section of the Forbes Mackenzie Act, 1853, 16 and 17 Vict. c. 69, provides the form in which certificates are to be granted by the Magistrates, and enacts that it shall not be lawful for the Magistrates to grant certificates in any other form than that in a schedule annexed to the Act in which the hour of opening is eight in the morning, and closing eleven at night. The section concludes—"That in any particular locality within any county or district of burgh requiring other hours for opening and closing inns and hotels and public-houses than those specified in the forms of certificates in said schedule applicable thereto, it shall be lawful for such Justices or Magistrates respectively to insert in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening, for closing the same, as they shall think fit."

The 12th section provides,—"If any certificate shall be granted contrary to the provisions of this Act the same shall be null and void to all intents and purposes."

By the 2d section of 25 and 26 Vict. c. 35, new forms of certificates are introduced, which contain the same hours for opening and closing public-houses, and the provision quoted above is repeated as to the Magistrates varying the hours in a particular locality. By the 4th section it is provided that any certificate granted "contrary to the terms and provisions of this Act shall be null and void to all intents and purposes."

The defenders founded on the 34th section of 25 and 26 Vict. c. 35, as excluding review. Sec. 34 is in the following terms:—"No warrant, sentence, order, decree, judgment, or decision made or given by any Quarter Sessions, Sheriff, Justice or Justices of the Peace, or Magistrate, in any cause, prosecution, or complaint, or in any other matter under the authority of the said recited Act or of this Act, shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution, on any ground or for any reason whatever other than by this Act provided."

The defenders maintained further that the decision of the Magistrates

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ing been given on 15th April, and the summons in this action having
a executed on 15th June, the action was excluded by the 35th section,
ch bears:—"Every action or prosecution against any Sheriff, Justice or
tices of the Peace, Magistrate, or Judge acting under any general or
l Police Act, or against any Sheriff-clerk, Clerk of the Peace, or Town-
k, or any Procurator-fiscal, or any other officer of police, or constable,
other person, on account of anything done in the execution of the
ted Acts and this Act, or any of them, shall be commenced within two
nths after the cause of the action or prosecution shall have arisen, and
afterwards."

The pursuers pleaded;—(1) The intention and effect of the resolution
plained of being entirely to depart from the statutory rules as to the
r for closing all the inns, hotels, and public-houses within the burgh,
same should be reduced. (2) The area affected by the said resolu-
n being the whole burgh for licensing purposes, the same should be
uced. (3) The resolution complained of not being in any case a com-
ent means of exercising the Magistrates' power of alteration, the same
uld be reduced. (4) The Magistrates' power of alteration only exists
ere other hours are required for opening as well as closing, and no
eration being required or made on the hour for opening, the defenders'
ings are illegal, and should be reduced. (5) The Magistrates having
any event acted irregularly and incompetently in proceeding upon the
olution complained of, without considering and hearing each of the
suers upon the circumstances of his individual case as affecting the
r for closing, the pursuers are entitled to decrees as craved. (6) The
triction of the pursuers to fourteen business hours, and the condition
quiring them to close at ten o'clock at night being illegal and un-
rranted by the statute, the pursuers are entitled to decrees as craved.
The proceedings complained of having caused, and still causing, loss,
ury, and damage to the pursuers, they are each entitled to recover
nages from the defenders, the said Daniel Macbeth, Robert Sharp, and
omas M'Kinlay, as the individual wrongdoers. (8) The proceedings
plained of having been *ultra vires* and not in *bona fide* execution of
Acts, but adopted maliciously and without reasonable or probable
se, the pursuers are entitled to redress thereagainst as craved, and
y are entitled to expenses.

The defenders pleaded;—(1) The present action is incompetent, re-
w being excluded by the 34th section of 25 and 26 Vict. c. 35. (2)
is action, not having been commenced within two months after the
se of action had arisen, is barred by the clause of limitation in the Act
25 and 26 Vict. c. 35 (sec. 35). (3) This action is incompetent, and
uld be dismissed, in respect that the actings of the Magistrates sought
be reduced were appealed by the pursuers to the Quarter Sessions of
Peace for the county, and judgment given by the Quarter Sessions
reon; and also in respect that no reduction has been brought of the
lgment of the Quarter Sessions. (4) The pursuers, by acceptance of
certificates granted to them, and keeping their inns or hotels, and
ing in virtue of and under the authority of these certificates, are barred
m raising the present action. (5) The conclusions for declarator that
pursuers' certificates shall be valid to the pursuers for the current
ar, as if there had been therein inserted only the condition as to the
ur of closing set forth in the form of certificate in schedule A, and the
clusion against the defender, John Wilson, to correct the certificates,
incompetent, (6) The damages claimed being prospective, the con-
sion therefor is incompetent. (7) The summons containing no aver-
nts of malice and want of probable cause on the part of the defenders

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the conclusion for damages is incompetent. (8) The action i petent, in respect of illegal *cumulatio actionum*. (9) The incompetent, and should be dismissed with expenses, in respect Magistrates and Quarter Sessions on appeal are, in the matt plained of, vested with exclusive jurisdiction, and their proce not subject to the review or interference of the Court of Session, there is no sufficient or relevant averment that they exceed statutory powers.

The Lord Ordinary pronounced this interlocutor:—"Repels th of reduction, and the whole pleas stated for the pursuers: Asso defenders from the whole conclusions of the libel, and decerns: defenders entitled to expenses, and remits," &c.*

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* "NOTE.—A good deal was said by the counsel for the pursuers as to and arbitrary nature of the resolution passed by the Magistrates of on 15th April 1872, and as to the injustice and inexpediency of cl whole hotels and public-houses in the burgh of Rothesay at so earl as ten o'clock at night. It was urged that in summer the traffic was at that hour, and that great inconvenience was caused by the arrangem

"With these, and with all similar considerations, the Lord Ordinary th he has no concern. He is not aware of the circumstances which in Magistrates of Rothesay to pass the resolution complained of, and inquire into its expediency or propriety.

"By the statutes in question relative to inns, hotels, and public-hous very large and important discretionary powers are vested in the Magi reference not only to the granting or withholding of licenses, but also ence to the hours at which hotels and public-houses within the territor opened and closed, and in reference to certain other conditions up licenses may be granted. On all these questions the Magistrates are judges. In some cases their judgment is subject to the review of th Sessions, but in no case is their judgment liable to be reviewed by the Courts of the country, and in particular the Court of Session has no p cannot be called upon to review the decisions of the Magistrates, or to regulate in any way the exercise of the discretion which the statutes h mitted to the Magistrates alone.

"In the view of the Lord Ordinary, therefore, the sole question in th case is, whether the Magistrates of Rothesay have or have not acted w powers committed to them by the statutes. If they have, then this C not and will not interfere. If, on the other hand, the Magistrates have their statutory powers, if they have gone out of their statutes, and eit something which the statutes expressly prohibit, or something which th do not permit, then undoubtedly there is jurisdiction in the Court of S correct the excess of power, and to set aside the illegal act.

"Now, after full consideration, the Lord Ordinary is of opinion resolution of the Magistrates of Rothesay of 15th April 1872 was wit competency, was authorised by the provisions of the statute 25 and 26 35, sec. 2, and that the condition inserted in the certificates of the purs closing at ten o'clock was a lawful condition, which the Magistrates were to insert, and against which, except perhaps by appeal to the Quarter (and even this is doubtful), the pursuers have no remedy.

"The second section of the Public-Houses Amendment Act provides in any particular locality within any county, or district, or burgh, requirin hours for opening and closing inns and hotels and public-houses tha specified in the forms of certificates in said schedule applicable thereto, be lawful for such Justices or Magistrates respectively to insert in such cates such other hours, not being earlier than six of the clock or later tha of the clock in the morning for opening, or earlier than nine of the c later than eleven of the clock in the evening for closing the same, as the think fit.'

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The pursuer reclaimed, and argued;—The Magistrates have only power change the hours in a particular locality, and are not entitled to change hours throughout the whole burgh. They have no right to make a eral rule for all the hotels and public-houses. Their duty is to hear h case and decide upon it separately. No power was given to diminish time during which public-houses were to remain open. Review is excluded, because the Magistrates were not acting under the statute coming to the resolution complained of. They acted *ultra vires*.[1]

The defenders argued;—The Magistrates did not meet as a Court, but a body of public representatives. They were charged with a discrenary power, and could include any part of the burgh in a district for purpose of limiting the hours during which public-houses were to be n. The only appeal was to the Quarter Sessions.[2]

LORD PRESIDENT.—The pursuers of this action state that they are the four ncipal hotel-keepers in the town of Rothesay, and as such they hold certifies for the sale of exciseable liquors, and have done so for a considerable number years. They complain of the Magistrates of the burgh that they have recently hat is to say, last year—for the first time made a change in the conditions of

"It is not disputed that the locality marked out in the resolution is a part ly of the royal burgh of Rothesay. It is therefore, in the sense of the statute, particular locality' to which the proviso applies. It seems to be of no conseence whether it includes *de facto* all the public-houses of the burgh or not. it does, it is only the more equitable and impartial. It is sufficient that it is thin the words and intendment of the statute.

"If the resolution is legal it seems to follow that the insertion in the certifies of the condition in terms of the resolution is also legal, and the Lord Ordiry cannot assent to the argument of the pursuers, that in respect their licenses certificates were 'renewed' certificates, the old hour of closing, eleven o'clock, ould have been continued as to them, though ten o'clock might have been ntly inserted in all others. The Lord Ordinary thinks that this could not ve been done consistently with the statute. When once a locality is fixed, e uniform rule must be applied under the proviso to all public-houses within e bounds. It would certainly be improper, and, *prima facie*, it would seem be illegal, to permit one hotel or public-house to remain open till eleven clock, and to compel another in the same locality and in the same circumstances close at ten o'clock.

"The Lord Ordinary is also of opinion that there was nothing illegal or imper in the mode in which the Magistrates proceeded in carrying out the viso of the statute. Plainly it was necessary and proper to fix the locality thin which the earlier hour of closing should be enforced before considering y special application for certificates, and this was done. But it was done in en Court, and if the pursuers, or any one else interested, had wished to be rd on the subject hearing would have been granted.

"It is vain to say the Magistrates had made up their minds beforehand. The me might be said of any judge whose opinions on any particular question ppened to be known. The Lord Ordinary thinks that the allegations of lice and of illegal purpose to defeat the statute, and injure the pursuers, are olly irrelevant.

"The view now taken is conclusive of the case against the pursuers, and it is necessary to consider any of the other questions raised, or any of the special as stated in defence. Even if the pursuers could shew that the resolution of th April 1872 was *ultra vires* and illegal, it is more than doubtful whether e remedies which the pursuers seek are competent or admissible."

[1] Silvester, 31 L. J. Magistrates Cases, p. 93, Feb. 17, 1862; 2 Bell's Com. th ed.) p. 1779; R. v. Justices of Walsall, Nov. 23, 1854, 24 Law Times, ; Crosbie v. M'Minn, June 8, 1866, *ante*, vol. iv. p. 803.

[2] Manson v. Smith, Feb. 8, 1871, *ante*, vol. ix. p. 492; Miller v. Henderson, 0, 12 D. 656.

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these certificates, by providing that, instead of their houses being opened at eig o'clock in the morning and shut at eleven at night, they are to be opened eight in the morning and shut at ten at night. And they complain, furth that this has been done in pursuance of a general resolution adopted by t Magistrates, which they have carried out to the effect of making it apply to t whole burgh,—that is to say, to every hotel and inn and public-house within t burgh. It is maintained that this proceeding of the Magistrates is beyond th powers under the Public-House Act.

The question is one of considerable general importance, and it requires a care examination of the provisions of the different statutes, for there are three statu in existence regulating this matter,—the Act of the 9th Geo. IV., commo called the Home Drummond Act, the Act of the 16th and 17th Victoria, kno as the Forbes Mackenzie Act, and the recent statute of the 25th and 26th of t Queen, c. 35, which made some important alterations upon the previous statut but did not repeal those Acts, except in so far as was necessary to give effect the new provisions. Under the first of these statutes the form of certificate p vided only, with regard to this matter, that no hotel, or inn, or public-hou should be kept open at unseasonable hours. But in the second statute of th 16th and 17th of Victoria the hours are introduced in the certificates in thi manner, that the person holding the certificate shall not sell or give out there from any liquor before eight of the clock in the morning, or after eleven of th clock at night, of any day. And the 11th section of that Act provides that th form of certificate contained in the schedule to this Act annexed shall come in place of the form of certificate provided by the said recited Act of the 9th of th reign of King George IV., and it shall not be lawful to the Justices of the Peac for any county or district, or the Magistrates of any burgh in Scotland, whether acting under the said recited Act or this Act, from and after the passing of thi Act, to grant any certificates in other forms than those contained in the sai schedule. And the 12th section provides that if any certificate shall be granted contrary to the provisions of this Act the same shall be null and void to al intents and purposes. The last statute substitutes certain new forms of certifi cates for those provided by the Act of the 16th and 17th of Victoria. But i so far as regards this matter of the time of opening and shutting they are iden tical with the previous statute. And the 2d section of this last Act provide that "the forms of certificate contained in schedule A to this Act annexed shal come in place of the forms of certificate provided by the recited Acts, or either of them, and it shall be lawful for the Justices of Peace for any county or dis trict, or the Magistrates of any burgh, where they shall deem it inexpedient t grant to any person a certificate in the form applied for, to grant him a certificat in any other of the forms contained in the said schedule." But again, as in the previous statute, the 4th section of this Act provides "that if any certificate shall be granted contrary to the terms and provisions of this Act the same shall be null and void to all intents and purposes."

Now, the result of these enactments appears to me to be that the Legislature has determined that, as a general rule at least, the time that hotels and public-houses are to be kept open is from eight o'clock in the morning till eleven o'clock at night,—that is to say, a period of fifteen hours each day. There is an excep tion to this general rule which I shall immediately notice, but it seems to me that as a general rule this is made imperative, because, except by means of the proviso which introduces a certain exception, no certificate which does not con tain these hours would be a lawful certificate under the Act of Parliament, but it would necessarily be under the fourth section null and void to all intents and purposes.

The exception is introduced in the last statute by a proviso in the second sec tion. But in order to understand precisely the meaning and object of the Legis lature in that proviso it is necessary to go back to a corresponding proviso in the Act of the 16th and 17th of Victoria. After providing that all certificates must be granted in the form of the schedule, the 11th section goes on "provided always that in localities requiring other hours for opening and closing public houses, inns, and hotels than those contained in the said schedule, it shall be

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ful for such Justices or Magistrates to insert in the said schedule such other
n, not being earlier than six o'clock or later than eight o'clock in the morn-
for opening, or earlier than nine o'clock or later than eleven o'clock in the
ing for closing the same, as they shall think fit." Now, there are two ex-
sions in this proviso which give rise to a good deal of doubt. In the first
e, what is meant by "requiring other hours for opening and closing?" Does
mean that the exigencies of the locality are such that it is desirable that
er hours shall be introduced in one place than in another, or does it mean
the inhabitants of the locality require or ask for such a variation? Perhaps
not of very much importance to the present inquiry which of these is the
ning. But there is another expression in this proviso which also must have
a rise, I think, to a good deal of difficulty in construction. This proviso
ies to localities requiring other hours, and that may be construed to mean
r a portion of a burgh or a portion of a county, or it may be construed to
a whole burgh or a whole county. The word "locality" would be equally
cable to both. Now, it is for the purpose, as I think, of removing this
r difficulty of construction that the new clause and the new proviso were in-
uced into the last statute, because the proviso runs thus:—"Provided
ys that in any particular locality within any county or district or burgh
iring other hours for opening and closing," and then follows the power of
Magistrates, just in the same words as in the previous statute. This mode
pression renders it quite clear that it was not the intention of the Legislature
ve power to the Justices or the Magistrates to alter the hours of an entire
ty, or an entire burgh, but only to exercise that power in any particular
ity within a county, or within a burgh, the peculiarities of which might
er it desirable that the hours should be earlier, because, it will be observed,
Magistrates have no power to make the hours later. They cannot make the
ing later than eight or the shutting later than eleven, which are the two
s prescribed in their schedule as a general rule. Their only power is to make
hours earlier. Now, construing this last proviso, I am of opinion, in the
place, that it certainly is unlawful for the Justices or the Magistrates to make
alteration applicable to the entire county or the entire burgh. I think also
the object for which this power was given is not far to seek. There are
localities, particularly within counties, where earlier hours are desirable
in other localities. One case easily understood, for example, that in a
ng district, where the workmen come up from their work in the mines gene-
at six o'clock in the morning, it is very desirable that they should have an
tunity of obtaining refreshment before they go to bed. But this is only
f a great many instances that could be suggested, where the particular kind
lustry or occupation existing in a particular locality might make it desirable
ve earlier hours than prevail in the county or burgh generally.
ow, keeping these observations in view, let us see what the Magistrates of
esay have done. They seem to have been aware that they would have a
ulty in dealing with the words "any particular locality within any county
rgh," and accordingly, in carrying out their resolution to shut up all the
s and public-houses in Rothesay at ten o'clock at night they defined a certain
of the burgh, and made their new hours applicable to that part of the burgh
excluding another but smaller part of the burgh. But then the line is so
iously drawn that, in that part of the burgh to which the change of hours
ade applicable, every hotel and public-house in the burgh is situated. So
in practical effect it is just the same thing as if they had come to a resolu-
that nobody in Rothesay, whether hotel-keeper, innkeeper, or public-house
er, should be allowed to keep his house open after ten o'clock. That is the
ical effect of it, and the attempt to make this take the appearance of a pro-
n for a particular locality is simply a fraud on the statute. I do not use
term in any offensive sense, but in its purely legal signification. It is a
of defeating the words of the Act of Parliament by an ingenious con-
nce. It appears to me that that is undoubtedly beyond the power
e Magistrates. There is no such power given to them by this Act of Par-
nt.

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There are other objections which might be stated to what they have dc It may well be doubted, I think, whether the Magistrates have any power, un the proviso in the 2d section, to diminish the number of hours for which pul houses and hotels are to be kept open, and there is a great deal of suppor that view from the particular words of the proviso itself, because it speak particular localities requiring other hours for opening *and* closing, and not opening *or* closing. It is undoubtedly the general rule introduced by schedule that every hotel, inn, and public-house shall be kept open for fif hours,—that is to say, shall be entitled to be open for fifteen hours; and I th it would require a proviso of a somewhat different kind from this, and differe expressed, to allow the Magistrates or the Justices to interfere with the num of hours which is thus assigned to public-house keepers and hotel keepers remaining open. But I do not desire to put my judgment on that ground, wh may admit of more hesitation than the other. I think the plain ground of judgment here is, that the Magistrates of Rothesay have endeavoured, under cover of this power which is given them in the proviso of the 2d section, to a thing which the Act never contemplated or intended they should have power to do.

I have thought it best to deal with this question upon its merits in the f place, before saying anything on certain preliminary pleas which are stated the defenders, because those preliminary pleas can be best judged of when c understands exactly what the question upon the merits is. The defenders ple that the present action is incompetent, review being excluded by the 34th secti of the statute 25 and 26 Vict. c. 35. Now, that 34th section enacts that " warrant, sentence, order, decree, judgment, or decision made or given by a Quarter Sessions, Sheriff, Justice or Justices of the Peace, or Magistrate, in a cause, prosecution, or complaint, or in any other matter under the authority the said recited Act or of this Act, shall be subject to reduction, advocatio suspension, or appeal, or any other form of review or stay of execution, on a ground or for any reason whatever other than by this Act provided." Now, t plain answer to the objection founded upon this section is, that the present not a process of review, nor is it in any proper sense a stay of execution. It a proceeding brought in the Court for the purpose of setting aside as incom petent and illegal the proceedings of an inferior Court, and the jurisdiction this Court to entertain such an action cannot be doubted, notwithstanding t entire prohibition of review of any kind. This is not review, as I said befo but it is the interference of the Supreme Court for the purpose of keeping infer Courts within the bounds of their jurisdiction. The Magistrates having exceed their powers under the statute their order, whatever it may be—or decision- liable to be set aside.

But, in the second place, the defenders maintain that the action, not havi been commenced within two months after the cause of action had arisen, barred by the clause of limitation in the 25th and 26th Vict. c. 35, sec. 3 That section provides that "every action or prosecution against any Sheri Justice or Justices of the Peace, Magistrate, or Judge acting under any gene or local Police Act, or against any Sheriff-clerk, Clerk of the Peace, or Tow clerk, or any Procurator-fiscal, or any other officer of police, or constable, other person, on account of anything done in the execution of the recited Ac and this Act, or any of them, shall be commenced within two months after t cause of the action or prosecution shall have arisen, and not afterwards." No I think, so far as the reductive conclusions of this summons are concerned, th this section has no application. It is not an action or prosecution within t meaning of the 35th section at all. It is a proceeding for the purpose of settin aside an incompetent and illegal proceeding of the Magistrates. But no dou this summons also contains conclusions for damages, and the 35th section do apply to a case of that kind; indeed, it is the very case contemplated l the 35th section. The only question therefore is, whether the facts foun the plea upon the 35th section. Is this action brought within two month after the cause of action arose, or is it beyond the two months? Now, th decision of the Magistrates on this matter was upon the 15th April, and th

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summons was executed upon the 15th June. We had some ingenious observations made upon the computation of time, and some English authorities were quoted to us, which, if I understand them aright, established a different rule in the computation of time from that which prevails in Scotland. But I have no hesitation in saying that, according to the well-established rule for the computation of time in our law, an action brought upon the 15th of June is brought within two months of the 15th of April; and I think it quite unnecessary to say more about it, because the thing is settled over and over again with reference to a great variety of cases.

I therefore think that the preliminary pleas of the defenders are not well founded, and that the pursuers are entitled to a remedy such as they seek under this summons. But it remains for consideration in what precise form that remedy should be given. They conclude for reduction of the resolution of the Magistrates,—that is, the general resolution to which they came about closing hotels and public-houses at ten o'clock,—and they also conclude for reduction of the condition as to the hour of closing inserted in the said certificate as aforesaid; and I am of opinion that the pursuers are entitled to prevail in that conclusion for reduction. But there remains a little difficulty, because if the condition as to the hour of closing inserted in the certificates is set aside, there would remain in the certificates no condition as to the hour of closing at all; and therefore it is necessary to obtain some practical remedy to obviate that result, and I think the pursuers have suggested a very good form in which to do it. It will be observed that the certificate in this Act, as in all the previous statutes, is made out by the clerk of the Magistrates. I presume it is the town-clerk who acts in that matter; but whoever it is, it is of very little consequence —it is the clerk who acts in that Licensing Court. The Magistrates decide upon who is to have the certificate, and having decided that, the making of the certificate is entirely the work of the clerk. He writes it, and he appends this docquet or note to it,—"The above certificate is made out according to the deliverance in the book or register appointed to be kept in terms of the Act of Parliament," and then he signs that as clerk. Now, I think it is quite competent for us, in rectifying any illegality which has been committed by the Magistrates, and by the clerk under their order, to order that clerk to undo that illegality; and therefore I would suggest that, under one of the conclusions of this summons which is specially directed to that subject, the clerk should be ordered to delete the word "ten" and substitute the word "eleven" in each of these certificates, which will have the complete effect of restoring the pursuers to the condition in which they were entitled to be when they got their certificates.

LORD DEAS.—I agree with your Lordship that the question whether we have jurisdiction to interfere in this matter depends entirely upon whether the Magistrates have or have not kept within their powers under the statute. If they have exceeded their powers there can be no question of the jurisdiction of this Court to rectify what they have done. I do not think that that question is affected by the fact which was pointed out in the discussion, that the judgment of the Quarter Sessions is not substantively complained of in this action; because what the Quarter Sessions did was simply to dismiss the appeals which were taken to them, leaving the original deliverance, or whatever it may be called, to stand. I may state, also, that I agree with your Lordship as to how the two months are to be reckoned with reference to the conclusion for damages. I think that the action was brought within the two months,—reckoned according to the rule fixed in our practice,—and that therefore there is no incompetency in that conclusion, any more than in the other.

With reference to the question itself, whether the Magistrates, in what they did, went out of or beyond the statute, that depends upon whether, under colour of altering the hours during which the hotels and public-houses were to be kept open within a particular locality in the burgh, they did or did not in substance alter the hours as to the whole hotels and inns, &c., within the burgh. I think it is clear enough that the effect of the words which were introduced into the

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last statute (25 and 26 Vict.), and which were not in the previous stat the words "in any particular locality," &c., necessarily is, and prob intended to be, to prevent the very thing which has been done here, changing of the hours with reference substantially to a whole county, or burgh. I agree with your Lordship that what was done here was sub to change the hours in the whole burgh of Rothesay. If that could b the whole burgh of Rothesay in this way it might of course equally b the whole burgh or city of Glasgow or of Edinburgh, and the consequen would be, that in one or both of these large cities it might be made i to close the whole inns, hotels, and public-houses within the bound o'clock in place of what is the general statutory regulation, viz., eleve at night. It would be very difficult to suppose that it was intended power of that kind. There was, as your Lordship has pointed out, so for alleging a power of that kind (although not so intended) under t of 16 and 17 Vict., but I cannot see any ground for holding that the a power as that under this statute, which expressly provides that the —for it is an exception—which enables the Magistrates to change t shall only apply to a "particular locality" within any county or burgh. Now, a particular locality within a county or district or burg possibly be read as the whole county, district, or burgh. The line in th case has obviously been drawn on purpose, so as to leave out a little burgh of Rothesay in which there are no public-houses, inns, or hotel take in the whole of the burgh in which the hotels, inns, and public-h situated. Now, that is doing, under colour of this proviso, a thing wh not be done directly, and which was never meant to be comprehended What the statute does enables the Magistrates of a burgh or the Justices in a county or district to do is a matter of very considerable difficulty. this statute, as happens too often, is not expressed in the clear and manner in which it ought to have been expressed. Words are not unfr put into such statutes which the parties who get them put in have sidered or fixed in their own minds the precise meaning of, and they Court to find out their meaning. That is imposing on us a hard task, observation may not be altogether inapplicable here; for what con locality "requiring" other hours than the general hours is not very easy stand. The locality does not "require" anything about it in any corr Whether it means required by the inhabitants, or whether it means, a probable, some such exceptional circumstances, or objects, as your Lord suggested, it is very difficult to say, and I do not wish to anticipate a tions that may arise, by going into that further than is necessary. T that I think pretty clear, and the only thing that I at present wish to d that, whatever the Magistrates could do in the burgh of Rothesay u proviso, they could not competently do the thing they have done. I agree with your Lordship as to the terms of the interlocutor we ough nounce, and the mode in which this error ought to be corrected.

Lord Ardmillan.—I concur in repelling the pleas urged by the defe exclude this action. I think that this action, which is not an appeal or a is competent, and not barred by the clauses of limitation (secs. 34 an the Act 25 and 26 Victoria, cap 35. On these points I add nothing has been already stated.

On the merits—that is, on the construction of the statute—and on jections to the competency of the resolution by the Magistrates, I h some difficulty; and though I feel greatly impressed by the remarks whi Lordships have made I cannot say that my difficulty is entirely removed.

But for the great respect with which I regard the opinion of your Lo and the great reluctance which I feel to differ on a question of construct statute of this kind, which is of extensive application and of practical ance, I should have been rather disposed to take a different view of the tion of this Act; and I should have hesitated in coming to the conclus the Magistrates of Rothesay, dealing with premises within the burgh, an

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he wide discretion committed to them, have here exceeded their statutory
ers. I should have been inclined to think that the Magistrates had power
sert in the certificates a condition that inns, hotels, and public-houses shall
losed at ten o'clock at night instead of eleven o'clock, and had the power to
t the insertion of such condition within the area of the "particular locality"
estion, the same being literally within the burgh of Rothesay. If the
strates could have issued that order, and inserted that condition, in regard
e street or one district in the burgh, or several streets or districts in the
h, which is scarcely disputed, then I have great difficulty in holding that
could not do the same thing in a larger area still within the burgh, but in-
ng all the public-houses. It rather seems to me that if the limitation of
urs was to be enforced at all,—a matter on which there may be difference of
on, but on which the Magistrates must judge,—then equality, impartiality,
justice would be better promoted by the course which they took than by
ning the resolution to a few streets. To limit the hours all over the town,
in all the public-houses, may be an extreme or an unwise measure. Some
st may think so. But to limit the hours in one-half of the town seems to
o be less just.

he law trusts the Magistrates. The law has committed to them a wide dis-
on in this matter. I have no doubt that they acted from the best motives,
according to their deliberate judgment. It is not for us to say whether
acted wisely or not. We are not called on to judge—we are not entitled
dge—on this matter. The duty and responsibility rested with them; and
e discharge of that duty, under that responsibility they have issued the re-
ion and order now complained of. These are my difficulties.

he judgment of your Lordships settles the question of construction of the
te and the question of the lawfulness or competency of the resolution; and
ng regard to the provisions in the series of statutes to which your Lordship
dverted in a most instructive commentary, I have not formed an opinion
iently clear and decided to justify my dissent from the judgment; accord-
r I do not dissent. But I think it right, at the same time, to express
ly and with much diffidence the doubts which I entertain. Nor can I re-
the result at which your Lordships have arrived, for I am one of those who
hat not so much by restraint of law as by moral influences and Christian
ple can the social reformation which these Magistrates desire be effectually
oted.

ORD JERVISWOODE concurred.

THE following interlocutor was pronounced:—"Recall the said interlocutor, repel the defences, reduce, decern, and declare in terms of the reductive conclusions of the summons; and decern and ordain the defender, John Wilson, as town-clerk of the Magistrates of Rothesay, to delete the word 'ten,' standing at present in each of the certificates granted to the pursuers by the defenders, the Magistrates of Rothesay, to denote the hour of closing the pursuers' hotels for the sale of exciseable liquors, and to substitute therefor in each of the said certificates the word 'eleven,' to denote such hour of closing: *Quoad ultra*, of consent of the pursuers, assoilzie the defenders, and decern: Find the pursuers entitled to expenses; allow an account," &c.

A. KIRK MACKIE, S.S.C.—J. & A. PEDDIE, W.S.—Agents.

No. 124.

June 20, 1873.

Fullerton v. Fullerton.

CHARLES FULLERTON, Pursuer.—*M'Kechnie.*
ANN SMART or FULLERTON, Defender.

Husband and Wife—Divorce—Proof—Extrajudicial Confession—Adultery—Circumstances which, coupled with evidence of extrajudicial acknowledgment of the illegitimacy of a child, *held* (*rev.* judgment of Lord Shand) sufficient to infer adultery on the part of a wife, and to entitle the husband to decree of divorce.

2D DIVISION. Lord Shand. R.

THIS was an action of divorce for adultery brought by Charles Fullerton, North Leith, against his wife, Ann Smart or Fullerton. The wife did not defend the action, and the averments of the pursuer on record were to the following effect:—

The pursuer and defender were, after proclamation of banns, regularly married to each other at Kirriemuir on 20th June 1856 by the Rev. David G. D. Ramsay, minister of the parish of Kirriemuir. They lived and cohabited together as husband and wife at Kirriemuir for about six years, and thereafter for several years at Newhaven. About two and a half years before the date of this action the pursuer was obliged to find fault with the defender on account of her drunken habits and general ill behaviour, and about that time she separated herself from his fellowship and society. Afterwards he was chiefly at sea, but when ashore he always lived in lodgings apart from the defender, and had no carnal intercourse with her. In particular, the pursuer was engaged as fireman or stoker on board the steamer "Stirling," trading between the ports of Leith and Cronstadt, during the months of June, July, August, September, October, and November 1871, and during the whole of that period had no carnal intercourse with the defender. Since the pursuer so separated from the defender the defender frequented houses of bad fame, and other places of bad resort, and kept the society of dissolute women and sailors in various places in Leith. During the latter half of the year 1871 the defender lodged in Henry Hay's Close, Giles Street, Leith. In the month of January 1872 the defender acted as nurse to a Mrs Lennie at 23 Queen Street, Leith, where she resided for about a month, and while acting as Mrs Lennie's nurse the defender was seen repeatedly frequenting public houses in the neighbourhood, and often the worse of drink. Her habits during that time were very loose and improper. She regularly of an evening left Mrs Lennie's house between eight and ten o'clock p.m., and did not return till two and three o'clock of the following morning. When she did return she was almost always the worse of liquor, and violent and excited. After the defender left Mrs Lennie's she resided for some time in Henry Hay's Close, Leith, and there kept the society of and consorted with women of loose and immoral character. The defender became a woman of immoral character, and was guilty of adultery with some man to the pursuer unknown, during the period the pursuer was on board the said steamer "Stirling," and prior and subsequently thereto; but the pursuer did not know more particularly the times, places, or circumstances when the defender so committed adultery. During the period since the defender left the fellowship and society of the pursuer, or a great part thereof, she was held and reputed by those who knew her as a woman of bad character. On the 22d April 1872 the defender gave birth to an illegitimate female child in a house in Henry Hay's Close, Giles Street, Leith, and the birth of which the defender registered as that of an illegitimate child. The pursuer averred that he was not the father of said child, but that it was the fruit of adulterous intercourse had by the defender on one or more occasions during the months of June, July,

August, and September 1871, in Henry Hay's Close, Giles Street, Leith, or elsewhere in Leith, the time or times and place or places being more particularly unknown to the pursuer, with some man to the pursuer unknown.

Upon a proof being taken the statements on record as to the defender's drunken habits, as to the birth of her child, and as to her registering it as illegitimate, were fully corroborated. It was also proved that the defender and pursuer had not lived together since April or May 1871. But it was not proved that the defender had not had opportunities of meeting the pursuer, nor, except general allegations that she had been seen with men and women of bad character, was there any evidence to shew that she had committed adultery. There was, however, the evidence of the registrar who, although he did not recollect if he asked the defender whether she was married or unmarried, believed that she volunteered the statement that the child was illegitimate. The person in whose house the child was born deponed also that she understood that the father of the child was somebody else than the husband, and that the defender "did not say very much about it" when charged with the child being illegitimate.

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer has failed to prove that the defender has been guilty of adultery: therefore dismisses the action, and decerns." *

The pursuer reclaimed, and argued that the evidence of the defender's general bad character, coupled with her own admission that the child was illegitimate, was sufficient to warrant the Court giving decree in terms of the conclusions of the summons.[1]

At advising,—

LORD JUSTICE-CLERK.—I am of opinion that the pursuer has sufficiently proved his case, and is entitled to his remedy. It is no doubt true that the main evidence here rests on the confession and admission of the wife, and the moral evidence of her own deliberate and personal acts. But the only ground on which the confession of the defender can be excluded in such a case is the danger or element of collusion. But where there is no room for that element, and in this case there can be none, no evidence can be stronger, and in England it has been repeatedly admitted in circumstances much less strong. It must also be kept in mind that all the circumstances, the separation of the parties, the wife's habits and mode of life, all tend strongly to corroborate her own conduct, deliberately registering her child as illegitimate. This is not a question as to the legitimacy of her child; and I say nothing as to the effect of the facts if such a question were raised. That would be a question involving other elements. But as evidence of the wife's guilt I think they are conclusive.

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* "NOTE.—It is, no doubt, proved that the defender has been living apart from her husband, and that in registering the birth of her child, in May 1872, she gave the information to the registrar that the child was illegitimate. This latter circumstance would have been of the utmost materiality had the proof otherwise shewn that the defender had not opportunity of meeting her husband, and was not associating, as alleged in the condescendence, in a suspicious way with other men. The evidence is, however, altogether wanting in precision and even clearness on the first of these points, and is loose and unsatisfactory on the second; and on the whole, the Lord Ordinary is unable to reach the conclusion that the pursuer has proved the facts necessary to lead to the inference that his wife has been guilty of adultery, and so to entitle him to decree of divorce. As the proof has been led in absence the action has been dismissed."

[1] Campbell v. Campbell, December 7, 1860, 23 D. 99; Burgess v. Burgess, 3 Haggart, p. 231; Mortimer v. Mortimer, 2 Haggart, 310.

No. 124. LORD COWAN concurred.

June 20, 1873. Fullerton v. Fullerton. LORD BENHOLME.—The weight to be given to the confession of a party, in the position in which the defender in this case is placed, depends very much upon the circumstances of the case. Such a confession must sometimes be entirely disregarded in cases in which there is a motive for making such a confession although it is not true. In this case there can be no such motive, and I can hardly conceive it possible that the confession of the defender should be untrue. Then the evidence of the witnesses tends to corroborate the defender's confession. I therefore concur with your Lordship.

LORD NEAVES concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor: Find facts, circumstances, and qualifications proved relevant to infer that the defender committed adultery: Find her guilty of adultery accordingly: Therefore divorce and separate the said defender from the pursuer," &c.

ROBERT A. VEITCH, S.S.C.—Agent.

No. 125.

June 21, 1873. Malcolm v. Kirk, &c.

SIR JAMES MALCOLM, Pursuer.—*Sol.-Gen. Clark—Duncan.*
MICHAEL KIRK AND OTHERS, Defenders.
MRS JEAN MALCOLM OR LYDE AND OTHERS, Defenders.—*Watson—Muirhead.*

Entail—Prohibitory and Resolutive Clauses—Reservation—Act 1685, c. 22—11 *and* 12 *Vict. c.* 56, *sec.* 43.—A deed of entail containing prohibitions against alienation and contraction of debt, duly fenced by irritant and resolutive clause, contained also a reservation of power to the heirs of entail to grant provisions to younger children to the extent of two years' rent, with power to sell portions of the estate sufficient to pay the debts thereby contracted. *Held* (*rev.* judgment of Lord Mackenzie) (1) that the entail was valid and effectual under the Act 1685, cap. 22; and (2) that being valid, it was not within the provisions of the 43d section of the Act 11 and 12 Vict. c. 36.

Entail—Prohibition—Irritancy.—A deed of entail contained prohibitions against alienation, contraction of debt, and altering the order of succession, and declared "all such deeds" null and void, and the person contravening to have lost all right to the estate. *Held* that the word "deeds" was sufficiently comprehensive to embrace all that was contained in the prohibitory clause, and that the entail was valid.

2D DIVISION, and three consulted Judges. Ld. Mackenzie. R.

BY disposition and deed of taillie, dated 9th October 1725, Michael Malcolm of Balbedie, with consent of Jean Blair, his spouse, disponed to his daughter, Margaret Malcolm, and a certain line of heirs, the lands and baronies of Nuthill and Balbedie. The deed contained the following prohibitory and resolutive clauses and reservations:—"And, further, it is hereby expressly provided and declared, that it shall not be in the power of the said Margaret Malcolm, nor any of the heirs of tailzie above named, to sell, annalzie, wadset, dilapidate, nor put away any of the lands above mentioned, nor contract debt, nor grant heritable bonds, or other rights and securities therefor, whereby the said lands or any part thereof may be evicted or adjudged from them in defraud of the other heirs of tailzie above specified, nor yet to alter this present tailzie and order of succession above mentioned, declaring all such deeds not only void and null, but the person so contravening to have amitted and lost all right and title to the foresaid lands and estate, and the same to fall and devolve upon the next member of tailzie hereby appointed to succeed, as if the contravener were naturally dead; and he or she is hereby obliged, upon the said contraven-

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tion, to denude themselves of the right of the said lands in favours of the said next member of tailzie, wherein, if they fail, the same is to be prosecuted by declarator, adjudication, or other action competent of the law; reserving always, notwithstanding of the prohibitory clauses above written, power and liberty to the said Margaret Malcolm and the other heirs of tailzie above specified to provide their husbands and wives in suitable liferents, by way of locality, not exceeding the half of the present rent of the estate for the time, and to provide their younger children, beside the heir, with competent provisions not exceeding two years' rent of the said estate; declaring always, that neither the said Margaret Malcolm nor any of the other heirs of tailzie shall suffer adjudications nor other real diligence to be led and done against the said lands, or any part thereof, for debts warrantably contracted, at least they shall be holden and obliged to purge and redeem the same two full years before expiring of the legal reversion, wherein, if they failzie, they shall lose their right of the said lands in manner foresaid, and it shall be leisome and lawful to the next member of tailzie to purge and redeem the same, and declare their right to the said estate in manner before prescribed: Providing, nevertheless, that it shall be free and lawful to the said heirs of tailzie or their foresaids to sell, annalzie, wadset, burden, wadset, or otherwise dispone as much of the said lands and baronies as may, by the price thereof, sufficiently satisfy and pay the debts warrantably contracted in manner foresaid, which shall be resting for the time, with annualrent, until the said heirs of tailzie can validly and legally dispose thereof for that effect; which disposition or other right shall be no ground for incurring the foresaid irritancies any manner of way."

This action was raised by Sir James Malcolm, heir of entail in possession of the lands, against Michael Kirk, the heir presumptive to him under the entail, and others, to have it declared that the deed of entail was "invalid and ineffectual in regard to all the prohibitions therein contained against sales and alienation, the contraction of debt, and alteration of the order of succession, in terms of the provisions in the 43d section of the Act 11 and 12 Victoria, cap. 36, and that the pursuer was entitled to hold and held the foresaid lands and others above described, or such part thereof as belonged to him as heir of entail, free from the prohibitions, conditions, and provisions contained in the said deed of taillie, with full power to sell and alienate the said lands and others as aforesaid, or to contract debt thereon, or to alter the succession thereto at pleasure, and generally to deal with the same as unlimited fee thereof, and that no action of forfeiture should be competent at the instance of any heir-substitute under the destination contained in the deed of taillie against the pursuer, by reason of the contravention of all or any of the prohibitions therein contained."

Michael Kirk and several others who were called as defenders did not appear, but defences were lodged for Mrs Jean Malcolm or Lyde (eldest daughter of the deceased Sir Michael Malcolm of Balbedie, the pursuer's uncle) and her children.

The 43d section of the Act 11 and 12 Vict. cap. 36, founded on by the pursuer, enacts that "where any taillie shall not be valid and effectual in terms of the said recited Act of the Scottish Parliament passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and in-

the three cardinal prohibitions required by the Act 1685, cap. 2. these prohibitions is, or at least one or other of them is not valid with irritant and resolutive clauses. (3) The entail does not e exclude or annul diligence against the estate at the instance of for or in respect of debts contracted by the heirs of entail. (4 tail being an incomplete and imperfect entail in terms of the cap. 22, is, in virtue of the provisions contained in the Act 1 Vict. cap. 36, invalid and defective *in toto*, and the pursuer is e decree as concluded for.

The defenders pleaded;—(1) The entail being complete and able in all its fettering clauses, the pleas stated by the pursuer be repelled.

The Lord Ordinary pronounced this interlocutor:—"Finds, and decerns in terms of the conclusions of the libel, and finds no due to either party."*

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* "NOTE.—1. The pursuer maintained that the prohibitions against contraction of debt, and alteration of the order of succession were with valid irritant and resolutive clauses. His contention was that 'deeds' in the irritant clause referred only to the granting of heritabl other rights and securities for debt whereby the estate may be evic judged—a prohibition which, he says, is separately mentioned in the p clause. The Lord Ordinary cannot so read the clause. The rule of co is, that while the prohibitory and irritant clauses of an entail are to be strictly, they are at the same time to be construed fairly, giving the ployed, when general, their natural import, especially where that is th the context confers upon them.

"After specifying the prohibitions, which are ample and complete proceeds as follows:—'Declaring all such deeds not only void and nu person so contravening to have amitted and lost all right and title to th lands and estate, and the same to fall and devolve upon the next i tailzie.' The word 'deeds' here used is, it is thought, applicable to an sales and alienations of the estate, the contracting of debt, the grantin able bonds, and other rights or securities therefor, whereby the estat evicted or adjudged, and the alteration of the order of succession, wh

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The defenders reclaimed, and the case was argued on the first branch dealt with in the Lord Ordinary's note, viz. as to the validity of the clauses, prohibitory, irritant, and resolutive.[1]

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o him to be unreasonable and ungrammatical. The resolutive clause, which is closely united to the irritant clause, also confirms this view, inasmuch as it declares the person 'so contravening to have amitted and lost all right,'—that s, the person contravening by doing, making, or granting what is prohibited in he prohibitory clause.

"2. The pursuer further pleads, that as the entail is not valid and effectual in erms of the Act 1685, c. 22, in regard to the prohibitions against sales, alienaion, and contraction of debt, in consequence of defects in the deed of entail, it s invalid and ineffectual as regards all the prohibitions, and subject to his debts nd deeds, in respect of the enactment to that effect contained in the 43d section f the Rutherfurd Act.

"In disposing of this plea it is necessary to keep in view the provisions of he Act 1685, c. 22, concerning tailzies. By that Act it is made lawful to the ages 'to tailzie their lands and estates, and to substitut aires in their tailzies ith such provisions and conditions as they shall think fitt, and to affect the id tailzies with irritant and resolutive clauses, whereby it shall not be lawful o the aires of tailzie to sell, annalzie, or dispone the said lands, or any part hereof, or contract debt, or doe any other deed whereby the samen may be apised, adjudged, or evicted from the others substitute in the tailzie, or the succession frustrat or interrupted, declaring all such deeds to be in themselves null nd void.'

"But although under this Act it is necessary to a valid entail that the entail hall contain prohibitory, irritant, and resolutive clauses, under which sales and lienations of the estate and the contraction of debt thereupon is unlawful, the ntail in the present case, after reserving power, notwithstanding the prohibitory lauses, to the heirs of tailzie, to provide their husbands and wives in suitable liferents by way of locality, not exceeding the half of the present rent of the state for the time, and to provide their younger children beside the heir with mpetent provisions, not exceeding two years' rent of the estate, expressly proides that it shall be free and lawful to the said heirs of tailzie or their foresaids o sell, annalzie, wadset, burden, wadset, or otherwise dispone as much of the said nds and baronies as may, by the price thereof, sufficiently satisfy and pay the bts warrantably contracted in manner foresaid, which shall be resting for the me, with annualrent, until the said heirs of tailzie can validly and legally dise thereof for that effect, which disposition or other right shall be no ground incurring the foresaid irritancies any manner of way.'

"Under this deed the heir in possession may sell, alienate, or burden as much the estate as may by the price pay the debts contracted under the power to ant provisions to widows and children to the extent authorised by the entail, hich shall be due at the time, with the annualrent or interest thereof, until heirs of tailzie can dispose of as much of the estate as may be necessary for t effect. In short, the fetters of the entail are not complete against sales, enation, or contraction of debt, but are invalid and ineffectual, and the heirs, fee-simple proprietors, to that extent can, for debts due in respect of provins granted to widows and children to the amount authorised by the deed, and annualrent thereof, sell, alienate, and burden the estate, the rule of law ing that heirs of entail are fee-simple proprietors, and have full power over the tailed estate, except in so far as they are fettered. In the exercise of this ht the heirs of entail can sell any part of the estate, even the mansion-house, lees, and policies, and in course of time, as they may sell not only for the prosions, but for the annualrent thereof, the whole estate may be sold and alienated.

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[1] Lang v. Lang, Nov. 23, 1838, 1 D. 98—rev. Aug. 16, 1839, M'L. and Rob. 1; Graham v. Murray, Jan. 21, 1848, 10 D. 380—aff. May 3, 1849, 6 Bell's pp. 441; Hay v. Hay, March 4, 1851, 13 D. 945; Udny v. Udny, March 16, 58, 20 D 796; Drummond v Hay, Feb. 3, 1872, *ante*, vol. x. 451.

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LORD COWAN.—The word "deeds" is a perfectly comprehensive term, and is recognised as such throughout the entail before us. No doubt the expression is capable of being construed; but where there is no limiting word, and nothing in the context to limit the generality of its meaning, the term when used in the irritant clause is sufficiently comprehensive to embrace the contraction of debt, the alienation of the property, and the alteration of the order of succession referred to in the prohibitory clause. Reference was made on the part of the pursuer to cases where a limiting meaning has been attached to the term "deeds." But in all these cases there were expressions in the prohibitory clause which limited the term "deeds" to something specially mentioned in that clause. There is nothing of that kind here. The term "deeds" does not occur at all in the prohibitory clause. The expression "facts and deeds" occurs in an earlier part of the deed of entail; but no attempt has been made to connect the expression "such deeds" with these "facts and deeds" mentioned in the earlier part of the entail. The previous cases referred to are of no application in the present case, because there is nothing here to connect the expression "deeds" with any special part of the prohibitory clause previously mentioned, and by such reference to limit the generality of its import. The case of the Roxburgh entail is a very strong illustration of what I have stated; for the irritant clause in it, which has always been considered beyond challenge, employs the same expression as is employed in this deed. It says "all whilk deeds," and so forth.

The other Judges concurred.

In regard to the second point, viz. the effect of the relaxation of the prohibitory clauses on the validity of the entail, the Court appointed the case to be heard before seven Judges.

Argued for the defenders;—There is not such defect in any of the fettering clauses as is contemplated by the 43d section of the Rutherfurd Act. The object of that Act was to deal with cases where the prohibitory

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There are no clauses in the entail restricting the granting of provisions by subsequent heirs until those granted by previous heirs had been paid, or declaring that the provisions shall only affect the rents, and not the fee, and the only provision besides those already noticed is, that the heirs of entail shall not suffer adjudication or other real diligence to be led against the estate for these debts, at least they shall purge and redeem the same two years before the expiry of the legal reversion. This they may do by selling or disponing as much of the estate as will pay the provision, debts, and annualrents.

"The question is new, and attended with difficulty. The Lord Ordinary has carefully considered the able and full argument of counsel, and the numerous cases cited at the debate, and he is humbly of opinion, that as the entail in the present case is not complete, and valid and effectual in terms of the Act 1685, c. 22, in regard to prohibitions against alienation and the contraction of debt, it is, in respect of the provisions of the 43d section of the Rutherfurd Act, invalid and effectual as regards all the prohibitions.

"The defenders maintain that as by the 21st section of the Rutherfurd Act the heir in possession liable to pay or provide for provisions to younger children granted by former heirs is empowered to charge them upon the fee and rents of the estate, other than the mansion-house, offices, and policies, by granting bond and disposition in security for the same, with all the usual clauses of such a deed, the provisions in the present entail to a similar effect cannot be held as invalidating it. But there is a great difference between powers conferred upon heirs of entail by statute, and rights excepted or reserved in a deed of entail. The former do not invalidate the entail; but under the latter the fetters of the entail are not applied by the entailer, and the entail is consequently not valid or effectual in terms of the Act 1685, c. 22."

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clause was omitted or was defective. In such a case the Act gives the heir power to shake himself free from the fetters. But in this entail there are all the prohibitions requisite to make a good entail under the Act of 1685. It is true that for provisions to children the entailer has exempted certain portions of the entailed estate from the fetters. There is a complete and valid prohibition against alienation, but that prohibition does not apply to the whole estate under certain circumstances. This exception is one which the entailer is quite entitled to make,[1] and is in the same position as entailer's debts.[2] It is *res judicata* that the entailer has power to allow the heirs to burden the estate with debt to a certain extent,[3] and the question is, has the entailer in this case gone beyond his powers. He has done it, for there is no such relaxation of the prohibition as practically to annul it, and the Court have authorised similar relaxations of prohibitions.[4] It would be a curious anomaly if it were held that the Rutherfurd Act, while by section 21 it gives power to affect the fee for children's provisions, by section 43 reduced any entail which did the same thing.

Argued for the pursuer;—In this entail power is given to the heir to sell any part of the estate, for any amount of debt, and without any restriction on the heir, except such as might arise from the Court interfering to prevent dilapidation. The Act of 1685 makes it lawful for the lieges to tailzie their lands, "and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annalzie, or dispone the said lands or any parts thereof," &c. Then the Rutherfurd Act says that if an entail is invalid or ineffectual as regards any one prohibition it shall be invalid and ineffectual as regards all the prohibitions. Now, this entail allows the heir to sell without limitation, and how can it be said that the prohibition to alienate is valid and effectual under the Act 1685, or that the entail does not come within the provisions of the 45th section of the Rutherfurd Act? If a specific portion of the estate was excepted from the prohibition that would not invalidate the entail, for that portion would be in fee-simple, and the other parts of the estate under the entail. But here there is no portion specified, and the prohibition against alienation is so defective as not to guard the *corpus* of the estate; and wherever the *corpus* of the estate is not secured against alienation the entail is bad under the Rutherfurd Act.

At advising,—

LORD PRESIDENT.—The question which has been argued before us relates to the validity of the entail of Balbedie. The pursuer of the action is the heir in possession, and he concludes for declarator that that entail is and shall be deemed and taken to be invalid and ineffectual in regard to all the prohibitions therein contained against sales and alienation, the contraction of debt, and alteration of the order of succession, in terms of the provisions in the 43d section of the Act 10 and 12 Vict. c. 36, and that the pursuer is entitled to hold, and holds, the said lands and others above described, or such part thereof as belongs to him as heir of entail foresaid, free from the prohibitions, conditions, and provisions contained in the said deed of tailzie, with full power to sell and alienate, &c.

The grounds upon which this action is based are distinctly enough stated in the pursuer's pleas, but these pleas have not all been dealt with in the argument before us. On the contrary, the sole ground upon which the pursuer has maintained in the course of that argument that the entail is invalid is that which is contained in the first plea taken in connection with the fourth. There are, there-

[1] Ker v. Innes Ker, July 6, 1812, 5 Paton's App. 609.
[2] Howden v. Porterfield, June 17, 1834, 12 S. and D. 734.
[3] Catton v. Mackenzie, March 1, 1872, *ante*, vol. x. (H. L.), 12.
[4] Rogerson v. Rogerson *et al.*, May 17, 1872, *ante*, vol. x. 698.

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fore, obviously questions in this case which cannot be at present disposed of. Whether the pursuer intends to insist upon the second and third pleas as separate grounds of action we have not been made aware, but it is necessary that I should state very distinctly that we have no intention at present to dispose of these pleas, having heard no argument upon the subject. The first plea in law is, "In respect of the reservations contained in the deed of tailzie from the prohibitions thereby imposed, the same does not contain valid or effectual prohibitions against either the contraction of debt, or against sales or alienations, or one or other of them, in terms of the Act 1685, c. 52." And the fourth plea, following out that objection, maintains that the entail, being incomplete and imperfect in terms of the Act 1685, is invalid and defective *in toto*, in virtue of the provisions contained in the Act 11 and 12 Vict. The objection to the validity of the entail is thus made to depend entirely upon the reservations from the prohibitions. It is to be assumed, of course, that all the cardinal prohibitions are well and effectually inserted in this deed, and that these have been fully fenced with irritant and resolutive clauses. But, that being done, the entailer proceeds thus—[His Lordship quoted the reservation clause of the deed of entail as above narrated]. The Lord Ordinary is of opinion that the effect of these reservations is to destroy or neutralise the prohibitions against sales and alienations, and the prohibition against the contraction of debt. But I cannot help thinking that his Lordship is under some misapprehension as to the precise effect of these reservations, for he says in his note,—"Under this deed the heir in possession may sell, alienate, or burden as much of the estate as may by the price pay the debts contracted under the power to grant provisions to widows and children to the extent authorised by the entail, which shall be due at the time, with the annualrent or interest thereof, until the heirs of tailzie can dispose of as much of the estate as may be necessary for that effect." Now, here his Lordship is obviously under the impression that the power of sale may be exercised to a larger extent than is, in reality, permitted by the deed. The provisions to widows can never be the cause of a sale of a part of the estate at all, because that provision is to be made by way of locality only. A locality is not a debt, and there is no provision made for converting it into a debt. It is an appropriation of a particular part of the lands to the widow in liferent. That does not permanently alienate any part of the estate, nor is it in any proper sense a contraction of debt. But, at all events, it is impossible, under this clause of reservation, that an heir of entail could be permitted to alienate any part of the estate for the purpose of satisfying the claim of the widow under a locality deed. The power of sale is confined entirely to debts which are contracted for the purpose of making provisions to younger children to the extent—to each family of younger children—of two years' rents of the estate. That is the full extent of it. The Lord Ordinary says further,—"In the exercise of this right the heir of entail can sell any part of the estate, even the mansion-house, offices, and policies, and in course of time, as they may sell not only for the provisions, but for the annualrent thereof, the whole estate may be sold and alienated." Now, his Lordship is here again under a mistake, because, in the exercise of such a power as this, the heir in possession would never be permitted to sell the mansion-house, offices, or policies. The practice in this respect is quite accurately stated by Mr Sandford in his book upon Entails, at p. 385, where he says,—"When the deed of entail contains a power of sale for the purpose of paying off the provisions to younger children, burdening the entailed estate, the heir in possession must execute it under the authority of the Court of Session. Upon a petition presented to them for that purpose, the Court will authorise a sale of certain parts of the entailed lands, and appoint a trustee in order to carry the same into effect, who is responsible, as under the statutes, for redeeming the land-tax, &c., that the purchase money be properly applied." It is quite plain, therefore, that the heir of entail proposing to exercise this power must come to the Court to have the portion of the estate that is to be sold selected and appointed by judicial authority. Neither am I very much moved by the suggestion of his Lordship that, in the exercise of this power, the whole estate may be sold and alienated within any short period of time. This entail was made in

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r 1725, and we are not informed that the estate has yet disappeared, not-
nding the lapse of a century and a-half. And, therefore, the effect of the
ion, practically, is certainly not what the Lord Ordinary attributes to it.
hough his Lordship has certainly ascribed far greater effect to this clause
really due to it, the question is still an important one, and very well
of consideration, whether this reservation does not so neutralise or dero-
m the cardinal prohibitions of the statute as to invalidate the entail. I
le understand that there might be such reservations as would make the
ions of the entail practically of no avail at all, and enable one heir of
r it may be two or three heirs of entail in succession, entirely to dilapi-
e whole estate; and a very serious question would then arise, whether
s an entail under the Act 1685 at all, or whether it was not a deed
by of the name of an entail, although taking in some respects the form of
utory provision. Is this a case of that kind? Does the reservation from
risions go that length?

, in determining whether this is a valid entail under the Act 1685 I can-
go back, in recollection, to a great many deeds of entail which we have
d a great many cases which have been decided prior to the passing of
ail Amendment Act, in which there is permission to contract debt and to
tions of the estate for the purpose of paying off the debt thus permitted
ontracted; and I am not aware that prior to the passing of the Entail
ment Act in 1848 it ever was doubted that these were valid and effectual
nder the Act 1685. It is quite unnecessary to particularise cases, but
a case that was quoted in the course of the argument—Howden v. Por-
—which is a very good example in point, where not only was there a
o contract debt for the purpose of paying younger children's provisions,
a power to contract debt to the extent of 6000 merks beyond, provided
t was never allowed to exceed that. Now, that certainly, although the
a was not directly raised, was held to be a perfectly valid and effectual
nder the statute 1685. And the question decided there was that the
ed debt, or the debt which the entail allowed the heirs to contract during
sistence and currency of the destination, was exactly in the same position
ler's debt; and if it be dealt with exactly in the same way as entailer's
at only goes to shew more clearly that the permission to contract that
uld constitute no objection to the validity of the entail under the statute
ecause a man may make a good entail under the statute 1685 though he
deeply in debt. It is not a very prudent thing to do, but if he has the
can convey it to a certain series of heirs, and he can subject it to fetters;
be very much in vain, because his creditors may afterwards carry it off
e heirs of entail, but that would not prevent the entail from being other-
ectual under the Act 1685. Indeed, my Lords, it appears to me quite
expatiate upon this further, because a partial relaxation of any of the
l prohibitions under the Act 1685 has never been held to invalidate an

then, we come to the question, what is the effect of the 43d section of
ail Amendment Act? And we approach the construction of that section
is, I think, quite settled, that, independent of the Entail Amendment
is is a valid entail under the Act 1685. Now, what does that section
It provides "that where any tailzie shall not be valid and effectual in
f the said recited Act of the Scottish Parliament, passed in the year
a regard to the prohibitions against alienation and contraction of debt,
ration of the order of succession, in consequence of defects either of the
deed of entail or of the investiture following thereon, but shall be
and ineffectual as regards any one of such prohibitions, then and in that
h tailzie shall be deemed and taken, from and after the passing of this
be invalid and ineffectual as regards all the prohibitions; and the estate
subject to the deeds and debts of the heir then in possession," &c. Now,
the kind of invalidity that is here contemplated and expressed? It is
ty in consequence of defects either of the original deed of entail or of the
ure following thereon. The natural construction of these words appear

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to me to be that it includes, and includes only, objections either to co prohibitions, that it is imperfectly expressed, or omitted, or in some w dered, or that it is not duly fenced with irritant and resolutive clauses. that be the meaning of the first part of this section, which regards the tions taken cumulatively, what shall we say is the meaning of the wor follow, "but shall be invalid and ineffectual as regards any one of such tions?" Plainly the true construction must be "shall be, as regards a such prohibitions, invalid and ineffectual, in consequence of defects eit original deed of entail, or of the investiture following thereon." Nov such an entail? Is this entail invalid under the Act 1685, in conseq defects in any one of the prohibitions? My answer to that question is in the negative. There is no defect at all. The prohibitions are perfec and are well fenced; and it is a good entail, therefore, under the Act 1 it were to be said that a defect, "as regards any one of such prohibitio mean a relaxation of any one of the prohibitions, I answer at once th not the true construction of the words. I think it is a total invalidity the prohibitions that is to lead to the result here contemplated. And struction is confirmed and fortified when we consider what was the we mischief intended to be remedied by this enactment. When there wa in one of the prohibitions of a deed of entail,—say, for example, in the tion against the contraction of debt,—the heir of entail was entitled to debt, and could do it effectually, but he could not sell the estate. And undoubtedly a very unfavourable position in which to place both the the estate. Again, take the case (which occurred in the case of v. Bogle[1]) that there is a defect in the prohibition against sale, but in the prohibition against the contraction of debt, the heir of entail is f so far that he can sell the estate whenever he likes, but his creditor touch it. And that, certainly, is a very anomalous position also, and on contemplated, one would say, by the Act 1685, the policy of which exclude both creditors and purchasers, and not one without the other. as the law stood before the passing of the Entail Amendment Act, tha effect of a defect in one of the prohibitions. Now, it was to remed apprehend, that the 43d section was enacted, and it can, in that point apply only to a case in which the heir in possession is absolutely free a one of the prohibitions. But what I have said on the construction of section must not be understood as weakening what I said before as to bility of an entail being so destroyed by exceptions and reservations as tially to leave no valid or effectual prohibitions, although they may be point of form; because, although that might not fall under the very the 43d section, I apprehend that such an entail as that would be inva the Act 1685. Therefore, upon the whole matter, I have come to th sion, and I must say without any difficulty, that the Lord Ordinary's int is wrong, and that the defenders are entitled to absolvitor in so far a that portion of the case which has been argued before us.

The other Judges concurred.

THE COURT pronounced this interlocutor:—"Recall the inte of the Lord Ordinary submitted to review, assoilzie the d from the whole conclusions of the summons, and decern."

TAIT & CRICHTON, W.S.—A. STEVENSON, W.S.—Agents.

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[1] Cochrane v. Bogle and Co., March 2, 1849, 11 D. 908.

HENRY SCOTT AND OTHERS (Spears' Trustees), of the First Part.—*Balfour.*
MRS ELIZA ISABELLA BAXTER OR SPEARS, of the Second Part.—*Omond.*
WILLIAM FRASER AND OTHERS, of the Third Part.—*Watson—Mackintosh.*

No. 126.
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Succession—Fee and Liferent—Residue—Advances to Children.—A testator directed his trustees to hold the residue of his estate for his son in liferent and his children in fee, the children's shares to be paid to them, if under age at their father's death, on attaining majority, and, in the case of daughters, on attaining majority or marriage. It was further provided in the trust-deed "that until the respective terms of payment of the said shares, the said trustees, after the death of both parents," should have full power to pay the interest of the trust-estate to the children, or to make advances to them out of the capital for furthering their prospects in life. The son, on his death, left a widow and two pupil children. *Held* (1) that the son's widow was not entitled to a liferent of the residue of the testator's estate; and (2) that the trustees were entitled, but not bound, to make advances from the annual proceeds of the trust-estate for the maintenance and support of the children while their mother survived.

2D DIVISION. I.

JAMES SPEARS died on 1st June 1853, leaving a trust-disposition and settlement dated 9th March 1853, whereby he conveyed his whole estate, heritable and moveable, to Henry Scott and others, as trustees for the purposes therein mentioned. The purposes of the trust were,—1st, payment of debts and funeral expenses; 2d, the liferent of his whole means and estate to his wife; 3d, on the death of his widow payment of the dividends of certain stock to a niece, and the residue of his estate to be held in trust for his son George Spears in liferent. After providing that in certain events the trustees might make advances to George Spears the deed goes on—"And after the death of the said George Spears I appoint my said trustees to hold the whole of the remaining residue of the said lands and effects for behoof of any children to be procreated of the said George Spears by his present or any subsequent marriage, share and share alike, in fee, but always subject to the general provisions and powers after-mentioned; and failing the whole of said children by death," that, before the testator, "then, and in that case, the said trustees shall divide the residue, and convey the same as follows." The deed then set forth the following clauses:—"Declaring that the shares of any of the foresaid parties who may be under age, or of their children, in the event of their having sons, shall not be paid over or conveyed to them respectively till they each attain the age of twenty-one years complete, and the shares of such of them as are daughters until they each respectively attain the said age of twenty-one, or marriage, whichever event shall first happen." And declaring that, until the respective terms of payment of said shares, the said trustees, after the death of both parents, shall have full power to pay the interest or free produce of the respective shares of the said trust-estate, or such part thereof as they in their discretion shall think proper, to the children who may ultimately be respectively entitled to the said shares, and likewise to advance such sums as the said trustees shall think reasonable to any of the said children out of their share of the capital stock for the purpose of putting them to any profession or business, or otherwise furthering their prospects in life."

James Spears was survived by his wife, Isabel Burns or Spears, his son George Spears, and the niece mentioned in the trust-deed.

Mrs Spears died on 2d December 1866, and after her death the trustees paid the dividends of the stock to the niece as directed in the trust-deed, and the annual proceeds of the trust-estate to George Spears, till his death, which occurred on 11th August 1871. Prior to the death of the

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said James Spears, the said George Spears was married to Miss Jane Smith, who died on 28th October 1864, without leaving issue. She was the wife of George Spears in 1853 when James Spears executed his trust-disposition and settlement. After Jane Smith's death George Spears was married to Mrs Eliza Isabella Baxter or Spears, the party of the second part, by whom he had two children, viz., Elizabeth Thomson Spears and Isabella Burns Spears, born respectively on 6th April 1867 and 8th October 1868, whose tutors are the parties of the third part.

George Spears left a trust-deed and settlement in which he left his whole estate to trustees, of which his wife was one. In this deed it was provided that his wife, Isabella Baxter or Spears, should have the annual produce of his estate during all the days of her life, for behoof of herself and children, and on her death the fee of the estate was to be divided among the children. He also appointed his trustees tutors and curators to his children.

In a special case, the widow of George Spears called upon the trustees of James Spears, the parties of the first part, to pay to her, for her own behoof during her life, the income of the residue of the trust-estate of the said James Spears; and the tutors of George Spears' children called upon the said parties of the first part to pay to them, for behoof of the said children, the said free annual income, or so much thereof as shall be necessary for their maintenance and education, but the parties of the first part considered "that, upon a sound construction of the trust-deed of the said James Spears, the widow of the said George Spears had no right to any part of the income of his estate, and that they were not entitled to make an allowance to his children until both the parents of said children are dead."

The following questions were therefore submitted for the opinion and judgment of the Court:—"(1) Is Mrs Eliza Isabella Baxter or Spears entitled to the liferent of the free residue of the estate of the said deceased James Spears? (2) Are the parties of the first part bound to pay over the annual proceeds of the trust-estate of the said James Spears in their hands to the tutors of George Spears' children, for behoof of their wards, or are they bound or entitled to make an allowance therefrom for the maintenance and support of the said children, while their mother, Mrs Eliza Isabella Baxter or Spears, survives?"

Argued for the first parties;—The provisions of the trust-deed were quite inconsistent with the claim made by the second party, the direction to the trustees being to hold the estate for behoof of George Spears' children, and no mention being made of his widow. The meaning of the words "after the death of both parents" was not quite clear, but they could not be construed so as to alter the plain meaning of the purposes of the deed.

Argued for the second party;—Under the trust-settlement two powers were contemplated (1) a power to pay interest, and (2) a power to advance money; and it was expressly declared that these powers were not to be exercised till "after the death of both parents." The presumption of law was against accumulation, and until the son attained majority, and the daughters attained majority or married, the widow was entitled to the annual income of the estate.[1]

Argued for the third parties;—The claim of the widow is excluded by the fact that a specific term of payment is fixed, namely, majority or

[1] Humphreys v. Humphreys, 4 L. R., Jan. 12, 1867 (Eq. Ca.), 475; 1 Jarman on Wills, 497; Cockshot v. Cockshot, 2 Coll. 432.

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marriage. The trustees, nevertheless, are entitled to make payment of interest during the lifetime of the widow.[1]

At advising,—

LORD BENHOLME.—This special case has been laid before your Lordships to obtain the opinion of the Court on certain questions which have arisen in the administration of the trust-estate of the late James Spears, who died in 1853, having a trust-disposition and settlement of his whole estate. This gentleman was survived by his wife, and only son George Spears, and also by another testatee, Margaret Fraser. His wife died in 1866, and thereby freed the estate of the liferent to which she was entitled; and George Spears, who was entitled to a postponed liferent, also died in 1871.

I would now call your Lordships' attention to the leading provisions of the testator's settlement, and particularly to the important clause by which, after the death of his son George Spears, he appoints his trustees to hold the whole of the remaining residue of his estate "for behoof of any children to be procreated of the said George Spears by his present or any subsequent marriage." I look on this as the decisive and most important clause in the settlement as bearing on the question now before us. The deed then goes on, "and failing the whole of said children by death, then and in that case the said trustees shall divide the residue and convey the same as follows," &c. I say no more as to the parties who are named, as it appears to be of no consequence in the case whether you consider the parties thus called in as conditional institutes, or as substitutes to George Spears' children, for it is certain that the trustees must hold the fund in the first instance for the children. Now, there are two children, both of them under age, in whose favour this residuary clause operates. And the questions we have to decide are first, as to the claim of their mother to a liferent, and second, as to the power of the trustees to make certain advances for behoof of the children, for whose benefit the residue was intended. I may here mention that the mother is not the person who was at the time the settlement was made or even when it came into operation the wife of George Spears. She has died, and this lady, George Spears' second wife, was an entire stranger to the testator. In support of the widow's claim to a liferent a very ingenious argument has been addressed to us, founded mainly, I apprehend, on an English decision in the case of Humphreys, 4 Law Reports, Eq. Ca. 475. Now, that case was one which in some respects resembled the present, but in others was strongly contrasted with it. In the case of Humphreys, the testator, after providing for various legacies, says,—"After my dear wife's death, Mary Humphreys, I leave the remainder of my property to be equally divided among" certain persons. It will be therefore observed that there was here no disposition of the residue during the life of this lady, and the inference therefore was that the testator intended her to have a liferent interest in the residue, which otherwise must have been retained and held for behoof of no person in particular during her survivance. In the present case, on the death of George Spears and the consequent expiry of his liferent, by the express terms of the trust-settlement the trustees are directed to hold the residue for the children, and the terms of payment of their respective shares is on attaining twenty-one years of age in the case of sons, and twenty-one years or marriage in the case of daughters. Now, it would be a very violent stretch, and one for which I can find no shadow of support, to hold that the widow is to have any concern in the annual proceeds of the residue, merely because this provision is added, that until the terms of payment shall arrive "the trustees, after the death of both parents, shall have full power to pay the interest or free produce of the respective shares, &c., to the children who may ultimately be respectively entitled to the said shares." Nothing is thereby given even by implication to the parents—there is merely a further discretionary power conferred on the trustees. These two things, that the residue was completely disposed of even during her life, and that this lady,

[1] Ogilvie v. Cuming and Boswell, Jan. 27, 1852, 14 D. 363; Campbell v. Reid, June 12, 1840, 2 D. 1084.

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the children's mother, was an entire stranger to the testator, appear to me sufficiently to distinguish this case from that of Humphreys.

The second question, as to whether the trustees are entitled to make advances for behoof of the children during their mother's lifetime, has no connection with that other one concerning her alleged liferent. I need not detain your Lordships long on this subject. The difficulty arises entirely out of the clause I have just read, specially empowering the trustees to make advances after the death of both parents, and the question is this, are the trustees thereby prevented from making advances or even paying the interest in whole or in part during the mother's lifetime? I am humbly of opinion that they are not. One main ground of my opinion is, that the trustees are throughout the whole deed vested with discretionary power, shewing an exuberance of confidence in them such as I have seldom seen in any deed. Now, are they to be debarred from the exercise of that discretion during the survivance of the mother, who herself is far from being amply provided for, merely because of the existence of the clause above referred to. Are the trustees not to be entitled to pay the interest or part of the interest for the benefit of the children for whose behoof the capital is being held? My idea is, that the testator may have thought that if the surviving parent were in good circumstances there would be no occasion for making advances. But if not, that he did not intend to prevent, and that there is nothing in this qualified power bestowed on the trustees which ought to prevent them, in the exercise of their discretion, making such advances as they deem to be necessary for the welfare of the children. Therefore, with regard to the second question, I am of opinion that though we cannot say they are "bound," we can distinguish between "bound" and "entitled," and can find that the trustees are entitled to make such advances.

I observe too that this lady, though not entitled to the liferent claimed, seems to have possessed the perfect confidence of her own husband, as he appoints her one of his trustees, and also a tutor and curator to the children; and though she cannot claim a liferent, the trustees may see their way to make such advances to her for behoof of the children as will be practically almost equivalent to what she claims on her own account.

I therefore propose that your Lordships should answer the first question in the negative, and the second in the affirmative, only substituting the word "entitled" for "bound."

Lord Cowan.—I concur in the opinion expressed by your Lordship, and particularly in the last observation, that though the trustees are entitled to make these advances, they must, as to the exercise of that power, be left to their own discretion. I would only add that we are now construing a deed of a special and very remarkable kind, and we must not be taken as intending to interpret the words which have here given rise to the difficulty, except as regards the deed immediately before us for construction.

Lord Neaves.—I concur in the opinion expressed by Lord Benholme, and I have only to add the suggestion that we should find that the trustees are entitled to make advances for the maintenance and education of the children. The trustees will make these advances, not under the strict letter of the deed, but under the authority of the Court, and I apprehend that the reason why the Court gives that authority is this, that the children, for whose benefit the trustees hold the estate, must be kept, and that means that they must be maintained and educated.

The Lord Justice-Clerk concurred.

The Court pronounced the following interlocutor:—"Find, in answer to the first query, that Mrs Spears is not entitled to the liferent of the free residue of the estate of her deceased husband: And in answer to the second query, that the parties of the first part are entitled, but not bound, to make an allowance

from the annual proceeds of the trust-estate for the maintenance and support of the children while their mother, Mrs Spears, survives, and decern: Allow the expenses in connection with the special case to be paid to the parties out of the trust-estate, and remit to the Auditor to tax the same, and report."

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JOHN ROBERTSON, S.S.C.—JARDINE, STODART, & FRASERS, W.S.—Agents.

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HENRY ELLIOT AND OTHERS, Pursuers.—*Watson—Balfour.*
s DOROTHY ELLIOT OR BOWHILL AND OTHERS, Defenders.—*Millar—Burnet—Harry Smith—Mackintosh.*

ccession—Vesting a morte testatoris—Alimentary Provision.—By trust-sition and settlement a father conveyed his whole property to trustees, and rticular he assigned to them the leases of four farms, which leases had dif-t periods of endurance. He directed them to carry on the management of farms, and, after payment of his debts, to divide yearly the annual profits e farms among his children, and on the expiry of the respective leases to e and divide the crop and stocking in the same way; declaring also that nnual profits should not be assignable or attachable for the debts of the ren, and that the issue of children predeceasing should succeed to their eed parents' shares. *Held* (1) that the provisions in favour of the children d *a morte testatoris* both as regarded the crop and stocking of the farms he annual profits; and (2) that the children's shares in the annual profits, gh inalienable and unassignable during their lives, might be assigned by n to take effect after death.

ccession—Legacy—Cumulative Provisions.—A father in his daughter's ante-al marriage-contract bound himself to pay at his death a sum of £1000 to arriage-contract trustees. He afterwards executed a trust-disposition and ment, by which he directed his trustees to pay his debts, and divide the ue of his estate equally among his children. *Held* that the provision in the age-contract was a debt due by the deceased, and was not to be deducted the daughter's share of residue.

2D DIVISION.
Lord Gifford.
I.

HE late James Elliot, tenant of the farm of Lamberton and other s in Berwickshire, by trust-disposition and settlement, dated 18th ust 1865, conveyed his whole property to certain trustees, and in cular he assigned to them the leases of (1) Lamberton and Lamberton lls, and (2) of Bastleridge, of which farms he was tenant, and which s had different periods of endurance.

he second and third purposes were as follows:—"Secondly, that said trustees shall, during the currency of the leases of Lamber-Lamberton Shiells, and Bastleridge, yearly divide the profits and uments arising therefrom among the various members of my family, n and share alike, the child or children of any predeceasing succeeding he portion that would have belonged to his, her, or their deceased nt, declaring that the sums so payable to each of my family are in-ed to be strictly alimentary, and shall not be assignable, nor liable to tached in any way by their creditors, or by the creditors of the hus-of any of my daughters; thirdly, upon the expiry of the tacks of berton, Lamberton Shiells, and Bastleridge, my said trustees are by authorised to realise the whole stock, crop, and others thereon, and vide the same equally among my sons and daughters; declaring that hild or children of any predeceasing shall succeed to the portion that d otherwise have belonged to his, her, or their deceased parent."

he truster died on 29th September 1866, survived by seven children, Henry, James, Mary (Mrs Railton), Dorothy (Mrs Bowhill), Robina

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(Mrs Turnbull), Elizabeth, and William. Elizabeth and William died on 24th April 1871 and 26th January 1872 respectively, both leaving settlements by which they each left their brother James to be their sole executor. Mrs Robina Elliot or Turnbull was married during her father's life, and by antenuptial contract of marriage, dated 13th November 1861, she conveyed to trustees all the property which she had or might become possessed of, and by said deed her father, James Elliot, bound "himself and his heirs, executors, and successors, within six months after his death, to pay to the said trustees" the sum of £1000, with interest until payment.

Upon Mr Elliot's death in 1866 his trustees took possession of his estate. The lease of the farm of Dalgleish, in Selkirkshire, which the truster occupied as joint tenant along with his brother Henry, expired at Whitsunday 1867, that of Bastleridge in 1873, and that of Lamberton and Lamberton Shiells in 1876.

The trustees continued to manage the estate until 30th November 1867, when, upon the application of the sole surviving trustee, a judicial factor was appointed by the Court.

The trustees, on 12th June 1867, paid over to the marriage-contract trustees of Mr and Mrs Turnbull the sum of £1000 already mentioned.

In these circumstances the present action of declarator was raised by Henry Elliot, James Elliot (as for himself, and as executor of his sister Elizabeth and his brother William, and as one of the assignees of his sister, Mrs Dorothy Elliot or Bowhill), and the marriage-contract trustees of Mrs Mary Elliot or Railton (as for her own right and as one of the assignees of Mrs Dorothy Elliot or Bowhill), against Mrs Dorothy Elliot or Bowhill, Mrs Robina Elliot or Turnbull and her marriage-contract trustees, and the judicial factor who had been appointed on the trust-estate.

The action concluded for declarator, *inter alia*, (1) that the whole rights and interests of the children of James Elliot under his settlement vested in them *a morte testatoris*, and that they had the power to grant valid conveyances of their interests in the leases of the several farms from the same date; (2) that the sum of £1000, paid to Mrs Robina Elliot or Turnbull under the terms of her antenuptial marriage-contract, should be imputed as a payment to account in settling or ascertaining the amount of her share of her father's residue.

Mrs Bowhill pleaded;—(1) On a sound construction of the trust-disposition and settlement of the deceased James Elliot the provisions therein in favour of his sons and daughters did not vest *a morte testatoris*, and that being so, the pursuers are not entitled to decree as concluded for.

Mrs Turnbull pleaded;—(1) On a sound construction of the late James Elliot's trust-disposition and settlement no interest in the fee of the provisions referred to in the second and third purposes of the trust vested in the children on the death of their father, or will vest until the termination of the leases. (2) No valid conveyance or assignation could be granted by any of the children either of the share of the fee which had not vested or of the share of the liferent which was declared to be not assignable. (3) Under the provisions of her contract of marriage Mrs Robina Elliot or Turnbull's marriage-contract trustees were creditors of James Elliot's trust-estate for £1000, and Mrs Robina Elliot or Turnbull is entitled to her share of the residue of the trust-estate under her father's trust-disposition and settlement without deduction of the said sum of £1000, or any part thereof.

The Lord Ordinary pronounced the following interlocutor:—"Finds that, according to the sound construction of the trust-disposition and

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tlement of the said James Elliot, dated 18th August 1865, each of his ren children who survived him took a vested right and interest in one- renth part of the whole free residue of his means and estate, and that *a rte testatoris*,—that is, on the death of the said James Elliot, which ık place on or about 29th September 1866: Finds that each of the said ren children of the said James Elliot took a vested right and interest one-seventh part of the yearly interests, profits, and emoluments arising ter the death of the said James Elliot, and payable in terms of his said ed yearly until the final division of his said estate, and that the said ght and interest vested *a morte testatoris*,—that is, on the death of the id James Elliot: Finds that the said annual profits and emoluments ayable yearly to each of the testator's children in terms of his deed, up the term or terms fixed for the final division of his estate, are strictly imentary, and are not assignable by any of the said children, nor liable be attached in any way by their creditors, or by the creditors of the sbands of any of the testator's daughters; and finds that the provision this effect contained in the said trust-deed and settlement is valid and ffectual in law: Finds that the trustees and representatives and estate f the said deceased James Elliot are liable and bound to pay the sum of 1000, with interest, contained in and provided by the antenuptial con- act of marriage, dated 13th November 1861, between Henry Turnbull nd Mrs Robina Elliot or Turnbull, the truster's daughter, and that in ms of the said antenuptial contract; and finds that said sum of £1000 nd interest does not fall to be imputed towards or deducted from the rovisions and interest to which the said Mrs Robina Elliot or Turnbull entitled under her father's said trust-disposition and settlement: And ith these findings appoints the cause to be enrolled, that the same may applied to the conclusions of the action, and for farther procedure erein; and meantime reserves all questions of expenses, and grants ve to reclaim against this interlocutor." *

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* "NOTE.—Instead of dealing directly and in the first instance with the ious declaratory and other conclusions of the summons the Lord Ordinary nks it more expedient to pronounce definite findings on the various questions law raised on the record. If these findings are affirmed or acquiesced in, or ied on a reclaiming note, there will be no difficulty in thereafter exhausting formal conclusions of the action. In accordance with what he understood be the wish of the parties the Lord Ordinary has given leave to reclaim.

"The trust-disposition and settlement of the late Mr James Elliot, tenant at nberton, is a very short and simple deed, and yet the questions arising under re attended with considerable nicety.

"The deed is dated 18th August 1865, and is in the form of a universal st-deed. It conveys to the trustees therein named the truster's whole estate, itable and moveable, of every description; and in particular it assigns two ses, the first of Lamberton and Lamberton Shiells, and the other of Bastle- ge, of which farms the truster was tenant, and which leases had different iods of endurance. The purposes of the trust are, first, payment of debts and neral charges. The second and third purposes, upon which the whole present estions turn, are thus expressed,—'Secondly, That my said trustees shall, ring the currency of the leases of Lamberton, Lamberton Shiells, and Bastle- ge, yearly divide the profits and emoluments arising therefrom among the ious members of my family, share and share alike, the child or children of predeceasing succeeding to the portion that would have belonged to his, her, their deceased parent; declaring that the sums so payable to each of my ily are intended to be strictly alimentary, and shall not be assignable, nor ble to be attached in any way by their creditors, or the creditors of the hus- nd of any of my daughters. Thirdly, Upon the expiry of the tacks of Lam- rton, Lamberton Shiells, and Bastleridge, my said trustees are hereby autho-

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Mrs Bowhill reclaimed, and argued;—(1) That it was the plain intention of the truster that none of the provisions in favour of his children

rised to realise the whole stock, crop, and others thereon, and to divide the same equally among my sons and daughters; declaring that the child or children of any predeceasing shall succeed to the portion that would otherwise have belonged to his, her, or their deceased parent.'

"The truster died on 29th September 1866, survived by seven children, viz., Henry, James, Mary (Mrs Railton), Dorothy (Mrs Bowhill), Robina (Mrs Turnbull), Elizabeth, and William. Elizabeth and William Elliot have since died, both leaving settlements appointing their brother James to be their sole executor. Mrs Turnbull was married during her father's life, and before the date of his trust-deed, and in her marriage-contract her father bound himself to pay £1000 to the marriage-contract trustees. Mrs Bowhill in 1870 conveyed her share of the succession to James and Mary Elliot, and in 1871 Mary Elliot (Mrs Railton) conveyed her share of the succession, including her half of Mrs Bowhill's share, to trustees, for certain purposes. Certain assignations in security have also been granted by James Elliot, William Elliot, Mary Elliot, and Henry Elliot, upon which claims arise.

"The estate is now under the management of a judicial factor, and the present action has been brought to determine the rights of the various parties under the trust-deed, and under the various assignations and conveyances which have been granted.

"I. The first and most important question is, when did the shares of the residue of the testator's estate vest in his children respectively? Did the right vest *a morte testatoris*, or was vesting suspended till the period of division fixed by the deed, being the expiry of the leases of Lamberton, Lamberton Shiels, and Bastleridge? The Lord Ordinary is of opinion that, according to a sound construction of the trust-deed, the whole residue of the estate vested in the testator's children *a morte testatoris*, one-seventh share in each child, and that vesting of the residue was not suspended till the period or periods of ultimate division.

"In cases like the present the presumption always is for instant vesting. In a universal settlement the equal share of each child is necessarily in full of legitim; and as legitim would have vested *a morte*, it is reasonable to hold that its substitute also so vested, unless there be some provision, expressed or implied, to the contrary.

"The bequest of the residue to the testator's children is in no sense made conditional. It does not depend on any uncertain or contingent event, but the direction is absolute that on the expiry of the leases the whole proceeds of stock, crop, and others are to be divided 'equally among my sons and daughters.'

"The postponement of the division till the expiry of the tacks is a mere postponement in point of time, and not in any view a postponement depending upon contingency. The tacks are certain to expire at fixed and known dates, and the direction must be read just as if the testator had fixed these dates as the dates of division. *Dies cedit sed non venit.*

"It is to be noticed also that the postponement of division was merely for the necessary purpose of administration and realisation. The farms were to be carried on till the expiry of the leases; and it was only then that the crops, stocking, &c., could be realised and divided. It was the mere accident of the condition or investment of the testator's means which caused the postponement, and not anything connected with the position of the beneficiaries. It is as if the estate had been locked up in bonds, payable at a distant date. They could not be divided until the day of payment arrived. A postponement like this never suspends the vesting, any more than a direction, for the sake of convenience, to pay six months or twelve months after a testator's death.

"Still farther, if the period of vesting is to be postponed till the period of division, it would lead to the awkward and anomalous result that there would be four separate periods of vesting. It is only the 'whole stock, crop, and

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d vest at his death. This was evidenced by his direction that the
should be managed by his trustees until the expiration of the re-

' on the farms that are to be realised and divided at the expiry of the
. Now, although a large portion of the testator's means were invested on
rms, there was considerable separate estate,—*inter alia*, a policy of in-
e and considerable debts. The provision about realising and dividing the
nd stocking would not affect the general estate, which would be held to
morte testatoris. Then the crop and stocking on Lamberton and Lam-
Shiells would be divisible in 1876, that on Bastleridge in 1873, and that
lgleish—which is a joint tenancy, not specially mentioned in the deed—
be divisible in 1867. It is thought that the idea of these separate periods
ting as to different portions of the estate—which, however, are all dealt
s a general residue,—is quite inadmissible.

or is there any real difficulty occasioned by the provision that the issue of
easing children shall succeed to their parent's share. The Lord Ordinary
the word 'predeceasing,' both in the third purpose and in the second, as
ng predeceasing the testator. There is no ulterior destination,—no desti-
over to survivors, and no reference to the children of the testator surviving
h of the leases or the final periods of division.

n the whole, the Lord Ordinary has not much difficulty in fixing on the
of the testator as the period of vesting of the whole residue of his estate.

It is thought that no distinction can be taken, as to the period of vest-
etween the residue or shares of residue of the testator's estate and the inter-
te annual proceeds which are to be paid to the children until the final
s of division arrive. The Lord Ordinary thinks that both provisions vested
tly *a morte testatoris*. As the testator was survived by all his seven child-
ach child instantly took, as a vested right and interest, not only a seventh
of the capital which might be ultimately divided, but also a seventh share
proceeds which might accrue and become divisible between the date of
stator's death and the date of the ultimate destination.

is true the children might have been made conjunct liferenters, so to
, so that the annual proceeds would divide among the surviving children,
exclusion of the representatives of deceasers, and this although the ulti-
hares of residue had vested in and were transmitted by the children de-

But no such conjunct liferent or conjunct annuity-right has been
ally constituted in the present case. Each child seems to be entitled to
or himself and his representatives not only one-seventh of the residue, but
venth of the interim proceeds.

There is, however, a difference between the accruing proceeds which are
paid annually and the share of residue ultimately divisible. The first—
, the annual payments of accruing profits—are declared to be 'strictly ali-
ry, not assignable,' nor liable to be attached by creditors in any way, or by
sbands of daughters. No such condition or provision is attached to the
te share of the residue.

otwithstanding the ingenious argument urged by the assignees and credi-
gainst the validity of the clause declaring the proceeds alimentary, and
iting assignation or diligence, the Lord Ordinary is of opinion that the
is a legal and competent one, and must receive effect. It is, no doubt,
hat such clauses are sometimes ineffectual, however strongly expressed,—
example, when the beneficiary has a right to demand instant payment of
ital sum, a provision that the interest shall be alimentary will go for
g. In the present case, however, while there is no doubt as to the mean-
d intention of the testator, there is really no difficulty in carrying out
ntention. The whole estate is vested in trustees, and not in the bene-
s themselves. The trustees are under an imperative direction during the
cy of the lease to divide yearly only the profits arising therefrom; and
seems nothing incompetent, nothing even unreasonable, in the provision
uring the limited period prescribed by the deed the shares of the annual
shall be strictly alimentary for the children; and though the children

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spective leases, and that these trustees should annually pay to the beneficiaries the accruing profits, with the further declaration that the sums so payable should be strictly alimentary, and should not be assignable nor liable to be attached by creditors. There was also a clause of survivorship and a destination over, as the word "predeceasing" in the second and third provisions of the deed did not mean "predeceasing the truster," but "predeceasing the period of division and of vesting." (2) If the vesting was held to be *a morte testatoris* this anomaly would be created, viz. that

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may alienate or assign their shares of the capital, yet, while the leases subsist, they are secured in a yearly alimentary provision, which cannot be defeated.

"It was not disputed that the testator might have given an alimentary liferent to one or more of his children, which would not be arrestable or assignable; and if so, it is difficult to see why such a provision may not be made terminable at the end of a fixed number of years.

"Of course, the only effect of the provision is that the yearly payments while the tacks last will be made to the children themselves, or on their own receipts. There is nothing to prevent each child, on getting payment, handing over the money to his or her assignee, or otherwise disposing of it at pleasure. Farther, as the declaration is limited to the children themselves, the executors or successors of deceased children are no way affected thereby.

"IV. The only other question which it is necessary to decide at present is the effect of the provision made or obligation undertaken by the testator in Mrs Turnbull's antenuptial contract of marriage. Is that provision to be imputed as part of, or to be deducted from, the equal seventh share which Mrs Turnbull takes under her father's settlement, or are the two provisions to be held concurrent and cumulative?

"The Lord Ordinary, though not without some hesitation, is of opinion that Mrs Turnbull's marriage-contract trustees are entitled as creditors to demand payment of the £1000, in terms of the antenuptial contract of marriage, and that the sum does not fall to be deducted from the equal seventh share to which Mrs Turnbull is entitled under her father's trust-deed. All such questions are ultimately *quæstiones voluntatis*, but the presumption is *in dubio* that the provisions are cumulative.

"In the present case the presumption that the antenuptial provision was a *præcipuum* arises very strongly. The antenuptial contract is an onerous deed, and is the first in date. Mr Elliot became by that deed absolute debtor to his daughter's trustees in £1000. He could not revoke or alter the obligation, and although he might satisfy it with a legacy, it must be shewn that the legacy was intended to be and actually was in satisfaction of the debt. The testator, when he made his trust-deed, must be held to have had his obligations fully in view, and in particular the obligation to his daughter's trustees, which he had come under less than four years previously. The first purpose of the trust is to pay his debts, and this £1000 is really one of these debts. It is only after this first purpose is fulfilled and all debts are paid that the residue falls to be managed and distributed under the second and third purposes of the trust.

"Then, there is no identity, nor even much similarity, between the two provisions. The £1000 is a direct debt due to the marriage-contract trustees, bearing interest from a fixed date. The other is a share of residue, uncertain in amount, and payable not to the trustees but to Mrs Turnbull herself or her assignees. It is a mere accident that the trustees happen to be her assignees. The ultimate application of the £1000 and interest thereon, and of the testamentary provision and interest, are also different, and the interim alimentary liferent which the trust-deed creates in favour of Mrs Turnbull individually and untransferably can hardly be compensated by a debt payable to her marriage-contract trustees. In short, as the testator has not himself chosen in his trust-deed to make any allowance for or reference to the £1000 the Court cannot make a will for him, even though it were much more clearly shewn than it is that he had overlooked or forgotten his daughter's marriage-contract."

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while the fund could be assigned or alienated the income which resulted from it was unassignable and inalienable. (3) This was not a case of liferent and fee, and consequently the cases quoted on the other side did not apply. (4) Generally, from a sound construction of the deed, the vesting was postponed, in the case of the annual accruing profits, till the annual period of payment, and in the case of the stock and crop until the expiration of each lease.[1]

The assignees of the beneficiaries argued;—That on a sound construction of the deed all the provisions vested *a morte testatoris*. The authorities quoted conclusively settled that where there was no contingency nor clause of survivance or destination over, but merely a postponement of payment of provisions, then the vesting must be held to take place *a morte testatoris*. There was no contingency here, nor clause of survivance, nor destination over, inasmuch as the word "predecease" in the second and third purposes of the deed meant "predecease the testator." The opposite argument led to the anomaly of four different periods of vesting under the same deed, which could never be assumed to have been the intention of the truster.[2]

The assignees of the beneficiaries farther argued, with reference to the sum of £1000 paid by the trustees to Mrs Turnbull under her antenuptial contract of marriage;—That this sum must be deducted from her seventh share under her father's deed. The principle which ruled the question was, that where the first payment is voluntarily undertaken there is no presumption that the second provision is not cumulative or duplicative, but where the first payment is made under an obligative deed, then the presumption "*debitor non præsumitur donare*" applies, and the second provision will be presumed in satisfaction of and not in addition to the first.[3]

Answered for Mrs Turnbull;—It was the plain intention of the truster that his children should share his estate equally after payment of his debts. This sum of £1000 was a debt due by the deceased, and he never intended that it should be deducted in computing Mrs Turnbull's share.[4]

At advising,—

LORD JUSTICE-CLERK.—(After stating the facts)—The first question which we have to decide, arising on the construction of this settlement, is at what period the interests created by the second and third purposes of this trust vested in the persons designated as entitled to take under them, and that again was presented in the argument in a double light,—(1) As regarded the annual profits of the farms in question, and (2) As regarded the ultimate division of the value of the stock and crop on these farms at the termination of the respective leases.

It has been contended, on the one hand, that the interests under both purposes vested *a morte testatoris*, while, on the other hand, the defenders have maintained that the intermediate profits of the farms only vested at each annual period of division, and that the price or value of the stock and crop only vested at the expiration of each of the leases.

In the view which I take of this case it is not necessary to enter in any detail

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[1] Provan v. Provan, Jan. 14, 1840, 2 D. 298; Johnstone v. Johnstone, June 1840, 2 D. 1038; Laing v. Barclay, July 20, 1865, *ante*, vol. iii. 1143.

[2] Forbes v. Luckie, Jan. 26, 1838, 16 S. 374; Matthew v. Scott, Feb. 21, 1844, 6 D. 718; Pretty v. Newbigging, March 2, 1854, 16 D. 667; Hunter's Trustees v. Carlton, Feb. 11, 1855, *ante*, vol. iii. 514; *ante*, vol. v. (H. L.) 151; Hendry's Trustees v. Hendry, Jan. 31, 1872, *ante*, vol. x. 432; Allan's Trustees v. Allan, Dec. 12, 1872, *ante*, 216.

[3] Kippen's Trustees v. Kippen, July 3, 1856, 18 D. 1137, and 3 M'Queen, 303, and Lord Chelmsford's Opinion, p. 232.

[4] Chichester v. Coventry, L. R. English and Irish Appeals, vol. ii. 71.

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into the authorities which were quoted to us on each side in regard to the principles of construction applicable to the vesting of interests, the payment or enjoyment of which are postponed beyond the period of the testator's death. Some general rules, indeed, so far as such can be applicable to that which is necessarily in each case a question of intention, are pretty firmly fixed. In the first place, the general presumption is that testamentary bequests vest *a morte testatoris*. In the second place, this result is not necessarily excluded because payment or enjoyment of the bequest is postponed until the termination of some interposed temporary interest, such as a liferent. And thirdly, if there be ulterior resulting interests created, failing the donee first designated, it will be more easy to presume that the testator intended that vesting should be suspended until the postponed term arrived.

In regard to the last of these rules, it can have no application to the present case, seeing that there are no ulterior or resulting interests created by the settlement, unless indeed the institution of children in place of their deceasing parents could be held to bear that character. But I am very clear, and as far as I know it has been uniformly held, that the expression of the condition *si sine liberis* cannot be regarded in that light. The subject was fully treated of by Lord Moncreiff in the case of Provan, and although his judgment in that case was altered by the Court on a general view of the testator's intention in the particular deed I know of no authority adverse to the general views which he expressed on this subject.

In regard to the second of those rules, viz., the effect of the interposition of a liferent right between the legatee and the death of the testator, so as to postpone the period of payment, I cannot state the law better than in the words of Lord Corehouse in the case of Forbes v. Luckie, 16 Shaw, 374, which I do with the more confidence that it was referred to as being still acknowledged law in the opinion of Lord Colonsay, in the House of Lords, in the case of Carlton in 1867 (*ante*, vol. v. H. L. 151). He says,—"I do not think that the fee of the residue was prevented from vesting in these children, either by the circumstance that the term of paying to each child its respective share was postponed until after the death of the liferentrix who survived the testator, or by the circumstance that a trust by executors was interposed for carrying into effect the intentions of the testator, or finally, by the circumstance that the bequest of the residue was conceived in favour of a class of persons and not in favour of certain individuals *nominatim*." These rules, of course, are subject to be controlled in each individual case by the general complexion of the settlement and the intention to be gathered from its provisions, and especially by the reason or object which it may appear that the testator had in view in postponing the payment of the interests conveyed by him.

The present case, however, appears to me to stand entirely clear of that category of the law, and a just apprehension of its real nature and import removes all difficulty in regard to its construction. In the first place, there is properly here no interposed interest at all. There is no interjected second party to take prior to the division of residue. That is not in any degree the nature of those provisions. The second purpose of the trust relates to the mode in which the annual profits of certain farms belonging to the testator are to be divided. The third purpose relates to the mode in which the value of the stock and crop on each of these farms, at the expiration of the respective leases, is to be divided. The subjects of the two purposes are entirely different, although arising out of the same occupation or speculation, viz., the leases of the farms. Farther, the persons who were favoured in each purpose are not different but the same, at least as far as the descriptive words are concerned. They are in both instances the truster's family, that is, his children, and the children of those who predecease. And, lastly, the postponement of the several periods of division in regard to the profits under the second purpose, and of the realised value of the crop and stocking under the third, arises not in respect of any interposed interest in favour of another, but solely and entirely from the nature of the particular property to which the interest bequeathed attaches, and which is the subject of it. Of course the profits of the farm could only be divided as they were realised year

nd in that respect the testator only gave, under the same conditions, imself had. In like manner the testator could only have realised his crop at the termination of the lease, as he was not entitled to dis- s farm during its currency. In both instances the subject conveyed by nent was a deferred interest, but one which was deferred in the person tator, and which he conveyed precisely as he held it himself. In such ppears to me entirely vain to contend that where the condition in point not attached to the interest of the beneficiary, but is an interest and of the thing which is bequeathed, it can possibly be held to qualify or ing *a morte testatoris*.

view, the words in regard to predecease present no difficulty at all. ostponed period does not depend on the life or death of any one it altogether a forced construction to refer the word "predecease" to it, natural and satisfactory relative is found in the death of the testator The term is precisely the same under both purposes, and in both has to the death of the testator. Indeed I do not see, especially under the rpose, how the construction of the defenders could be practically applied, n is fixed for the payment of the annual profits, which is left entirely cretion of the trustees.

sight some difficulty is created by the peculiar terms of the qualifica- hed to the bequest under the second purpose, but I have come to concur w which the Lord Ordinary takes of that matter. I think that the n that these yearly profits shall be alimentary and not assignable or limits the right of the beneficiary during his life, and is effectual to no farther. Whether it would attach also to his children is open to but I am satisfied that it does not interfere with the power of *mortis* osition, and therefore, on the whole matter, I am of opinion, on this the case, that these provisions vested *a morte testatoris*, and that the f the Lord Ordinary are sound.

ond question which was argued to us is also one of considerable inte- seems that the late Mr Elliot, in the marriage-contract of his daughter . 1861, undertook to pay to her marriage trustees the sum of £1000, ontended on the part of the trustees that that amount, which has been aid, must be imputed *pro tanto* to her share of the succession, on the of *debitor non præsumitur donare*.

se of Kippen, where this question was very fully discussed, truly the authorities, and I think it unnecessary to go over them. It really is matter to a question of intention. The maxim *debitor non præsumitur* such a case is easily overcome by an opposite presumption, and covers ground in a *mortis causa* settlement. Provisions to children in such in their own nature donations, and in regard to them the presumption granter intended them as a gift. In the case of Elliot, 1 Shaw, p. 218, ident Hope laid down the principle that double legacies were presumed ulative. In the cases which were quoted to us of Grant v. Anderson , and of Nimmo (3 D. 1109), the question arose, in the first place, not to residue, but in regard to specific legacies, and secondly, where there onable coincidence in amount between the obligation and the provision. se of Grant the obligatory writing was posterior to the gift. In the se it would be hard to hold that an uncertain share of residue was in- satisfaction of a specific debt. The trustees under the settlement were o pay the debt in the first instance, and then, at a postponed term, to residue which remained. They have paid the debt, and they are now carry out the second and third purposes of the trust according to the which their instructions are expressed. Although *debitor non præsumitur* et if the words of the gift be clear, as they seem to be in this deed, the ion must yield to the fact.

OWAN and LORD BENHOLME concurred.

EATES.—I concur in the opinion which has been expressed by your

No. 127. June 21, 1873. Elliot v. Bowhill, &c.

Lordship, and I have little to add. I confess that at one time I entertained considerable doubts as to the period of vesting of the intermediate profits. But I have got over any difficulty that I had, and I have been chiefly moved by this consideration, viz., that when once it has been fixed that the *corpus* or *universitas* of a succession has vested *a morte testatoris* it is very difficult to imagine that the fruits of that *corpus* or *universitas* should vest at a different period of time. I have only to say further that I conceive the Lord Ordinary's meaning upon the question of the assignability of the children's shares of the annual profits to be this, that while the children are barred from assigning their shares by deeds *inter vivos*, they are not barred from making settlements *mortis causa*, or from leaving their shares to executors. The intention of the truster was that none of his children should remain unprovided for during the currency of the leases by any act of their own in assigning their property to creditors, but he did not desire to limit their power of disposing of it at their respective deaths.

THE COURT adhered to the Lord Ordinary's interlocutor.

DALMAHOY & COWAN, W.S.—ADAM & SANG, W.S.—H. & H. TOD, W.S.—JARDINE, STODART, & FRASERS, W.S.—Agents.

No. 128. June 21, 1873. Low's Executors and Others.

JOHN GRANT AND OTHERS (Low's Executors), First Parties.—*Sol.-Gen. Clark—Jameson.*

JOHN MACDONALD AND OTHERS, Second Parties.—*Cleghorn—Innes.*

Succession—Testament—Revocation.—A testator left a holograph testament containing a nomination of executors and a disposal of his whole means among certain legatees, along with another signed holograph writing of subsequent date, commencing "I desire to bequeath as follows," and containing bequests and annuities to nearly the same parties as were mentioned in the first writing. It concluded, "balance left for further disposal;" but no other deed was discovered. Both writings were found in the testator's travelling bag. *Held* (1) that the second writing was a testamentary writing; and (2) that it did not revoke the first writing, but that both must be read as one writing.

Succession—Legacy—Uncertainty.—Bequests to "charities in Glasgow, £1000. Do. Abdn., £1000"—*held* void from uncertainty.

2D DIVISION. R.

MR JOHN LOW, for some time secretary of the City of Glasgow Bank, Glasgow, died on 26th July 1872, while on a visit to his sister-in-law in Aberdeen. He left two testamentary writings, both holograph and signed, and dated respectively 22d May 1869 and 22d April 1872. They were found in his travelling bag after his death. The first in date was found in a leather case in the bag, and the second in a pocket-book in the bag, along with a memorandum regarding the amount of his means and estate.

By the first of these writings Mr Low left his whole property to John Grant and others, as executors for the purpose of carrying out the following directions:—

"First.—As to the disposal of my effects, I desire that all my household furniture, bed and table linen, silver-plate, books, pictures, &c., be sold, and out of which funeral expenses to be paid.

"Second.—All investments to be realised, and the money lent on heritable property or first-class railway debenture bonds.

"I desire the following legacies to be paid free of duty, viz.:—To John Low Brebner one hundred pounds, John Low Pithie one hundred pounds, John Low Dickie one hundred pounds, John Low Clark one hundred pounds, being all my nephews, and to Free St John's Sabbath-schools twenty pounds, Free St John's Bible-women fifty pounds, Free St John's Local Mission thirty pounds, to be distributed in the local district under

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y charge, and visited by Mr Crombie and others, in annual sums of five unds for six years.

" To each of my executors ten pounds.

" I desire the interest on the residue of my estate to be divided into ree equal parts (after deducting an allowance to the party who may be ppointed as factor for the trust), and given to my two sisters, Margaret wrie and Mary Brebner, and my sister-in-law, Mrs Low, in half-yearly yments.

" The families of the annuitants to get the interest of their mother ntil the death of the last annuitant, when at the ensuing money term he residue of my estate is to be divided into two parts—the one-half for he families of my two sisters (excluding the *jus mariti* of their husbands), nd the other half to the treasurer of the Free Church for the Sustentation nd College Funds equally. The interest accruing to be applied as a contribution annually from Free St John's Church, Glasgow, for the Sustenation and College, and I desire the portion of interest to this last fund be applied in forming two or more bursaries as the professors may uggest, but their recommendation subject to the approval of Free St ohn's Session, Glasgow.

. . . . . .

" All former wills cancelled.

" Witness my hand this twenty-second day of May 1869.

" JOHN LOW."

The second writing was in these terms :—

" 14 Windsor Terrace, St George's Road,
" Glasgow, 22d April 1872.

" I desire to bequeath as follows :—

" Annuities

my sister Margaret		£200 p. annum	
Mary		200 p. annum	
Mrs Low		100 p. annum	
		£500	
	free of legacy duty to my Nieces		
ina Lawrie or Brown for family equally			£1000
phia Lawrie or Clark			1000
ary Lawrie or Pithie			2000
a Agnes Low or Dickie			1000
Namesons Brown			
Clark	£100 each		500
Pithie,			
Dickie			
Brebner			
harities in Glasgow			1000
Do. Abdn.			1000
			£7500

n *second page*)

Suppose my estate to realise £20000

take off 7500

£12500

affirmative, 2. Was the writing second in date to be held as and revoking the writing first in date, as regarded the disposal o tor's whole estate in money, investments, &c.? and 3. Was the £11,500 or thereby brought out as residue in the second wr dealt with as residue is directed to be dealt with by the first does it fall to be dealt with as intestate estate subject to th mentioned in the second writing?"

The executors maintained (1) That both writings mentioned l valid and operative testamentary writings. (2) That the writin date superseded the first to the extent of the sum of £20,000 and (3) that the sum of £11,500 was intestate succession ceased, and fell to be paid to the next of kin, subject to the bu annuities.[1]

John Macdonald, general treasurer of the Free Church, maintained (1) That the writing first in date alone was a valid tive testamentary writing, and that the writing second in date a memorandum or jotting, and did not contain the concluded directions of the deceased regarding the disposal of his estate thereof, nor any revocation of the first. (2) That in the event held that both writings were valid, the second in date shou under and along with the first, and should only be held to b *quoad* the bequests to individuals specified in itself; and (3) T quests to congregational charities in the first writing, and the regarding the disposal of the capital of the residue therein mad given effect to.[2]

At advising,—

Lord Cowan.—The testator left two writings purporting to regu cession, the validity and effect of which form the subject of the que to this special case. These writings are respectively dated 22d M 22d April 1872. Both are holograph and subscribed by the dec first writing in 1869 is in every respect a regular and testamentar taining the appointment of executors, with directions as to the reali means and effects, and disposal of his estate when realised in special residuary bequests; and it contains a declaration "all former will

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e informal. It states the writer's desire to bequeath the special legacies
ı mentioned, but contains no disposal of the residue, and concluding with
rds "balance left for further disposal."
testator's death occurred in Aberdeen on 24th July 1872, whither he had
m a visit to his sister-in-law, Mrs Low. The writings referred to were
in his travelling-bag after his death; the first in date was found in a
r case in the said travelling-bag, along with a dedication of himself to God,
ıe one second in date was found in a pocket-book in the said travelling-
long with a memorandum regarding the amount of his means and estate.
admitted facts shew the care with which the deceased preserved both
ents in his personal custody. And it is not immaterial to observe that
the memorandum as to his means it appears that his fortune between the
of the two writings had very considerably increased.
ı first question for consideration is, whether the imperfect writing second
e is to be regarded as a testamentary writing, and entitled to effect as such.
e not unattended with difficulty. The writing no doubt is holograph and
l, and is thus probative; but the question still is, what is the character of
riting? Is it a will or not? There are expressions in the writing which
ise to grave doubts whether it was not written as a mere jotting, to be after-
completed and put into the form of a proper deed, either by himself or by
ı of business. On the other hand, there are words expressive of testa-
ry intention and of direct bequest to individuals named; and the writing
is not in the form of instructions to a law-agent with the view of its con-
being embodied in a formal deed; nor is there any extrinsic evidence of
ing intended to be used for that purpose and no other. That was the
arity which led the House of Lords in the leading case of Monro v. Coutts,
7, 1813, 1 Dow, 437, to reverse the judgment of this Court, and to hold a
g subscribed by the party, and purporting to be "codicil to my will," not
ıentary. And, on the same principle it was that the decision in Lowson
rd, March 20, 1866, proceeded, in rejecting three of the four writings
in question, and in holding only one of them testamentary. The three re-
. papers were regarded as mere directions to be acted on by the gentlemen
ıom they were addressed, making an addition to the previous will, while
ırth writing would have suffered the same fate had it not contained a clear
ssion of intention—that whether added to the will or not it was to have
. In this case the writing of April 1872 does not partake of that character
. It contains a clear expression of the testator's will as to the matters with
ı it deals affecting his succession. Then it is found in the same place of
it with the complete writing of the prior date, although not put up with it
e same cover—the two writings, however, being carried with him in his
lling-bag, evidently not less for safety than to have them under his im-
ate control. It would be inconsistent, in my opinion, with the principle
hich the Court in such questions has invariably acted to refuse effect to
writing as testamentary. I am therefore of opinion that the first question
ld be answered in the affirmative.
ıe second inquiry relates to the effect of this second deed upon the first
ng, dated in May 1869—whether it excludes and revokes its contents as
ds the disposal of the testator's whole estate, or merely alters and modifies its
nts, leaving the nomination of executors untouched. It is contended by
irst parties that the second deed is a total revocation of the disposal of the
tor's means and estate contained in the first deed, at least to the extent of
,000; while the second parties contend that the second deed is effectual
ly to alter the first deed in the matter with which it specially deals. Were
ormer view to prevail the result must be that the testator's estate, except in
r as specially bequeathed by the second deed, must be held intestate suc-
on. But the contents of the second deed are not, as I think, such as to
fy that view of the testator's intention.
y the first dated deed the testator had in due form effectually disposed of
whole estate. That deed was found carefully preserved by him in his personal
ody at his death. It was found in a perfect state, without mutilation in any

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respect. Had there been any intention of revoking the deed, or of recalling any of its provisions, there was nothing to have prevented him cancelling or destroying the writing if he was so inclined. No doubt it was open to the testator to have expressly recalled this deed in whole or in part, by a separate writing, but such writing must in express terms recall the previous will, and mere doubtful expressions will not operate that effect. In the present case there are no words of revocation at all. There are certain bequests provided for holding the deed to be testamentary—and the only words alleged by implication to indicate an intention in the testator's mind to change the destination of the residue of his estate are "balance left for further disposal." The previous will had disposed of his whole residue. The words may possibly be viewed as indicating some intention at a future time to consider whether he should adhere to that disposition of it, or to make an alteration on it in whole or in part. They truly indicate no more—if they can be held to be applicable to the whole residue disposed of by his will of May 1869 at all. The view I take of the import of the words is, that he might possibly at some after time make a further disposal by legacies to individuals, or otherwise, similar to what he had done in this very writing; and although such bequests when made would diminish the amount of the estate there is no indication of a desire—far less an intention—to disturb the destination of residue generally contained in his prior testamentary deed. When a testamentary writing is left by a testator unexceptionable in itself, doubtful or equivocal expressions in a subsequent testamentary writing will not infer the revocation of the previous will. The whole of this doctrine underwent consideration in the case of Horsburgh (May 4, 1845, 9 D. 324), and more recently in the case of Stoddart v. Grant (June 1852, 1 Macq. 153), in which case it was held by the House of Lords, reversing the judgment of this Court, to be a fixed principle that the mere fact of making a subsequent will does not work a total revocation of a prior one, unless the latter expressly revokes the former, or the two be incapable of standing together. The rule in such cases was held by the House of Lords to have been well stated in the opinion of Lord Moncreiff, who was in the minority in this Court, that "where a person deceased has left various writings, probative in themselves, for disposing of his or her property, they are to be understood as constituting one testamentary settlement, in so far as they have not been revoked, and are not inconsistent with each other." The same principle is stated even more strongly in the opinion of Lord Fullerton, who also was in the minority. I consider this authority directly applicable to this case. The two writings were found together in the testator's repositories, and were to be held and given effect to as one testament. There is no inconsistency or difficulty in giving to both of them their just effect and meaning as regulating the testator's succession, as will be immediately shewn. And, in my apprehension, to hold the doubtful or equivocal words in the last deed, on which reliance is placed, as amounting to a revocation of the first deed, would be to disregard the established principles to which I have adverted. For these reasons, I am of opinion that the second and third questions must be answered—the second in the negative, and the third in the affirmative as to its first branch and in the negative as to its second branch.

As regards the effect of the second writing and its several provisions, its true construction, I think, must lead to these results:—

1. That the annuities provided to his two sisters and to Mrs Low supersede the bequest in the first writing to them of the interest on the residue, to be taken in three equal parts in half-yearly payments.

2. That the families of the annuitants take the interest of their mothers until the death of the last annuitant.

3. That the two bequests, to charities in Glasgow and charities in Aberdeen, are void from vagueness and uncertainty.

And 4. That the residue, as appointed by the first deed, will fall on the death of the last annuitant to be divided between the parties, and for the purposes and in the manner prescribed by the testator in that deed.

The other Judges concurred.

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THIS interlocutor was pronounced :—" The Lords, having heard counsel on the special case, are of opinion, and find, in answer to the first query, that the writing second in date is a valid testamentary writing: In answer to the second query, that the writing second in date does not exclude and revoke the writing first in date as regards the disposal of the testator's whole estate in money, investments, &c.; and in answer to the third query, that the balance of £11,500 or thereby brought out as residue in the second writing is not to be dealt with as intestate estate, but as disposed of by the first writing," &c.

JOHN AULD, W.S.—DALMAHOY & COWAN, W.S.—Agents.

No. 129.

June 24, 1873.

Dobie v. Lauder's Trustees.

JEAN DOBIE, Pursuer.—*Pattison.*
SCOTT BOWER AND OTHERS (Lauder's Trustees), Defenders.—*Campbell Smith—M'Kechnie.*

oof—Agreement—Parole Evidence—Competency—Damage—Reparation.—
action of damages the pursuer averred that the defenders had arranged to
certain children with her, and that as both parties had contemplated that
rangement should endure for a term of years she had incurred certain expen-
e which she lost by the guardians suddenly bringing the arrangement to a
. *Held* (1) that parole evidence of such an arrangement was competent,
2) that the pursuer was entitled to be reimbursed for actual loss.
served (*per* Lord Neaves), that when parties are engaged mutually in pro-
ng an object of common interest, and the expenses entailed in furthering
bject are thrown on one of the parties, then, when that expenditure fails of
ning the end aimed at, the party-disburser must be recompensed, as being
isburser for a common object.

2D DIVISION. Lord Shand. I.

IIS action was brought by Miss Jean Dobie, Edinburgh, against the
ees of the late James Lauder, Lutton Place, Edinburgh, and the
mons concluded for payment—" (First) Of the sum of £45 sterling,
the legal interest thereof at the rate of five per centum per annum
and since the 25th day of July 1871 and until payment. (Second)
he sum of £3, 2s. 11d. sterling, and the legal interest thereof at the
rate from and since the said 25th day of July 1871 and until pay-
t. (Third) Of the sum of £100 sterling in name of damages and
ium." The pursuer averred that in March 1870 the defenders
nged with her that the children of the late James Lauder, some of
m were in pupillarity and some in minority, should reside in family
the pursuer, and be boarded by her at the rate of £60 per annum
ectively, until in the case of sons they should attain twenty-one years
ge, and in the case of a daughter, Agnes Lauder, until she should
in that age or be married. In reliance on this arrangement, the pur-
, with the knowledge and approval of the defenders, took a lease
house in Frederick Street for seven years, and expended consider-
sums of money in furnishing and otherwise implementing her part
he contract. The defenders paid the stipulated board until October
1, when they intimated to the pursuer that they wished to reduce
sum payable for each child from £60 a-year to £45 a-year, and on
pursuer refusing to agree to this they removed the children from her
ge.
n account of loss and injury sustained in consequence of the defenders
refusing to implement their part of the agreement the pursuer
ght this action.

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The defenders in answer stated (Ans. 9),—"Explained that Mi minor children were to be boarded with the pursuer at the ra per annum each, payable quarterly in advance, and that she v allowed the use of the furniture in the Lutton Place house children were so boarded with her. The defenders entered int agreement with the pursuer as to the length of time the said were to reside with her as is set forth in the article under answ pursuer was aware of the ages of Mr Lauder's children, and defenders had no power to bind any of them to reside with h William, who is still in pupillarity."

The defenders also admitted that they had taken away the and averred that the reason of the removal was the insufficien board the children received from the pursuer, and her unkind of them.

After the action was brought the pursuer's claim for two £45 and £3, 2s. 11d., first concluded for in the summons, were puted.

The pursuer pleaded;—(2) The defenders having by their ac conduct in relation to the pursuer as above set forth caused injury, and damage, they are liable to her in reparation therefo

The defenders pleaded;—(2) The pursuer's statements are i non-specific, and insufficient to support the conclusion for dama *separatim*, the defenders having had no power to enter into th averred, the action falls to be dismissed. (3) The action is inc in respect it is directed against the defenders in their individual (4) The pursuer's whole statements and pleas, except as to the board, and the other small accounts due to her, being false i untenable in law, and the damages claimed being in any view o tial and excessive, the defenders are entitled to absolvitor, with (5) The defenders having consigned the sum due to the pu entitled to absolvitor, with expenses.

The Lord Ordinary allowed a proof, the result of which, as w farther facts of the case, are fully set forth in his Lordship's in and subjoined note.

The Lord Ordinary pronounced this interlocutor:—"Finds pursuer's claims of £45 and £3, 2s. 11d. are not disputed, and finds the defenders liable to the pursuer in these sums, and grant to the pursuer to uplift the sum of £48, 2s. 11d., consigne defenders in the City of Glasgow Bank on 23d October 1872 bank interest which has accrued thereon, but finds no farthe due; ordains the said City of Glasgow Bank to make payme pursuer of the said sum and interest; and grants warrant t countant of Court to deliver up the deposit-receipt to the pursue that such payment may be made to her, and decerns: Farther, in or about the month of March 1870 the defenders arranged a with the pursuer that the children of the late James Laude minority or in pupillarity respectively, other than his eldest should, at or before Whitsunday 1870, reside in family with the and be boarded by her at the rate of £60 per annum respectiv in the case of sons, they should attain to twenty-one years of a the case of a daughter, Agnes Lauder, until she should attain t be married; and that to enable the pursuer to receive the childr this arrangement, it was stipulated by the defenders, and agree the pursuer should take a suitable house for their accommodatio was farther agreed that to enable her to furnish the house sh have the use of the late Mr Lauder's furniture, situated in the

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Place, formerly occupied by him, and after his death by his
: Finds that, in reliance on this arrangement, and in order to
her to perform her part thereof, the pursuer, with the knowledge
proval of the defenders, took a lease, for a period of seven years, of
3 in Frederick Street, having the requisite accommodation, and that
niture above mentioned was removed to it about the end of April
it which date the children of the late Mr Lauder, under the said
ment, went to reside there with the pursuer, and the pursuer
d considerable expense in supplying a variety of articles of furni-
quired for the said house, beyond the furniture taken from Lutton
Finds that the stipulated board of £60 was paid for said children,
number, till 25th April 1871, when Alexander Lauder, the eldest
th the pursuer's consent, ceased to reside with her, and that the
ing three children's board (including the sum of £45, above found
is been paid down to 25th October 1871: Finds that the defenders,
called on to do so, have declined to pay board for the children
ter, or to proceed farther in carrying out or implementing the said
ment: Finds that this declinature on their part has been caused,
any failure on the pursuer's part to fulfil her part of the said
ment, or by any conduct on her part to justify it, but because of
usal to continue to board the children on different and more favour-
rms for the defenders than those agreed to between her and the
rs as aforesaid: Finds that, in consequence of the defenders'
ture to carry out the said arrangement the pursuer has sustained
the extent of £50, in respect of outlays made by her on account of
xes, and rates for said house down to April or May 1872, when
s relieved of her liability therefor, and on account of furniture pro-
y her for said house to enable her to fulfil her part of said arrange-
nd which she was obliged to sell at a sacrifice: Finds in law that
enders are liable to reimburse the pursuer in said loss so sustained
: Therefore decerns against the defenders for said sum of £50:
he pursuer entitled to expenses, of which allows an account to be
n, and remits the same, when lodged, to the Auditor to tax and
and decerns." *

OTE.—The present action concludes, (1) For payment of a sum of £45,
unt of board of certain of the children of the late James Lauder, and
11d. for outlays made by the pursuer on account of the children; and
a sum of £100 in name of damages. From the correspondence which
ace between the agents of the parties before the action was raised it
that the claim for board was for a time disputed, but in December
ie defenders' agent intimated that his clients would pay the sum claimed
account, and the small accounts for outlay, if correct; and in the 13th
th answers to the condescendence the sums sued for on this account
lmitted and consigned. This unfortunate litigation has thus arisen
with reference to the pursuer's claim of damages.

at claim is not maintained upon the ordinary footing of damages for
of contract, where the pursuer claims not only indemnification against
it payment for loss of profit or advantage, caused by the defenders'
to implement a contract, or for breach of it. The claim, as insisted in,
ed to reimbursement of actual loss alleged to have been sustained by the
in consequence of outlays made and responsibility undertaken by her,
ie knowledge and approval of the defenders, to enable her to carry out
t of an undertaking and agreement entered into with the defenders, but
he defenders have failed or refused to carry out on their part, to the loss
ursuer.

e arrangement alleged to have been entered into between the pursuer

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The defenders reclaimed.

Argued for them;—(1) This being an action of damages for non-i ment of a contract to extend over a period of years parole evidenc

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and defenders was somewhat peculiar, but not an unnatural one, in the c stances in which the parties were placed. The pursuer was a cousin of t Mr Lauder, who died in 1866, leaving several children, some of th minority and some in pupillarity. His trust-deed, under which the de act, and by which they are appointed tutors and curators to the childre tains provisions for keeping the family together, and with that view he d the house in Lutton Place, in which he lived, to be kept as a home children, and his household furniture to be preserved for their use un youngest child should attain the age of twenty-one years as regards majority or marriage as regards daughters. In the end of 1869, in conse of the marriage of the eldest daughter, who had previously managed the hold, it became necessary that the trustees should make new arrangeme the maintenance and care of the children, of whom there were four, t other daughter, Agnes, being then about fifteen years old, and having tw brothers and one younger, about eight or nine years old. The pursuer that Mr Bower, one of Mr Lauder's trustees, who seems to have been an i friend of all the parties, and Mr John Lauder, the other trustee, afte negotiation, arranged with her that the house in Lutton Place should b up, and that the children should be placed under her care, in a hous taken by her, on the agreement that a sum of £60 a-year should be paid board of each of them, and that they should remain with her so long should respectively be under the guardianship of the trustees. It is st have been part of this arrangement that the furniture in the Lutton Plac should be given over to the pursuer, who had not then a house of her enable her to furnish the larger and more important rooms of the hous taken by her, and to be kept by her for the use of the children, and t house was to come substantially in place of the Lutton Place house un settlement of the late Mr Lauder. The pursuer, who at the time refe was a boarder with a friend, farther alleges, that on this arrangement made, and in reliance on the defenders' fulfilment of their part of it, sh the knowledge and approval of the defenders, took a house, of a size and ch suitable for carrying it out, for seven years; and it is proved that she into a lease for that period of a house in Frederick Street of ten roo kitchen, at a rent of £68, and that as soon as certain repairs required wer by the landlord, viz., in April 1870, the Lutton Place furniture was mov it, and the children took up their residence there with the pursuer. February 1871, Alexander, the eldest of Mr Lauder's sons, left the hous serious differences had occurred between him and the pursuer. In Aug lowing the other children went to Dunfermline to spend some holida never returned, but were sent by the defenders to board in another h Edinburgh. The sum of £45, sued for on account of board, is for the current when the children left, viz., from 25th July to 25th October 18 the defenders dispute their liability for any farther payment. The hou left on the pursuer's hands, and, from October onwards, it appears th defenders demanded delivery of the Lutton Place furniture, in order to sold. The pursuer succeeded in getting the lease taken over by another shortly before Whitsunday 1872, and the furniture belonging to the de was then given up to them, but in the meantime the pursuer alleges sh sustained actual loss to the amount sued for, (1) in having to pay the re rates, and taxes, on the house from October 1871 to April 1872, the new having taken upon him the rent thereafter; and (2) in having been obli sell furniture at a sacrifice, part of which she had owned previously, a bought to enable her to complete the furnishing of the house.

"At the proof which took place before the Lord Ordinary the p admitted that there was no written agreement between the parties, and th

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not admissible in proof of the agreement.[1] (2) The defenders could not bind those children who were in minority to any such agreement as that

was unable to prove the agreement by writing, and it was thereupon maintained for the defenders that parole evidence on the subject was incompetent. The Lord Ordinary repelled this objection, and admitted the parole evidence tendered. Had the case been one of implement, or an ordinary claim of damages for non-implement or breach of contract, such evidence in proof of an agreement, to extend over a period of years, would have been inadmissible; but the Lord Ordinary was and is of opinion that the case falls within the rule to which effect was given in Bell v. Bell, 9th July 1841, 3 D. 1201, and in the previous case in regard to the Melville Monument there referred to, viz., that parole evidence of the arrangement and actings of parties is competent when the claim made is for relief or indemnity from actual loss sustained by a party acting in reliance on the fulfilment by another who has refused to carry out his part of an arrangement which had been entered into but which could only be made legally binding so as to be capable of enforcement on being committed to writing. The indemnification from loss which in such a case is claimed has been directly caused by the representations and conduct of a party who refuses to fulfil his undertaking. The claim for relief is supported by obvious considerations of equity, and it is only reasonable that the representations and conduct of the parties which give rise to it should be capable of proof in the ordinary way in which representations, actings, and conduct are generally proved, viz., by parole evidence.

"Into the details of the case or the proof the Lord Ordinary deems it unnecessary to enter very fully. He is of opinion that an arrangement of the general nature above mentioned was entered into between the parties. The parole evidence of the pursuer, Mr Ross, and Mr Bower, seems to lead to this inference. The provisions of Mr Lauder's deed make such an arrangement reasonable and probable, and the facts—(1) of the pursuer herself undertaking the responsibility of such a lease as she entered into, and (2) of the furniture supplied by the defenders having been really necessary for the continued occupation of the house, are matters of real evidence which strongly support the pursuer's case.

"The evidence, farther, in the opinion of the Lord Ordinary, shews that the pursuer undertook the responsibility of the house, and supplied a considerable amount of furniture of her own, suitable for its occupation, with the knowledge of the defenders, and in reliance on their representations and actings and on their fulfilment of the arrangement entered into.

"It remains only for consideration whether the defenders unwarrantably caused to go on with the arrangement, and in consequence the pursuer sustained loss, in the sense already explained, and the Lord Ordinary is of opinion that both of these questions must be answered in the affirmative. It cannot, perhaps, be said that if the children, from causes over which the defenders had no control, had themselves refused to continue to reside with the pursuer, and actually left her against the defenders' remonstrances and efforts, that the defenders would have been liable to such a claim as the present, for the agreement which was entered into, without its terms being very clearly defined, taken reasonably, would probably not admit of being carried the length of an absolute undertaking on the defenders that, in any circumstances, the children should reside for the full term with the pursuer, but amounted to this only, that the defenders, who had the control of the trust-funds, would use all means in their power for this purpose. But it is unnecessary to consider this view, for it is clear to the Lord Ordinary that three of the children would have been quite ready to remain with the pursuer had the defenders desired it, and that the true cause of their being

[1] Walker v. Flint, Feb. 20, 1863, *ante*, vol. i., 417; Fowlie v. M'Lean, Jan. 31, 1868, *ante*, vol. vi., 254; Stewart v. Clark, March 4, 1871, *ante*, vol. ix., 636; Edmonston v. Bruce or Edmonston, June 7, 1861, 23 D. 995.

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averred by the pursuer. (3) An agreement in the terms stated pursuer was not proved, and even if there had been such an ag the pursuer's treatment of the children justified the defenders' therefrom.

Argued for the pursuer;—The action is not for damages for b contract, nor for non-implement of contract, but for indemnific money expended on the faith of the trustees' promises. To en pursuer to recover it is not necessary to go the length of a co contract.[1]

At advising,—

LORD JUSTICE-CLERK.—The view which the Lord Ordinary has take case assumes, and I think justly assumes, that the claim which he has is neither for implement of the contract alleged, nor for loss of expect tage from it. I am inclined to go further. I think the claim can onl ported on the footing that there was no concluded or binding con therefore could be no breach of it. Had it been necessary for the p prove a contract for a term of years of the nature alleged there would h in my opinion, great difficulty—I go no further—in the mode of pr such is the nature of the claim, at least to the extent to which I am d sustain it. The footing on which the parties acted was not and could been that of a binding contract. It was a family arrangement, the su which was that the children should live with the pursuer, and beyon was contemplated that this arrangement should be of some endurance. the essence of any mutual understanding between the parties; all the mere incidents. The house they were to occupy, the board they we were merely the details under which the undertaking was to receive a is plain that under such an arrangement neither party was or could be continue to observe it; and ceasing to observe it was no breach of But it does not follow that if the arrangement be terminated by the a party the other has not a claim to be kept free of loss; and that is footing on which the pursuer's claim can rest.

The first question is, whether parole proof of the footing on which t

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taken away, or rather of their not having returned as they intended t their holidays, was the pursuer's refusal to reduce the agreed-on rat from £60 to £45. The defenders founded on the pursuer's letter of 2 1871, as shewing that she was quite willing that the whole family sh her, but the explanation of that letter is evidently the same as tha similar expressions used by the pursuer, and spoken to by some of the viz., temporary annoyance and impatience at the conduct of one or m members of the family. The alleged excess in expenditure, taking and outlays together, of the children's income, is not very clearly pr even if it were so, would not justify the defenders in withdrawing th as they did, without indemnifying the pursuer. The defenders had power to restrict the outlays beyond the board to such sum as they de

"The Lord Ordinary is of opinion that the loss proved may fairly at £50. The rent of the house, with rates and taxes, is stated at £ pursuer had about six months' rent and charges, or £44, to pay, w return, but she and Mrs Stevenson had the use of the house for them the loss on this head ought not to be estimated beyond £25 or £30. in furniture is not very clearly proved, but the Lord Ordinary is satisf must have been from £20 to £25, and on the whole, therefore, he has total loss at £50, for which decree has been given.

"It does not appear that the defenders required the pursuer to ab claim of damages as a condition of paying the other sums for which been given, and the Lord Ordinary has therefore allowed bank intere the sums consigned."

[1] Walker v. Milne and Others, June 10, 1825, 2 S. 379.

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acted is competent. I have no doubt about that; indeed the statements on record are almost of themselves sufficient to establish the ground of action. But I have no doubt it was competent to prove the *res gestæ* by parole. It was a terminable arrangement, which might be ended at pleasure, and the lease of the house was no more of the essence of the bargain than if the pursuer had engaged a governess, or a tutor, or a carriage and horses, with the knowledge and approval of the trustees. To apply the restriction of proof to writ or oath to this case would be extravagant. The proof has been taken, and leaves no doubt at all on the fact of the arrangement having been made, and the house having been taken and furnished with the knowledge and approval of the trustees.

This being so, is there a claim for indemnity? I entertain no doubt, both on principle and on authority, that there is—that the arrangement necessarily included the condition that if the arrangement was terminated it should not be to the loss of one party. I agree with the Lord Ordinary as to the amount. This was an arrangement which, before it could be acted on in any way, implied considerable outlay on the part of Miss Dobie. She took a large house, and purchased furniture in order to carry out the arrangement to which she had agreed, and with the knowledge and approbation of the trustees. She lost by the abrupt termination of it, and I think is entitled to what the Lord Ordinary has awarded.

LORD COWAN and LORD BENHOLME concurred.

LORD NEAVES.—I concur with your Lordship, and would only remark on two points. First, I do not think that the summons can be said to be well laid, though it does in a way cover the claim now insisted in. Second, I think that the legal principle applicable to the case is this: that when parties are engaged mutually in promoting an object of common interest, and the expenses entailed in furthering that object are thrown on one of the parties, then when that expenditure fails of obtaining the end aimed at the party-disburser must be recompensed, as being the disburser for a common object. This is not the case of a contract of which specific implement can be enforced, but the circumstances are such as to bring it fully within the rule I have stated.

THE COURT adhered.

R. P. STEVENSON, S.S.C.—THOMAS M'LAREN, S.S.C.—Agents.

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Bruce v. Bruce and Another.

JOHN BRUCE AND OTHERS, First Parties.—*Moncreiff.*
ROBERT BRUCE AND THE EARL OF ZETLAND, Second Parties.—*Adam.*

Church—Assessment—Statutes 17 *and* 18 *Vict. c.* 91 (*Valuation of Lands, Scotland*) *Act*, 1854), *sec.* 33, *and* 31 *and* 32 *Vict. c.* 96 (*Ecclesiastical Buildings Scotland*) *Act*, 1868), *sec.* 23—*Real and Valued Rent—Merksland.—Held* (*dub.* Lord Justice-Clerk) that in a landward parish, in Shetland, the assessment for alterations and repairs on a manse fell to be assessed upon the heritors liable, according to the number of merksland held by them respectively, that having been the rule of assessment from time immemorial, and there being no special circumstances in the case to render that rule inequitable.

2D DIVISION. I.

THE parties to this special case were John Bruce of Sumburgh and another, trustees under the marriage-contract of Robert Bell, Esquire, advocate, Sheriff-substitute at Falkirk, and the now deceased Mrs Robina Hunter or Bell of Lunna, his spouse, and as such proprietors of the estate of Lunna, in Shetland, and Major Thomas Cameron Mouat, of Annsbrae and Garth, heritors of the united parishes of Nesting, Lunnasting, Whalsay, and Skerries, of the first part; and Robert Bruce, of Symbister, in Shetland, and the Right Honourable Thomas Earl of Zetland, also heritors of the said united parishes, of the second part. The following were the facts set forth in the special case:—

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"The manse of the said united parishes is situated at Nesting. I built in 1778, and the expense of building it was assessed and im by the presbytery of Lerwick upon the heritors according to their nu of merksland.

"From time immemorial the expense of necessary repairs upon th manse has been assessed upon the heritors according to the numl merksland.

"In the beginning of the year 1870 the heritors of the said united pa were required by the presbytery of Olnafirth, in terms of a remit the Court of Session, to execute certain additions, repairs, and alter on the said manse, and proceeded to do so.

"A statement was laid before a meeting of the heritors by their shewing that the sum required for executing the said additions, re and alterations on the manse was estimated to amount to £1007, 9s The meeting unanimously agreed to impose an assessment for this am but the heritors present at the meeting being divided in opinion o question whether the assessment should be levied according to th rent of the respective heritors, or per merkland, according to pre practice, the meeting resolved to present a special case for the opini the Court.

"As appearing from the valuation-roll for 1871-1872 the total am of assessable rental in the united parishes is £2267, 7s. 2d.

"The following is a note of the valuation of each heritor in the u parishes, and of the proportion of the said sum of £1007, 9s. 9½d. pay by him if the assessment be imposed according to the real rent:—

"Mr Bruce, . .	£1327 0 2	£589 13 0
"The Lunna Trustees, .	919 4 6	408 9 1
"Earl of Zetland, . .	17 10 0	7 15 6
"Major Cameron Mouat, .	3 5 0	1 8 10
"Robert Gaudie, . .	0 7 6	0 3 4
	£2267 7 2	£1007 9 9

"The following is a note of the number of merksland possessed by of the heritors, and the proportion of the said sum of £1007, 9s. 9 payable by him if the assessment be imposed according to the numb merks:—

"Mr Bruce, . . .	565	£683 15 4
"The Lunna Trustees, . .	253⅜	306 15 9
"Earl of Zetland, . .	11⅛	13 18 4
"Major Cameron Mouat, . .	2	2 8 4
"Robert Gaudie, . .	⅜	0 12 0
Total, . .	832⅜	£1007 9 9

"Robert Gaudie is a pauper lunatic.

"The parties hereto are agreed that the said united parishes are enti landward.*

* By the 33d section of the Valuation of Lands (Scotland) Act, 185 and 18 Victoria, cap. 91, it is, *inter alia*, provided,—"Where in any cou burgh, or town, any county, municipal, parochial or other public assessm or any assessment, rate, or tax under any Act of Parliament, is authorised t imposed or made upon or according to the real rent of lands and herit the yearly rent or value of such lands or heritages, as appearing from valuation-roll in force for the time under this Act, in such county, bu or town, shall, from and after the establishment of such valuation the be always deemed and taken to be the just amount of real rent for the purp of such county, municipal, parochial or other assessment, rate, or tax, and the s

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ce 1855 a valuation-roll has, in terms of the Valuation Act, 1854, ade up annually in Shetland, in which the yearly rent or value of ls and heritages belonging to the heritors in the said united parishes n regularly entered." *

following questions of law were submitted for the opinion and nt of the Court:—"Whether the assessment for the additions to and and alterations on the manse of Nesting falls to be imposed upon itors liable therefor according to the number of merksland held by spectively? Or, whether the said assessment falls to be imposed ng to the real rent of the lands and heritages, belonging to the ritors as appearing from the valuation-roll in force for the time, he Valuation of Lands (Scotland) Act, 1854?"

ed for the first parties;—In a purely landward parish the valued always taken, unless there is something to take the parish out of eral rule, such as a village possessed by feuars, a railway company there is no such disturbing element here. Then the assessment parish has always been according to the valued rent, and to change l assess according to real rent would be very hard upon some of itors. The Ecclesiastical Buildings and Valuation Acts do not ny alteration in regard to assessments of this nature, and do not assessment by real rent where it was not so before.[1]

ed for the third and fourth parties;—The assessment should be ccording to real rent because (1) if taken according to merksland lts are unjust to the heritors, for Mr Bruce would have to pay of his rent, whereas the Lunna trustees would only have to pay d; and (2) the nature of the assessment is an assessment on real d the only reason why it was ever put on the valued rent was

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assessed and levied according to such yearly rent or value accordingly, or usage to the contrary notwithstanding, provided always, that when of any parish church heretofore erected has been allocated among the according to their respective valued rents, as appearing upon the present -roll, all assessments for the repair thereof shall be imposed according to ued rents."

ection 23 of the Ecclesiastical Buildings (Scotland) Act, 1868, 31 and ria, cap. 96, it is enacted,—"All assessments for the purpose of defraying connected with the building, rebuilding, or repairing of churches or or the designing or excambing of sites therefor, or the designing or ex- of glebes, or additions to glebes, or the designing or excambing of sites ions to churchyards, and the suitable maintenance thereof (including ing, rebuilding or repairing of churchyard walls) in any parish, shall be in manner after mentioned, upon all lands and heritages within such cording to the yearly value thereof, as the same shall appear in the -roll or rolls in force in such parish at the time when such assessments , or according to the valued rent of such lands and heritages as the be; and such assessment shall be imposed and recovered according to nt law and practice, provided always that when the area of any parish eretofore erected has been allocated among the heritors, according to ective valued rents, all assessments for the repair thereof shall be im- such heritors according to such valued rent."

ors of Campbelton v. Rowat, 1775, M. 7921; Feuars of Crieff v. 1781, M. 7924; Ure and Carnegy (Forfar case), 1793, M. 7929; nd Others v. Heritors of Peterhead, 4 Paton's App. 356; Boswell v. (Mauchline case), June 15, 1837, 15 S. 1148; Marwell v. Endon, 1816, App. 279; Bell v. Earl of Wemyss, 1805, M. App. *voce* Kirk, No. 3; lis Parishioners, 1712, M. 5131; M'Farlane v. Monkland's Railway Co. 864, *ante*, vol. ii. 519; Highland Railway Co. v. Heritors of Kinne 15, 1870, *ante*, vol. viii. 858.

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because at the time when that was done the valued rent was the re
rent.

At advising,—

LORD COWAN.—The established rule is that the valued rent must be taken
the basis of assessment in landward parishes, except where special circumstan
can be stated which would render that rule altogether inequitable. If assessm
according to the valued rent would leave a considerable part of the property of
parish unaffected by the assessment, then the real rent must be taken. This is
rule which has hitherto been acted on, and the cases referred to all support both
general rule and the alteration in modern times which has been introduced fr
the special position or circumstances of this parish. For example, in the Pe
head case there was a populous village united with a landward parish.
decision of the House of Lords in that case has always been regarded as fix
the rule in all cases of a similar kind. So in the case of Mauchline it was l
that where there is no way of getting at the parties who really hold property
the parish except by the real rent, that must be taken as the basis. Without g
into the other cases, I shall only refer your Lordships to the case of the H
land Railway Company, 15th June 1870, in which all the former cases were c
fully considered. In the opinions there delivered in pronouncing judgmen
was stated—"The import of the decisions referred to by the parties appear
be that where equity as regards the incidence of the tax on the assessable subj
within the parish cannot be secured by taking the valued rent, and can be reac
only by taking the real rent as the basis of apportionment, this last must be adopte
In that case the Highland Railway Company were large proprietors who wo
have almost entirely escaped if the valued rent had been taken, and it
clear that the principle of the Peterhead case applied. In the present case th
is no large village possessed by feuars whose property would be unaffec
if valued rent were taken. There is no railway in the parish, and in short
peculiarity whatever in the circumstances. All that is said is that if we t
the valued as compared with the real rent a greater assessment will be l
on some heritors in the one case than in the other. But the mode of assessm
by merksland has existed for time immemorial in this parish, and I see no g
reason stated why it should be interfered with. It is said that the real rent
a more equitable basis, but it is not explained that any change has taken place in
circumstances of the parish, except it may be that some lands have been m
improved than others; but I do not think that because a property happens
have been improved, it may be at great expense, a larger burden should be laid u
it than has been by use and wont. Again the relative value of lands is to so
extent affected by the mode of assessment. The burdens affecting an estate
always taken into view, and accurately estimated in sale and purchase;
basis on which assessments are imposed should not be changed unless good ca
is shewn. In this case I think it would be an unjust interference with a
known principle of rating for us to substitute another.

LORD BENHOLME and LORD NEAVES concurred.

LORD JUSTICE-CLERK.—Looking to the nature of this case I have g
doubt as to some of the topics adverted to by your Lordship, although at
same time I am not inclined formally to dissent from the judgment. In
first place, I think that the clause in the Valuation Act which is referred
makes it imperative to adopt the value from the valuation-roll only whe
statute excludes the valued rent, and that this is not an assessment within
clause. I think, however, that it is in its own nature an assessment laid on
real rent or value of the lands, and in laying the assessment the nearer we c
to the real value the nearer we come to the true principle. I do not give
weight to the Peterhead case and other cases previous to the Valuation Act,
cept in so far as they lay down the rule that the basis of assessment should
proportional to the real value of the lands. The reason why in these cases
valued rent was taken as the basis of assessment was, that it was then im
sible, without great expense, to ascertain the true value of the lands. N

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rever, we consider this question with the valuation-roll from year to year ly to our hand, and the question is whether or not we should apply it. It is l that it would be unjust to act upon the value in the valuation-roll. But I ld ask, which is more likely to be just, the valuation of the time of Charles or the present valuation-roll? Before the time of Charles II. there was the extent—a valuation so old that its origin is lost in antiquity. It might have n unreasonable in these days for any one to have said "we will not take the extent, but we will have a correct valuation," but when a correct valuation made in the reign of Charles II. it would have been in the highest degree asonable had the Courts said that they would only adopt the new valuation n some ratepayer would otherwise escape, and that special cause must be m for adopting it. Why, in the present question, we should refuse to take true value, and go back to the old, I cannot see.

is said that assessment by the valued rent leads to no inequality. The is that it makes the difference of £100 to one man, and certainly that is an ality.

ut an argument of great weight is that the valued rent has become a well n element in the calculation of burdens and the transfer of land. In so l an interest as this I am unwilling to press my views, but I want to guard lf in case the question should arise on a larger scale.

THE following interlocutor was pronounced:—"The Lords, having heard counsel on the special case, are of opinion and find that the assessment for the additions to and repairs and alterations on the manse of Nesting falls to be imposed upon the heritors liable therefor, according to the number of merksland held by them respectively, and not according to the real rent as appearing from the valuation-roll in force for the time under the Valuation of Lands (Scotland) Act, 1854, and decern: Find the parties of the first part entitled to expenses, and remit," &c.

NEILSON & BELL, W.S—JOHN PHIN, S.S.C—W. N. FRASER, S.S.C.—H. G. & S. DICKSON, S.S.C.—Agents.

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Dean v. Walker.

DAVID DEAN, Pursuer.—*Fraser—Robertson.*
WILLIAM WALKER, Defender.—*Trayner—J. A. Reid.*

xpenses—Jury Trial.—Circumstances in which the Court found a pursuer jury trial, who had failed in four out of five issues, neither entitled to nor e in expenses.

bserved (*per* Lord President), that where in a jury trial expenses are to be led according to the success of parties, the mode of effecting that division is merely haphazard division, giving a certain proportion to one party and so h to the other, but it must be ascertained through the Auditor what portion ie expenses is applicable to each point.

1ST DIVISION. Ld. Ormidale. B.

this action of damages, raised by David Dean against William ker, for defamation, the case was tried before Lord Ormidale and a upon issues and counter issues. The 1st, 2d, 3d, and 4th issues rred to letters sent by the defender to pursuer, charging him with ury and subornation of perjury; and the fourth to a letter represent- the pursuer to be a frequenter of brothels. The counter issues raised question whether the pursuer had committed perjury and suborna- of perjury.

he jury by a majority returned a verdict for the pursuer on the 4th e, assessing the damages at £300, and upon the other issues and all counter issues for the defender.

he Lord Ordinary afterwards (22d February 1873) decerned against the

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defender for £300, and found neither party entitled to expenses, the one against the other.*

The defender reclaimed, and argued;—The expenses ought to be apportioned according to the success of the parties in their various issues. This was peculiarly a case for doing so, the defender having been successful in all his counter-issues, and on all the pursuer's issues as well, except on a single point.[1]

The pursuer argued that the Lord Ordinary had followed the only reasonable and practicable course in the circumstances.

At advising,—

LORD PRESIDENT.—I do not think that there is any rule that affords a safe guide in determining a question of this kind.

The so called rule said to be laid down in the cases of Stoppel and Johnston goes no further than this, that where the Court are of opinion that the expenses should be divided according to the success of the parties, the mode of effecting that division is not merely a haphazard division, giving a certain proportion to one party and so much to the other; but the mode is to ascertain through the Auditor's department what portion of the expense is applicable to each point,

* "NOTE.—The parties having acquiesced in the verdict of the jury in this case there was no difficulty in applying it.

"But as regards the question of expenses the parties were anything but agreed. While the pursuer insisted that he ought to be found entitled to expenses generally, subject to some modification, the defender maintained that expenses ought either to be divided between him and the pursuer according to the number of issues on which they were respectively successful, or at any rate that each should be found entitled to the expenses which might be ascertained to have been incurred by him in reference to those parts of the litigation in which he was successful.

"After full consideration the Lord Ordinary has come to the conclusion that the best, if not the only practicable, solution of the question of expenses, was to find, as he has done, neither party entitled to expenses, the one against the other. Having presided at the trial, he is satisfied not only that it would be difficult, if not impossible, consistently with justice, to divide or apportion the expenses as suggested by the defender, but that it would not be right to do so, even if practicable, keeping in view the large sum of damages to which the jury has found the pursuer entitled. It is, besides, impossible for the Lord Ordinary to overlook the circumstances in the conduct of both parties, and especially in that of the defender, which led to the litigation, and having regard to these circumstances, as well as the nature of the verdict, he believes the result he has arrived at is the correct one.

"That the Lord Ordinary is not bound by any fixed rule in regard to the matter of expenses, but is entitled to take into consideration the whole circumstances, a knowledge of which he has acquired from the case having depended before him all along, is clear from the precedents. Thus, in Rae v. M'Lay, 29th November 1852, 15 D. 30, it was observed by the Court that in the matter of expenses they would be guided mainly by the Judge who presided at the trial; in Roger v. Dick, 4th February 1864, 2 Macph. 591, the pursuer was found entitled to expenses subject to modification, although he had got only a verdict for 1s. of damages on one of four issues, the verdict on the other three issues being for the defender; and in Duncan v. Balbirnie, 3d March 1860, 22 D. 934, although the pursuer had got a verdict for 1s. of damages for defamation, no expenses were given either to him or the defender."

[1] Stoppel v. M'Laren's Trustees, Dec. 18, 1850, 13 D. 345; Johnston v. Smellie's Trustees, July 15, 1856, 18 D. 1234, and the cases referred to in the Lord Ordinary's note.

d if we are to disturb the Lord Ordinary's interlocutor we must do something [this sort. No. 131.

I think we must not do so unless we are quite prepared to carry out the ision of the expenses on this principle to its legitimate issue. I am not pre- ed to say that we should do this, because it is quite possible that on the ditor's report a very small portion of the expenses will appear to be applicable the fourth issue, on which the pursuer succeeded. June 26, 1873. Dean v. Walker.

The case is a very peculiar one, and it is difficult to understand on what inciple the jury came to a conclusion in favour of the pursuer. The charge de by him against the defender, and in regard to which they found in his vour, is not much more than the defender admitted on his oath, and at the me time that the jury holds this charge to be unfounded they brand him as perjurer by affirming the *veritas* of the charges set forth in the other issues. I not prepared to say, on the whole matter, that the Lord Ordinary's conclu- n is anything but reasonable, and in such a case I am disposed to give much ight to the opinion of the presiding Judge.

LORD DEAS.—I agree with your Lordship. The case is so peculiar that if we re to apply to it any general rule it would be apt to lead us astray. The pur- r has got very full damages on one issue out of five; but he not merely failed the other four issues, but he failed because the *veritas* of the charges against s had been established. On the other hand, it is impossible to dispute the ervation of the Lord Ordinary that the defender was very reckless in his ac- ations. Upon the whole, I think his Lordship's interlocutor with reference expenses is right.

LORD ARDMILLAN and LORD JERVISWOODE concurred.

THE COURT adhered to the interlocutor of the Lord Ordinary.

PHILIP, LAING, & MONRO, W.S.—W. G. ROY, S.S.C.—Agents.

GEORGE WEIR COSENS, First Party.—*Marshall.* No. 132.
RS CAROLINE LOUISA ANTOINETTE COSENS OR STEVENSON AND OTHERS, Second Parties.—*Lee.*

June 26, 1873. Cosens v. Stevenson, &c.

Husband and Wife—Annuity—Alimentary—Discharge.—A husband burdened ain lands with an annuity to his widow, declaring that it should be ali- tary and not assignable, and should be exclusive of the *jus mariti* of any band she might marry. He directed his trustees upon the death of his ow to convey the lands to A. The free rents of the lands were insufficient ay the annuity, and the trustees required to borrow money to pay it on the rity of the lands.

he widow and A agreed that she should disburden the lands for a cer- . sum, and that the trustees should on such payment convey the lands at to A.

n a special case by A and the trustees, *held* that the widow could not dis- ge the annuity, and that the trustees were not authorised to convey the ls to A.

HIS was a special case presented by George Weir Cosens of Kames . the trustees of the late Robert Cosens Weir of Bogangreen. 2D DIVISION. R.

he facts were thus stated in the special case:—By antenuptial con- t of marriage, dated 16th June 1865, the late Robert Cosens Weir of angreen bound himself, his heirs, executors, and representatives whom- er, to make payment to Caroline Louisa Antoinette Irwin, his then mised spouse, in case she should survive him, yearly, and each year ing all the days of her life after his decease, of a free liferent annuity 300; further, he bound and obliged himself and his foresaids to make

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payment to her, in case she should survive him, and there should be no living child of the intended marriage, and no issue of such child, of an additional free liferent annuity of £100, payable in the same manner and subject to the like condition as the annuity of £300; and it was declared that the said annuities should be paid to her exclusive of the *jus mariti* of her husband, in case she should enter into a second marriage, and the receipts for the same to be granted by her alone should be valid and sufficient. The contract contained a declaration in the following terms, viz.:—"And said annuities are hereby declared alimentary, and it shall not be competent for the said Caroline Louisa Antoinetta Irwin to sell, assign, or burden the same, and they shall not be affectable by the deeds or attachable for the debts of any husband to whom she may be married." In security of the annuities George Cosens Weir disponed to his intended wife his lands and estate of Bogangreen, in the parish of Coldingham and county of Berwick. By trust-disposition and settlement dated 12th May 1866, the said Robert Cosens Weir conveyed the said lands and estate of Bogangreen and the lands of Alemill, as also his whole other estate, heritable and moveable, to trustees for the purposes following, viz.:—First, to pay debts, &c.; second, to make payment to his said wife, in case she should survive him, in any event, of both the annuities of £300 and £100 settled upon her by their contract of marriage. The trust-deed contained a declaration in the following terms, viz.:—"And said annuity is hereby declared alimentary, and it shall not be competent for my said wife to sell, assign, or burden the same, and it shall not be affectable by the deeds or attachable for the debts of any husband she whom she may be married." . . . . Eighth, The trustees were directed, in case all the testator's children should predecease him, or after surviving him should predecease his said wife without leaving lawful issue, to pay the then free remainder of the moveable estate to her and her heirs, executors, and successors whomsoever, for their own absolute use and uncontrolled disposal, and to give to her during her life the free rents of the heritable estate; and lastly, the testator directed his trustees, on the death of his wife and all his children, without leaving lawful issue, to pay, assign, and dispone the then free remainder of the trust-estate, heritable and moveable, to his only brother, George Weir Cosens, and his heirs, executors, and successors whomsoever, for their own absolute use and uncontrolled disposal, and failing him, then to his, the testator's nearest heir absolutely. The marriage-contract and the trust-settlement were recorded in the Register of Sasines. Robert Cosens Weir died on 3d September 1867. There was no issue born of the marriage. His widow entered into a second marriage with Montagu Stevenson, late captain in her Majesty's 30th Regiment of Foot, residing at Fairfield, Bradford-on-Avon. The moveable estate was exhausted in paying the debts of the truster, and there was thus no free moveable estate available for payment to Mrs Stevenson under the last purpose of the trust-deed. Since the death of Robert Cosens Weir his widow had regularly received payment of the foresaid annuities, amounting together to £400, but the yearly income of the trust-estate was not sufficient to pay the same. [The deficiency was stated at the bar to be about £180 a-year.] The trustees were thus under the necessity of borrowing money from time to time, on the security of the trust-estate, in order to enable them to pay the annuities. The income and fee of the estate were thus being rapidly diminished, and the result would be that in the course of a few years the estate would be exhausted, and the annuities would cease. In this state of matters Mrs Stevenson, and George Weir Cosens, the first party, had informed the trustees that they had entered into an arrangement for the discharge

Mrs Stevenson of her right to the annuities in future, in consideration of receiving from the said George Weir Cosens the sum of £4500. The first purpose of the trust created by the said Robert Cosens Weir had been long ago implemented, and the trust had since existed only for the purpose of securing to the widow the said annuities. George Weir Cosens had required the trustees, upon production and delivery of such discharge by Mrs Stevenson, to convey to him the remainder of the trust-estate still in their hands, but they declined to do so, not being satisfied that under the terms of the foresaid trust-deed and contract of marriage they were entitled or bound so to convey. They did not admit the power of Mrs Stevenson and her said husband to discharge her claims under the foresaid contract of marriage and trust-disposition and settlement.[1]

A special case was accordingly presented to the Court by (1) George Weir Cosens, and (2) the trustees of the late Robert Cosens Weir and Montagu Stevenson.

The question of law was as follows:—"Whether the said Mrs C. L. A. Irwin or Stevenson, with concurrence of her present husband, has power to discharge provisions secured to her by the marriage-contract and trust-disposition and settlement above recited, and to disburden the lands of Bogangreen, &c., thereof; and whether, upon production and delivery of a discharge by her, with concurrence aforesaid, in favour of the trustees, the said trustees are entitled and bound to convey the remainder of the trust-estate to the said George Weir Cosens?"

At advising,—

LORD JUSTICE-CLERK.—I think the contention on the part of the residuary legatee is untenable. The cases of Tod's Trustees and Kippen have no application. What was decided in those cases was that, where the interest under a trust has come to be vested in one beneficiary, the conditions of the trust may be dispensed with, especially when no machinery has been provided to enforce them. In both cases the trust was to come to an end on the purchase of an annuity, and the condition of not being assignable flew off. This case is quite opposite. The condition in the marriage-contract is perfectly legal and effectual. Not only is the annuity declared alimentary, but machinery is provided to prevent its losing that character. I think it would be very dangerous to allow the annuitant to discharge her annuity in the manner proposed. It is said that there is considerable risk of the annuity failing. The interposition of the Court may hereafter be required in another form, but on this I say nothing.

LORD COWAN.—The cases of Tod's Trustees and Kippen proceeded on grounds which are detailed in the opinions of the Judges then delivered, and which your Lordship has now stated. Here we have to deal with entirely different circumstances. The expressions both of the marriage-contract and of the trust-settlement are most explicit in the limitations of the gift conferred by them. The annuity is declared alimentary, and is not assignable by the widow or any future husband she might marry. Now, I do not think that a husband, in thus providing for the aliment of his widow, is in any different position from that of a father conferring an alimentary provision upon his daughter, so as to provide for her comfortable and respectable maintenance for her whole lifetime, and to guard

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[1] *Cases cited*:—Tod v. Tod's Trustees, March 18, 1871, *ante*, vol. ix. 728; Kippen v. Kippen's Trustees, Nov. 24, 1871, *ante*, vol. x. 134; Lady Massy v. Scott's Trustees, Dec. 5, 1872, *ante*, 173; Torry Anderson v. Buchanan, June 2, 1837, 15 S. 1073; Pringle v. Anderson, July 3, 1868, *ante*, vol. vi. 982; Gordon v. Gordon's Trustees, March 2, 1866, *ante*, vol. iv. 501; Smith's Trustees, May 29, 1873, *ante*, p. 630; Rennie v. Ritchie, April 25, 1845, 4 Bell's App. 221.

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it against her own improvidence or that of her husband. This may be effectually done by a father, and I think it may be by a husband. The question then is, whether an annuity thus protected is to be deprived of its alimentary character, and to be sold for £4500, without any condition that what is substituted shall be alimentary and protected to the same effect as the annuity. On principle I am clear that any discharge by Mrs Stevenson of her annuity would not have the effect of disburdening the lands and discharging her late husband's trustees. We are told that the annual proceeds of the estate are not enough to provide for the annuity, and that the fee is being gradually eaten away. We should have had the facts stated more fully. But there are ways in which the ultimate destruction of the annuity may be prevented; if not by means of a private sale of the lands, with consent of all the parties interested, at any rate by a judicial sale in a ranking and sale. Then the true value of the estate would be ascertained and realised, and the proceeds would be available to purchase an annuity, it may be of smaller amount, but which, at sight of the Court, would be made subject to the same conditions as the annuity payable by the deed.

LORD BENHOLME and LORD NEAVES concurred.

THIS interlocutor was pronounced:—"The Lords are of opinion, and find that Mrs Stevenson has no power, with concurrence of her present husband, to discharge the provisions secured to her by the marriage-contract and trust-disposition and settlement referred to in the special case, nor to disburden the lands of Bogangreen, &c., thereof; and further, that the trustees are not bound nor entitled, upon production and delivery of a discharge by Mrs Stevenson, with concurrence foresaid, in their favour, to convey the remainder of the trust-estate to George Weir Cosens, and decern."

J. & J. TURNBULL, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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DONALD MACVEAN, Pursuer.—*Sol.-Gen. Clark—Fraser.*
ALEXANDER THOMAS MACLEAN AND OTHERS, Defenders.—*Millar—Adam.*

Obligation—Conditional Discharge—Process—Sist.—In an action by a tenant against the representatives of his landlord for payment of certain bills of exchange granted by the latter, the defenders founded on a letter by the tenant in proof of an alleged agreement by the tenant not to ask payment of the bills in consideration of a renewed lease being granted to the tenant. The pursuer, in reply, stated that the lease was threatened to be reduced by the next heir of entail in possession of the estate as in contravention of the entail. After a proof, *held* (*dis.* Lord Benholme) that a *pactum de non petendo* had been proved, and that the pursuer being still in undisturbed possession of the farm was not *in hoc statu* entitled to decree, reserving all further questions on the merits.

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SEE previous report, p. 506.

A proof was led before Lord Neaves, the import of which sufficiently appears from his Lordship's opinion.

At advising,—

LORD NEAVES.—This case is attended with considerable difficulty and delicacy—difficulty as to the matters of fact to be ascertained, and delicacy as to some of the points of law involved. The pursuer's action in itself was rested upon simple and clear grounds. He sued the late Ardgour for payment of £1000, contained in two promissory-notes granted by him to the pursuer in March 1868 for £500 each. The notes were produced, and, not being prescribed, they were *prima facie* due. Ardgour, who was alive when the action was brought, and who survived the closing of the record, did not dispute the original constitution of the debt, and did not allege payment of it. But he defended himself on this ground—that in 1868, at the time when the bills were granted, the pursuer was

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his tenant in the farm of Sallachan on a lease, and that it was afterwards arranged between them that the pursuer should get a new and longer lease at the same rent in consideration of his cancelling Ardgour's debt to him upon the notes libelled. In evidence of this alleged arrangement the defender, the late Ardgour, produced a letter which he alleged the pursuer had written to him in reference to the new lease. That letter was in these terms:—"Saturday evening.—In looking through my papers to-day I find that all the documents I have of any consequence are lying in the bank safe, amongst others your promissory-notes for £1000, and if you have any doubts of my integrity you had better keep the lease until I give you a sufficient guarantee that I'll never claim the above. I called up this evening but could not find you."

This letter, the defender contended, proved that an agreement had been made by the parties in connection with the new lease, that the pursuer would never make a claim upon the promissory-notes in question, and that it was understood that the notes and the lease were to be exchanged, but that if the lease was delivered without delivery of the notes, which were not at hand, the pursuer was, if required, to give a guarantee that he would never claim on them, or, if Ardgour had no doubts of the pursuer's integrity, he might trust to that without guarantee. The defender alleged that having no such doubts he had delivered the lease without requiring a guarantee, and without again demanding delivery of the notes, relying upon the letter as sufficient evidence of the agreement. In reply to this defence the pursuer made a very elaborate statement in his revised condescendence, particularly in articles 3 to 6 inclusive. The statement in article 5 deserves special attention,—(Cond. 5) "In the beginning of April 1869 the defender offered to give him a lease for nineteen years of Sallachan, from Whitsunday 1869, at a rent of £300, provided he would discharge the debt for £1000 contained in the promissory-notes. In consequence of this offer the pursuer wrote to the defender a letter in the following terms:—'Alexander Maclean, Esq. of Ardgour. Dear Sir,—According to your request I now make you an offer of three hundred pounds of yearly rent for the farm of Sallachan, as presently possessed by myself, the lease to endure for nineteen years from Whitsunday first 1869, and I am to give up the promissory-notes for the £1000 as you proposed.—I have the honour to be your obedient servant, DOND. MACVEAN.' To this letter the defender replied accepting the offer, and the letter quoted in the defences was written in answer to the defender's acceptance." But the pursuer goes on to say that this arrangement came to an end in the manner explained in the 6th article of his condescendence,—(Cond. 6) "After writing the letter quoted in the defences the pursuer went to Fort-William and consulted the late Mr M'Gregor, writer there, who was also local agent for the defender, as to whether a lease at a reduced rent, for which a grassum of £1000 had been paid, would be binding on the defender's heirs of entail, and he received an opinion to the effect that it would not. He then consulted Mr D. S. M'Laren, writer, Fort-William, on the same point, and received the same opinion. In consequence of this he, on his return to Sallachan, called on the defender, and informed him that he had been advised that the lease would not be binding on the defender's successors, and that therefore the transaction could not be gone on with. To this the defender replied that it was all right, and he could do as he pleased. He, however, declined to enter into the transaction further. Nothing further was said upon the subject of a lease until the beginning of January 1870, when, in consequence of a report that the pursuer was looking out for another farm, the subject was resumed by the defender, who wrote him a letter in the following terms:—'Private. Ardgour H., 1st Jany. /70. Dear MacVean,—I have by no means given up the intention of giving you a new lease of Sallachan. I hope it is not too late to do so. I should be sorry to lose you as a tenant and neighbour.—Yrs. truly, ALEXR. MACLEAN. Donald MacVean, Esq., Sallachan.' In consequence of this letter he called upon the defender, when the defender offered to give him a lease of the farm at the old rent of £361, 6s. 10d. for twenty-one years, as from Whitsunday 1869. . . . He agreed to the defender's offer of a twenty-one years' lease as from Whitsunday 1869, and the lease was accordingly extended and executed on 20th January 1870, and under this lease

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he now possessed the farm of Sallachan." The pursuer then declined to go on with the transaction, and nothing more took place till the beginning of January, in which month the new lease was entered into,—entered into no doubt for the period agreed on, but not at the reduced rent, for the rent agreed on was the then existing rent of £361. Now, this is his explanation: that the letter which has no other date than that of "Saturday evening" cannot be available to the defender in this case, because in reality it applied to a totally different transaction, which had taken place in April 1869, and had so far been completed, but was afterwards departed from, and in which it was part of the transaction that the bills were to be given up. But in that negotiation the rent mentioned was £300 instead of £361, and upon finding, quite unexpectedly, as the pursuer contends, that this was an invalid contract, he, although he had been corresponding about it for some time, retired from it, and consequently the transaction fell through, and the letter of Saturday evening, which had reference to it alone, ceased to be binding when the new lease was entered into in January 1870. Besides this letter of Saturday evening, other circumstances, to which I shall afterwards refer, were founded on by the defender in support of his statement, and in particular the fact that the pursuer, when written to by the defender's agents to furnish a statement of his claims against the defender, brought forward no other debt than one of £300, contained in another promissory-note.

The Lord Ordinary, when the case came to be debated after the closing of the record, and after the death of the original defender, allowed the parties before answer a proof of their respective averments, and on advising a reclaiming note the Court adhered. In doing so the Court did not overlook the delicate nature of the point of law thus raised as to the competency of parole proof. But they thought themselves, in the circumstances, bound to allow an investigation. On the one hand, no doubt, the pursuer had his documents to found on as establishing his debt; but, on the other hand, the defender had a document to rely on of a very peculiar kind—a document under the hand of the pursuer, which, if it referred to the transaction which led to the new lease, seemed clearly to infer some obligation on the part of the pursuer not to make a claim on these bills. That document referred to a lease as about to be delivered, and it indicated very plainly that although the lease might be delivered and the bills not delivered, this was not to infer a claim upon the bills as competent to the pursuer. It is certain that a lease was granted and delivered to the pursuer in January 1870, and although the letter of Saturday evening does not explicitly shew that the lease there referred to was the one of January 1870 which was executed, and although there was no such date to the letter as unequivocally connected it with that transaction, yet that uncertainty was the result of the pursuer's unbusiness-like conduct in putting an imperfect date and otherwise using ambiguous language; and, on the other hand, the fact remained that the letter of Saturday evening was left in Ardgour's hands, and that its terms called imperatively for explanation to clear them up and take off their effect.

The proof having now been taken, it is our present task to state our opinion of its import as far as we can, and to say what course shall be taken. In support of the defender's allegation that the letter of Saturday evening was written in reference to the new lease of January 1870 there is not much direct evidence, unless it be the defender's own statements during his lifetime, before the action came into Court. But it seems expedient in these circumstances to look at the pursuer's proof as to this matter, for if he has sufficiently proved that the letter had reference to another and earlier transaction, and a totally different state of things, this may put an end to the whole case. The pursuer states in his deposition these facts,—(1) That before the January lease was concluded,—in fact a considerable time before,—there was a proposal that Ardgour should give him a lease for nineteen years at the rent of £300 a-year. (2) He says that this proposal was first spoken of in the beginning of 1869. (3) That the proposal was made at Ardgour House, and that in answer to the proposal the pursuer agreed to it, and a verbal bargain was concluded. (4) That this bargain was shortly afterwards departed from, also verbally, in consequence of the pursuer having when in Fort-William consulted Mr M'Gregor, Mr Mackenzie, and Mr M'Laren,

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dvised him that it would not be a safe bargain, or binding on the heirs of , so that, he says, "I threw up the bargain at once." It is somewhat kable that in the first part of his evidence the pursuer makes no reference l to writings as passing between him and Ardgour as to the £300 lease. ys they made the bargain for the new lease verbally, and he threw it up lly. However, though there is a good deal of going backwards and for- s in the evidence I am not inclined to give much effect to that, for so may depend on the way in which questions are asked that we must give he evidence fair play. In the latter part of his evidence, when cross- ined by his own counsel, he gave another statement, being very nearly that on record. When asked about the letter of Saturday evening he tells w he wrote it,—"I wrote that letter to Ardgour in answer to a note from saying that he had written the lease, or the letter of lease as he called it, for) of yearly rent, to endure for nineteen years. I took that note back to our when I found it was not according to law to take a lease of that sort. ; letter from Ardgour to me was written in April 1869. (Q.) Did he ask in letter that you should deliver up the bills? (A.) Yes; I think he said thing about that. (Q.) What did he say? (A.) So far as I remember he e me that it was better that we should exchange the lease and the bills, or thing to that effect; I cannot remember the words. (Q.) What did you erstand him to mean by the lease? (A.) The letter of lease that he had ten out himself. (Q.) Had he given it to you? (A.) He had not given it, he had sent me that note saying it was ready. (Q.) Where are these notes? I brought them back to Ardgour when I told him that the transaction could be gone on with. (Q.) Was it in answer to these notes that you wrote that r? (A.) Yes; it was in answer to the note agreeing to give me the lease £300 for the farm of which I was then in possession. (Q.) Had he given that letter agreeing to give the farm at the rent of £300? (A.) He had me that note saying it was ready. (Q.) Upon what condition was he to you the farm at that rent? (A.) Upon the condition that I was to give up £1000. (Q.) That letter being in your possession, what did you refer to in letter No. 11 when you said that 'if you have any doubt of my integrity, had better keep the lease until I give you a sufficient guarantee'? (A.) I wanted him to keep the lease. (Q.) But you had it? (A.) No, I did not it. (Q.) Did you not say that you had the letter in your possession at time? (A.) I did not. (Q.) Had there been a letter of lease prepared by Maclean at that time? (A.) He said so in his note. (Q.) And you took note back to him? (A.) Yes, I took it back after I returned from Fort- liam. (Q.) Why did you not get up the letter No. 11 when you took back note? (A.) I never thought anything about it." Now, it is certainly arkable that the pursuer, after an exchange of missives on the subject—(he ing, as he says, made an offer, at Ardgour's request, for a lease at £300, and ing got Ardgour's acceptance, and then, in answer to that acceptance, having ten the letter of Saturday evening containing a very remarkable statement at the bills)—when he finds that that lease is challengeable, goes to Ardgour breaks it off, and gives up, as I understand, Ardgour's note to him, and does get up that letter which he had written in these circumstances, but allows gour from that time forward to remain in possession of that letter,—a letter ing such an equivocal meaning that it was impossible to tell from the face of he year in which occurred the transaction to which it referred; that he uld moreover leave the thing to stand on that footing, and be now obliged to e this elaborate explanation. Let us see what corroboration there is of it. he letter that he sent to Ardgour making the offer is not recovered (Ardgour it not, and it is not to be found); but the pursuer says he kept a copy of it, he produces a copy of it. It bears the date of April 1869. It is a rather arkable looking document, and it is attended with this peculiarity also, that says he took a copy of this proposal at the time when he made it, and then n after time he made a copy of that copy to send to his agent, and he says copy produced is one or other of these copies—either the first copy or the ond; but which it is he cannot tell. That is rather a curious circumstance

lease. Did he say what induced him to make that proposal? thought it was very hard on him to be paying me £50 a-year fo and he thought if we would come to an understanding about getti a reduced rent, and me giving up the £1000, it would accommo much." Now, there is no doubt that giving up the £1000 woul him, but the way in which Ardgour is made to put it is rather sin very probable, for what he says is, that it was hard to be paying £ he was wanting therefore to get rid of that burden. And how wa of the burden? He was to get rid of the burden of paying £50 a- or losing £60 a-year of what was got by the existing lease!—fo nature of it. The ultimate getting rid of the debt was no doubt but at present the difference was little if, instead of getting £3(£50, he lowered the rent to £300. It appears to shew a loss illogical way of putting it. But still something of that kind was in t pursuer, and let us see how he corroborates that story by evidence consulted oftener than once three men of business, Mr Mackenzie, and Mr M'Laren. The time for all this the pursuer positively sta 1869. Of that he has no doubt; the copy of one of his letters b Mr M'Gregor unfortunately is dead, and Mr M'Laren, the pursue though he speaks of a consultation, can affix no date to it, exce between the death of young M'Gregor and that of his father— occurring in February 1868, the other in the end of 1869. But is more precise, and it is very difficult to get over Mr Mackenzie "I went to Fort-William at Whitsunday 1868 to be associated in the late Mr M'Gregor. I was his partner in connection with t the bank, as well as with the writing business, from that time. Mr M'Gregor was agent for Ardgour, and also for Macvean." N are corroborated so far as this goes, because Mr Mackenzie went place of Mr M'Gregor's son, whose death took place in February says, "I remember Mr Macvean coming to the office one day in the summer of 1868, but I am not prepared to say at what time i I am quite sure it was in the summer of 1868. He saw Mr M first instance, and I was afterwards called in from a separate apa room in which they were. After being introduced to Mr Macvean, asked me if a sum of money paid by a tenant for a lease would lease in the case of an entail. I answered that it would; up M'Gregor turned round to Mr Macvean and said to him, 'Noo some similar expression." Mr Mackenzie is pressed particularly a "How do you remember that it was the summer of 1868 that the

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cause that involves this, that Mr Mackenzie had remained twelve months altother at Fort-William a partner in Mr M'Gregor's business and in the bank, nd had not seen Mr Macvean; whereas he says in the most clear manner that his was his first introduction—which is very probable—and that when he came this question was discussed and answered. That is no corroboration certainly the pursuer's statement as to the time; and if we believe this, how can we reconcile it with his statement, that (having got this information and learned this law of the law in 1868, if Mr Mackenzie is correct) he, in April 1869, in ignorance any such objection, entered into—first verbally and then in writing—an arrangement with Ardgour for a lease of that objectionable kind—not only extending the term, but lowering the rent by £60—and then, after that, found out (if Mr Mackenzie is right he knew it long ago) that it was an objectionable transaction, and so resiled? Now, if the pursuer is not corroborated as to that, it gives a very awkward appearance to the whole case, because it then comes to this, that there could not have been in April 1869 a proposal for a lease at £300, because he tells you he would not have entered into such a thing if he had known it was objectionable in law. If he knew it, the story is thrown into inextricable confusion; and if in 1869 there was a proposal for a lease, he having known in 1868 that the terms were objectionable, then the letter of Saturday evening, written in 1869, cannot have referred to a lease at a lower rent (for the pursuer must have given up any idea of that), but to a lease which, though not carried through in 1869, was allowed to go off and on, and was carried out in January 1870. That makes a very material difference on the pursuer's statement, for undoubtedly the pursuer's case is this—that this document of Saturday evening, which is capable of being considered as relating to the lease actually carried through, and has no date incompatible with that, can be explained away by the fact that at the time it was written there was a verbal and written agreement for the lease at £300, and that a diminution of rent was the consideration for which he agreed to abstain from claiming on the bills. If that is not true, it comes to this, that there are two competing transactions for explaining that letter, but that in so far as the rent is concerned from 1868 downwards after that interview with Mr Mackenzie there was the old rent exacted, whatever lease was executed. Then came the transaction, there being a lease for the old rent, carried through after some delays.

This letter, written and delivered to Ardgour for an important purpose, which in this transaction must be considered of special importance, was allowed to remain in Ardgour's possession, just as the bills were allowed to remain in Macvean's possession. The effect of that I shall afterwards speak to, but it appears a matter for the pursuer to clear up by proof; and if he has not made out his case then there comes to be considered how we are to dispose of it. Another thing with regard to this letter is that it speaks of a lease; but the pursuer says there was no lease, but only his own offer—his own copy of that offer—and the answer by Ardgour accepting that offer, which he says he returned. Now, if that be so, it just comes to this, that the letter was left—an important document, which it undoubtedly was—and it never occurred to the pursuer that, having written such a document, knowing the transaction had gone entirely off, he ought to have got it up, so as to prevent the possibility of its being used against him. That seems difficult to explain. There are other circumstances that we have to keep in view. The copy of this letter proposing the lease has made its appearance in a peculiar way. The pursuer had mentioned verbally to his agent, Mr M'Laren, that there had been a talk about the rent being £300, and Mr M'Laren had spoken to Ardgour about that before the action was raised. But although he had told that to Mr M'Laren, he furnished him with no evidence. Mr M'Laren tells us he had several meetings with Mr Macvean before he sent him the copy letter. "He did not at any of these meetings make any reference to such a letter being in his possession. (Q.) Can you recollect the terms of the letter in which he sent the copy to you? (A.) The substance of it was that the copy was evidently a discovery made by him after he had seen me on several occasions. (Q.) Did the thing so far come upon you as a surprise? (A.) It did. I said to him the first time he came to me afterwards that it was a very

£300 at that time, it would cut him out of the claim for the £10
chose to insist in it again. He asked Mr Mackenzie how long th
stand, and was told they would stand for six years. Another thin
to the bills is, that he tells us he got them up from the bank at
learned the transaction was a bad one. He says the bills were
back to him. That is curious, if he got them up, for this reason
he had made then a binding transaction, and when he went to get
was told that it was bad, so that he would have to keep the bi
There is no corroboration of this by any one. All these are pe
stances. Another fact is that the pursuer got no interest from th
lease. The lease began at Whitsunday 1869, and he got no intere
to that period on the £1000, though he got interest on other debt
by Ardgour. Then there is another statement that he made to M
that if the lease stood good he was not so much caring about the
these are indications somewhat at least in the direction of the d
that the lease of 1870 was granted in consideration of the debt u
being cancelled. Now, the result appears to me upon the whole c
—1st, that whilst the pursuer so early as the year 1868 was disp
a new and longer lease of his farm, and to make some concession a
due to him for that purpose, and whilst the late Ardgour was als
come to terms on the subject, it is not proved that Ardgour ever r
tained an offer for such a lease at a reduced rent of £300. 2d, Th
stage of their communications on the subject the pursuer ascertai
aware that a lease for a reduced rent and also for a longer period
serious objection to such a transaction, and that it is not proved t
was ever made the subject of mutual agreement except for payme
and existing rent. 3d, That, in particular, it is not proved that th
Saturday evening was written in April 1869, between the time—f
pursuer's statement—when a proposal for a lease had been agree
time when such a proposal was resiled from as alleged by the p
That while the pursuer avers that other documents passing betwe
were given up the document of Saturday evening was allowed to
late Ardgour's possession, and ought to receive effect as part of t
according to the true interpretation that may be due to it.

Then comes the question as to obligation under the bills. Now
of the case I think it is not clear that the notes were finally di
seems to me, from the bills being allowed to remain, and the letter
of the opposite parties, that the transaction is more like what in

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g; but if the heir fails in that the lease will stand. Now, I am not pre- d to give the pursuer both his lease and the bills, nor am I prepared to say he shall have neither. I think that, in these circumstances, after findings ıe effect aforesaid, we should sist procedure *in hoc statu*, and in course of the case must come to a point in one way or other, and we shall see what oposed to take place between those parties who are interested and who have r own evidence and views to bring forward, which may ultimately throw ; on the matter, and enable us to do justice in the case. I propose that your lships should sist procedure *in hoc statu*, prefixing some findings that will r the general views we take, but without conclusively determining the ques- whether there is a complete discharge of the bills, but only such a condi- al discharge of their obligations as constitutes a bar *in hoc statu* to the uer.

he LORD JUSTICE-CLERK and LORD COWAN concurred.

ORD BENHOLME.—I dissent from the judgment, on the ground that there no sufficient evidence that that Saturday night's letter was written after the mencement of the final negotiation—that which terminated in the lease. own impression is that it had been written with reference to some of the ner negotiations.

THE COURT pronounced the following interlocutor :—" Find that prior to the 20th day of January 1870 the pursuer was tenant of the farm of Sallachan, belonging to the original defender Alexander Maclean of Ardgour, under a tack dated 14th February 1865, for the period of seven years from Whitsunday 1865, but terminable at the tenant's death, if that event should sooner happen, and this at the money rent of £361, 6s. 10d. yearly: Find also that prior to the year 1870 the pursuer was creditor of the said Alexander Maclean in certain sums of money, and specially in the sum of £1000 contained in the two bills for £500 each: Find that in the course of the years 1868 and 1869 communings and correspondence took place between the said parties as to the said farm and the said bills, and, in particular, as to the pursuer's obtaining a new and longer lease of the said farm and the power of the said Alexander Maclean as an heir of entail to grant such a lease: And find that ultimately, on the said 20th of January 1870, the lease, of which No. 10 is a copy, was agreed upon and was executed between the parties for the period of twenty-one years at the old rent: Find that in the course of the said communings and correspondence the letter No. 11 of process, dated Saturday evening, was written and sent by the pursuer to the said Alexander Maclean, in which he refers to the bills for £1000 libelled, and to a lease as then ready to be delivered, and proposes that if Maclean has any doubts of his integrity he should keep the lease until the pursuer gave him a sufficient guarantee that he would never claim the said bills: Find it is not proved at what precise time the said note, dated Saturday evening, was written or sent; but find that the said letter was allowed to remain in the hands of the said Alexander Maclean, who produced it in this process as having been written in reference to the said lease of 20th January 1870: Find that after the execution of the said last-mentioned lease the pursuer, though he kept possession of the said bills, neither received nor claimed payment of any interest thereon subsequent to Whitsunday 1869, the commencement of the said lease, and that in March 1872, when requested by the agents for Ardgour to state the particulars of any claim he had against the said

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Alexander Maclean, he mentioned a debt of £300 as due to him on another bill, but did not mention any debt as due under the bills libelled: Find that in May 1872 the agents for Mr J. D. Maclean, the said Alexander Maclean's son, intimated to the pursuer that it was intended to challenge the lease of 20th January 1870 as granted *in fraudem* of the entail of Ardgour, and that thereafter, in July 1872, the present action was raised: Find, on the one hand, that the said letter No. 11 of process, dated Saturday evening, does not import a final discharge of the bills libelled; but find that it imports an undertaking and obligation by the pursuer of the nature of a *pactum de non petendo* that he would not make a claim upon the said bills as matters stood when the lease of 1870 was executed or agreed upon, or except in the event of the said lease being set aside: Find that, as far as appears, no challenge of the said lease has been brought by the heir of entail now in possession of the estate of Ardgour, and that the pursuer is as yet in the undisturbed possession of the said farm under the said lease: Find that, in these circumstances, the pursuer is not *in hoc statu* entitled to decree in terms of the conclusions of the summons: Therefore supersede further consideration of this process, reserving all further questions on the merits of the case, and all questions of expenses."

MURRAY, BEITH, & MURRAY, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 134.

June 28, 1873.
Stevens v. Campbell.

WILLIAM STEVENS, Petitioner.— *Watson—Harper.*
ROBERT CAMPBELL, Respondent.—*Scott—M'Kechnie.*

Diligence—Inhibition—Bill of Exchange—Vergens ad inopiam.—The creditor in a bill of exchange which was dishonoured at maturity received from his debtor two renewal bills in lieu of the original bill, which, however, he retained in his own possession under an agreement whereby, as he alleged, he was to be entitled "to do such diligence on the original bill as might be necessary for his security, in the event of other creditors doing diligence against the petitioner or his estate, or of circumstances emerging which should make it proper and advisable for the respondent to take steps that the debt due to him should be paid." The creditor presented a bill in the Bill-Chamber during the currency of the renewal bills, setting forth nothing more than that he was in possession of the original bill, and that it had been dishonoured at maturity, and craving letters of inhibition, which he obtained. In a petition for recall of the letters of inhibition, *held* that the bill upon which they proceeded should have set forth not only the original bill but also the two renewal bills, and a statement that the debtor was *vergens ad inopiam*, and the letters accordingly recalled.

Titles to Land Act, 1868, 31 *and* 32 *Vict. c.* 101, *sec.* 156, *schedule QQ thereof—A.S.*, 18*th Nov.* 1871.—*Observed* that the above statute had made no change upon the rule that a bill presented in the Bill-Chamber for the purpose of obtaining letters of inhibition must set forth fully and explicitly all the grounds of debt which justify the creditor in craving diligence.

1ST DIVISION. B.

ON 28th May Robert Campbell raised and executed letters of inhibition against William Stevens. The bill upon which the letters proceeded set forth "that the complainer is holder of a bill for the sum of £59, 10s. 9d. sterling, drawn by him upon and accepted by William Stevens, merchant, West Calder, dated," &c., "which bill when duly presented for payment was dishonoured by the said William Stevens."

Stevens thereupon presented this petition for recall of the inhibition, in which he stated "that the said inhibition is nimious, oppressive, and

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illegal; that it proceeded upon a bill which Mr Campbell had no right to have in his possession, and under which he had no claim against the petitioner; and that the petitioner is not only not *vergens ad inopiam*, but that his estate, heritable and moveable, if realised, would shew a large surplus."

It appeared that Stevens had accepted a bill drawn by Campbell upon him for the amount of £59, 10s. 9d., dated 6th December 1872, and payable on 9th April 1873. The bill was not paid at maturity, and an arrangement was entered into under which Stevens granted two new bills for £25, and £35, 3s. respectively in lieu of the first bill. These renewal bills were payable on 31st May and 31st July 1873 respectively, and the difference between £59, 10s. 9d., the amount of the original bill, and £60, 3s., the amount of the two new bills, was made up of a charge of interest, and of the expense of the stamps of the two renewal bills.

The original bill was retained by the respondent, Campbell, under an arrangement between the parties.

This arrangement was thus set forth by the respondent in his answers to the present petition:—"It was part of the said agreement, and the respondent entered into it upon the distinct understanding, that the original bill was not to be delivered up to the petitioner, but was to be retained by the respondent as the foundation of the debt thereby constituted, until the new bills proposed to be granted as aforesaid should be paid. . . . . The currency of the said bills was fixed at two and four months respectively, but it was agreed between the parties that it was to be in the option of the respondent to call up the whole debt at an earlier period. In accordance with the said agreement the petitioner allowed the original bill to remain in the possession of the respondent as the real document of debt. The effect and object of this arrangement was to enable the respondent to grant to the petitioner the delay sought for by him, without prejudice to his right to do such diligence on the original bill as might be necessary for his security, in the event of other creditors doing diligence against the petitioner or his estate, or of circumstances emerging which should make it proper and advisable for the respondent to take steps to secure that the debt due to him should be paid."

The respondent pleaded;—(1) The respondent having, in conformity with the agreement, and for the purpose set forth in the answers, retained in his possession the bill for £59, 10s. 9d. sterling, as a valid and subsisting document of debt, was, in the circumstances, entitled to have recourse to the inhibition complained of, and the same cannot be recalled until payment of the respondent's debt, or security therefor.

Argued for the petitioner;—By the law both of England and Scotland the acceptance of a renewal bill operates a suspension of the debt in the original bill until the maturity of the renewal bill, and no action is competent on the original bill until such maturity.[1] The renewal bills constituted novation of the debt. Even if there was no novation the debt was still current, and not past due. In either case the bill upon which the letters proceeded must bear that the debtor was *vergens ad inopiam*, or must set forth full and explicit reasons for the issue of the letters of inhibition.[2] The bill upon which these letters proceeded set forth that there was a debt past due contained in a bill which had been dishonoured at maturity, which was not a correct statement of the circumstances.

The respondent argued;—The agreement between the debtor and creditor was perfectly legitimate if proved, and was only to be rebutted by

[1] Byles on Bills, p. 235; Chitty on Bills, p. 126.
[2] Style Book, p. 530; A.S. Nov. 18, 1871.

creditor; and according to his allegation it did so remain under agreement as set forth in his answers to the petition as follows:— of the said agreement, and the respondent entered into it upon understanding, that the original bill was not to be delivered up to t but was to be retained by the respondent as the foundation of the constituted until the new bills proposed to be granted as aforesa paid . . . . The currency of the said bills was fixed at two and respectively, but it was agreed between the parties that it was option of the respondent to call up the whole debt at an earlier The effect and object of this arrangement was to enable the respon to the petitioner the delay sought for by him, without prejudice to do such diligence on the original bill as might be necessary for h the event of other creditors doing diligence against the petitioner or of circumstances emerging which should make it proper and adv respondent to take steps to secure that the debt due to him sho Now, no doubt that is a very peculiar arrangement, and if it w to investigate the matter some questions of considerable nicety with regard to the burden and mode of proof. But in the view of this case it is not necessary to decide any of these points, be ing the statements of the respondent to be true, the question a justified in using the diligence now sought to be recalled. It thought that some novelty was introduced by the "Titles to Land 156, and relative schedule, to which I shall afterwards refer. T which the letters of inhibition proceeded set forth that the comp spondent here, was the holder of a bill for £59, 10s. 9d. sterling, duly presented for payment, was dishonoured. That is the whol which inhibition is prayed for and obtained. The inhibition is dishonoured bill, that is to say, on a liquid document of debt past that does not truly represent the position of the parties with rega for £59 odds, even according to the statement of the respondent h answers. Even upon his own statement he was only entitled to on the old bill in the event of other creditors doing diligence, "stances emerging which should make it proper and advisable for th to take steps to secure that the debt due to him should be paid."

Putting out of view the provisions of the "Titles to Land what would have been the ordinary procedure in obtaining lett tion on this bill? When a bill for letters of inhibition was pres Bill-Chamber with a past due bill it was not necessary to state stated in the bill here. But when the debt was not yet due and

n necessary for the creditor to have set forth the circumstances which ow divulged in his answers to the petition.
uestion thus arises, has the Act of 1868 made any change in the prac- uis respect. I am of opinion it has not. In section 156, no doubt, a m is introduced. The schedule referred to in that section proceeds very the same form as was followed prior to the passing of the Act, being ıewhat shorter. Still the names and designations of the parties must , and the document upon which the diligence is to proceed must be set forth. This statute, although it makes no mention of bills for f inhibition, has certainly not done away with these bills. In the Act ınt of 18th November 1871, passed in pursuance of the power given us .ct, we provide "that the mode of obtaining warrant for signeting letters ition in the form mentioned in section 156 and schedule (QQ) of the recited Act, shall be by production of a *fiat ut petitur* duly obtained ll-Chamber, on a bill presented along with a proper ground of debt, or h a depending summons on which the inhibition is to be raised." The ; of Sederunt provides also that this regulation is not to apply to inhibi- eeding on a warrant to inhibit contained in a summons, because such ns are sufficiently warranted by the summons having passed the Signet. ile a bill is said not to be necessary where the inhibition is to follow on ns containing warrant to inhibit, it seems clear that it is essential where ence proceeds on a document of debt. That being so, if the ground of ıot simply a mere document of debt, which is past due, then it is evi- ; the bill must bear some additional statement. If a bill accordingly be ome future date, the statement that the debtor is *vergens ad inopiam* inserted before the creditor is entitled to obtain his diligence. In this bill for the letters of inhibition should have contained a full and ex- tement of the facts as they stood, especially seeing that they are by no nple. I am therefore of opinion that this inhibition should be recalled.

Deas.—The creditor in this case had in his possession a past-due bill, bills granted in renewal thereof,—the original bill having been retained y of his debt. In that state of matters he was quite entitled to have letters of inhibition, but I agree with your Lordship that, in order to ought to have presented a bill setting forth not only the original bill, the two renewal bills, and that the debtor was *vergens ad inopiam*, he was justified in demanding security for a debt not yet due. Unfor- the agent mistook the manner in which the diligence should have been or and obtained, and the inhibition must therefore be recalled. I am ised at the mistake, much misunderstanding having prevailed as to the the statute; but we cannot help the result.

Ardmillan.—It is settled in the law both of England and of Scotland, holder of a bill cannot do diligence upon it, after it has been renewed, ıe currency of the renewal bill. It is equally settled that a creditor in n of a bill, the term of payment of which has not arrived, may do upon it in security of his debt, but only upon an allegation that the *vergens ad inopiam*, or of some other important emerging circumstance, him to ask security for his own protection.
s case the creditor had three bills in his possession, the two last being doubt renewals of the first. In my opinion the effect of taking these bills was to postpone the term of payment of the original bill, and con- r, when these letters of inhibition were applied for the debt contained ill was not yet due. In these circumstances it appears to me that the in making his application for inhibition, was not entitled to set forth ıal bill alone, and conceal the fact of the existence of the renewal bills. ith Lord Deas in thinking that the creditor was entitled to ask for in- in security of his debt, and that the letters of inhibition would have perly issued if they had set forth circumstances relevant and sufficient t that it was necessary for him to claim protection. If he had alleged

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that the debtor was *vergens ad inopiam*, and was proceeding to sell a table estate, and if he had inhibited on the original bill, as on a bill t payment of which had not arrived, he would have been entitled to t he craved. But as he did not take this course I agree in thinkin letters of inhibition must be recalled.

LORD JERVISWOODE concurred.

THIS interlocutor was pronounced:—"Recall the inhibit tioned in the petition raised at the instance of the re Robert Campbell, and grant warrant for marking the said as discharged in the Register of Inhibitions, and decern: petitioner entitled to expenses, and remit," &c.

HENRY BUCHAN, S.S.C.—WILLIAM BLACK, S.S.C.—Agents.

No. 135.
June 28, 1873.
Ogilvy v. Paul and Others.

THOMAS OGILVY, Pursuer.—*Sol-Gen. Clark.*
ARCHIBALD PAUL AND OTHERS, Defenders.—*Fraser—Guthrie S Campbell Smith—Macdonald—Mackintosh.*

Reparation—Slander—Counter Issue—Veritas Convicii.—Circum which *held* that it was necessary for a defender in an action of da slander who pleaded *veritas* to put in his counter issue the words u libel.

1st DIVISION.
Lord Gifford.
M.

THIS was an action of damages for slander. The pursuer O a Justice of the Peace for the county of Forfar, and on 16th Jan he was convicted in the Police Court of Brechin of an assau post-boy named Donaldson, and fined £2, 2s., with the alternati days' imprisonment. The post-boy raised an action of damag Court of Session for this alleged assault, and employed Paul, present defenders, as his local agent in said action. In April 1 wrote the following letter to Alexander Pirie, another of the p fenders, who was an hotel-keeper in Brechin, and the employer of boy Donaldson:—"Mr Pirie, Commercial Hotel. Dear Si ing it said in Brechin that you are my employer in the case of boy against Mr Thomas Ogilvy I beg to state that such a report unfounded. I was employed by the boy, and his many friends v pathised with him, for the dastardly and cowardly attack made on a Sunday in the open street of Brechin, by a Justice of Pe has punished others most severely for much lesser crimes tha committed. I remain, yours truly, ARCH. PAUL. 12th April 18

This letter was sent by Pirie to David Burns, another of the and the proprietor, printer, and publisher, of the "Brechin Advert was by him published in that newspaper on 15th April 1873 in of an advertisement.

Ogilvy accordingly raised the present action concluding for against Paul, the writer of the said letter, Pirie who had sent newspaper, and Burns the publisher.

The following issues were approved of by the Lord Ordina Issues for Pursuer)—(1) Whether the defender, Archibald Paul, caused to be written, and delivered, or caused to be delivered, fender, Alexander Pirie, the letter printed in the schedule hereto a and whether the said letter was, in whole or in part, of and conce pursuer, and falsely and calumniously represents that the pur been guilty of the crime of assaulting William Donaldson, po Brechin, in a dastardly and cowardly manner, and that the purs person unfit to hold the office of a Justice of the Peace, to the lo and damage of the pursuer? (2) Whether the defenders, or

hich of them, published, or caused to be published, in the 'Brechin No. 135.
dvertiser and Angus and Mearns Intelligencer' newspaper, the letter
rinted in the schedule hereto appended; and whether the said letter was, June 28, 1873.
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n whole or in part, of and concerning the pursuer, and falsely and and Others.
alumniously represents that the pursuer had been guilty of the crime of
ssaulting William Donaldson, post-boy in Brechin, in a dastardly and
owardly manner, and that the pursuer was a person unfit to hold the
ffice of a Justice of the Peace, to the loss, injury, and damage of the
ursuer. Damages laid at £3000. Or (2. Counter-issue for Defenders)
—Whether, on or about the 12th January 1873 (on the street of Brechin),
he pursuer, being then a Justice of the Peace, assaulted the said William
Donaldson?"

The pursuer moved the Court to vary the counter issue for the defenders
o the effect of making it run as follows:—"Whether the said statements
nd representations were true? Or, to the effect of making them run
hus:—Whether the pursuer was guilty of the crime of assaulting William
Donaldson, post-boy in Brechin, in a dastardly and cowardly manner, and
s a person unfit to hold the office of a Justice of the Peace?"

The pursuer contended that the counter issue must justify the accusation, which was that the assault had been committed in a "dastardly and cowardly" manner, and also the *innuendo*, which was that the pursuer was unfit to be a magistrate of the county.[1]

The defenders answered;—(1) That they were bound to justify nothing more than the statement made, and not an *innuendo* which the pursuer might ingeniously extract from it. (2) That the words "cowardly and dastardly" were used rhetorically, and were not of the essence of the accusation.[2]

The Court altered the counter issue of the defenders to the following:—"Whether, on or about 12th January 1873, the pursuer, being then a Justice of the Peace, assaulted the said William Donaldson on the street, of Brechin in a dastardly and cowardly manner."

HENRY & SHIRESS, S.S.C.—THOMAS WALLACE, S.S.C.—RENTON & GRAY, S.S.C.—WEBSTER & WILL, S.S.C.—Agents.

JOHN M'IVER, Pursuer.—*Lang.* No. 136.
MALCOLM M'NEILL, Defender.—*Fraser—Marshall.*

June 28, 1873.
M'Iver v. M'Neill.

Reparation—Process—Issues—Slander—Veritas.—A visitor at a hotel made an entry in the visitors' book to the effect that he had visited most of the hotels in Scotland, but that he had nowhere "encountered so much drinking or so much squalid untidiness and dirt."

In an action of damages brought by the hotel-keeper against the writer the latter pleaded *veritas*. In adjusting issues, *held* that while the pursuer was entitled to the issue, whether the entry falsely, maliciously, and calumniously, represented that the pursuer kept his hotel in a state of squalid untidiness and dirt, and permitted persons to drink therein to excess, all to such a degree as to distinguish it in these respects from most of the hotels in Scotland, and to cause discomfort and annoyance to visitors to and residents in the hotel, the defender did not require to put in his counter issue more than whether on or about the date of the entry there was an excessive amount of drinking in the hotel, and whether the hotel on said days was in a state of much squalid untidiness and filth.

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[1] Helsham v. Blackwood, 20 L. J. 187 (C. P.); Torrens v. Waddell, December 12, 1868, *ante*, vol. vii. 243.

[2] Chitty jr. on Pleading, p. 710, and case of Morrison v. Harman, 3 Bing. N.C. 759, there cited.

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June 28, 1873. M'Iver v. M'Neill.

1st Division. Ld. Ormidale. B.

Mr M'Neill, a visiting officer of the Board of Supervision, came on 6th July 1871, along with his wife and sister-in-law, to the Dunvegan Hotel, Dunvegan, Skye, of which M'Iver was the lessee. After spending the night there they left after breakfast on the 7th July, but before departing Mr M'Neill made the following entry in the visitors' book kept in the hotel:—"July 7th, 1871.—I have been in many—indeed, in most—hotels in Scotland, but nowhere have I encountered so much drinking or so much squalid untidiness and dirt. (Signed) Malcolm M'Neill."

M'Iver raised an action of damages against Mr M'Neill, concluding for £500. He averred;—"By said entry the defender falsely, calumniously, and maliciously represented and insinuated that the pursuer, as keeper of the hotel, permitted persons to drink in his hotel to such a degree as to annoy and inconvenience the visitors and residents in the hotel; that the pursuer kept his hotel in such a state of untidiness and dirt as to distinguish it in these respects from most of the hotels in Scotland; that by keeping his hotel in this state the pursuer caused annoyance and discomfort to the visitors to the hotel, and that the degree of untidiness and dirt in the pursuer's hotel was such as to merit the epithet 'squalid.'"

The defender averred that he made the statements contained in the visiting book, which was brought into his room for his remarks, without malice, and believing them to be true, and that they were true.

The pursuer pleaded;—(1) The representations or insinuations contained in the entry regarding the pursuer being false, malicious, and calumnious, and the defender having written the entry and published it to the customers of the pursuer and the public by inserting it in the visitors' book, he was liable to the pursuer in reparation, as concluded for. (2) The pursuer having suffered in his business, reputation, and feelings in consequence of the entry, he was entitled to reparation therefor from the defender, he being the writer thereof, as concluded for.

The defender pleaded;—(1) the statement made by the defender in the pursuer's book not being libellous, but, on the contary, legitimate criticism, the defender was not liable in damages;—and, *separatim*, the words used were not fairly susceptible of being understood as averred. (2) The defender was privileged to express an opinion in the visiting book in regard to the matters contained in the entry which he made therein; and having made such entry, believing the statement to be true and without malice, he was not liable in damages, even although it be proved that his opinion was erroneous. (3) The statements contained in said entry being true in fact, the defender ought to be assoilzied.

The pursuer proposed the following issue:—"It being admitted that, on or about the 6th or 7th days of July 1871 an entry in the terms set out in the annexed schedule was made by the defender in the visitors' book, kept in the hotel kept by the pursuer at Dunvegan in Skye: Whether the said entry falsely, maliciously, and calumniously represents that the pursuer kept his said hotel in a state of squalid untidiness and dirt, and permitted persons to drink therein to excess, all to such a degree as to distinguish it in these respects from most of the hotels in Scotland, and to cause discomfort and annoyance to the visitors to and residents in the said hotel, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The defender proposed the following counter issue:—"Whether, on or about 6th or 7th July 1871, there were persons in a state of intoxication in the hotel kept by the pursuer at Dunvegan aforesaid; and whether the said hotel itself, on said days, was in a state of squalid untidiness and dirt?"

The Lord Ordinary (June 17, 1873), "approved of the issue; and ap-

inted it to be the issue for trial of the cause, and dissallowed the unter issue for the defender.* No. 136.

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The defender reclaimed, and argued;—There was nothing libellous in the ry complained of, and no issue should be allowed at all. It was fair icism; and the defender had been invited to write his opinion of the el in the book. Moreover, the book was the property of the landlord, d if anything in it offended him he could cut it out. In any view an issue were allowed the defender was entitled to a counter issue ch as he proposed.[1]

Argued for the pursuer;—The words used were truly libellous. The de- der pleaded *veritas*, and if he got a counter issue at all it must be a per issue of *veritas*. The real sting of the libel lay in the defender inguishing the hotel from most hotels in Scotland; that must be in the unter issue.

At advising,—

Lord President.—No doubt there is a certain sting in the statement made by defender that his large experience of hotels in Scotland enabled him to pare this one unfavourably with all others he had seen. But if the putting that into the issue of justification were to compel the defender to prove the te of most of the hotels in Scotland it would be putting upon him a burden ich it would be impossible to discharge. If it is not inserted for that pur- e then it is of no use at all, because it is not to be supposed that all hotels dirty, and that excessive drinking takes place in all. The obvious object of entry in the visitors' book is to denounce the hotel as one in which there is essive drinking and squalid untidiness and dirt, and if that is in the unter issue it fully meets the libel. It is quite competent for the pursuer to in issue, as he has done, that the defender's entry draws a distinction between hotel and most others in Scotland. But this is just one of those cases where is not necessary to repeat every word of the libel in a counter issue of tification.

The other Judges concurred.

This was the counter issue as adjusted by the Court:—"Whether, on about 6th or 7th July 1871, there was an excessive amount of drink- g in the hotel kept by the pursuer at Dunvegan foresaid; and whether he said hotel itself, on said days, was in a state of much squalid untidi- ss and dirt?"

The following interlocutor was pronounced:—"Recall the interlocutor: Approve of the issues as now finally adjusted, No. 10 of process, and appoint them to be the issues for the trial of the cause, and remit to the Lord Ordinary, reserving expenses."

Drummond & Mackenzie, S.S.C.—M'Neill & Sime, W.S.—Agents.

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* "Note.—The Lord Ordinary is very clear that if the pursuer did not aver malice against the defender, and undertake to establish it, his action would not be maintainable at all. But with malice charged, and inserted in the issue as it has been, the Lord Ordinary is of opinion that the case must go to a jury. Whether, ultimately, the pursuer or the defender is to prevail is a question into which the Court cannot enter at present.

"The defender did not object to the terms of the pursuer's issue, No. 7 of process, as ultimately adjusted. His objection was to any issue being allowed at all, and the defender proposed, if the pursuer was to have his issue sustained, to take the counter issue, No. 8 of process. But the Lord Ordinary has found himself unable to sustain that issue, for the reason that it does not meet or come up to the pursuer's issue."

[1] Kennedy v. Baillie, Dec. 5, 1855, 18 D. 138; Carmichael v. Cowan, Dec. 19, 1862, *ante*, vol. i. 204; Broomfield v. Greig, March 10, 1868, *ante*, vol. vi. 663; Hamilton v. Anderson (H. of L.), June 18, 1858, 3 Macq. 363.

whole estate, and should hold one-half thereof subject to the life
vivor for behoof of the relatives of the first deceaser. The spouse
power to alter the deed during their joint lives, and the wife dec
visions in her favour to be in full of her legal claims. *Held* that
was not revocable by the surviving husband, and that the right
of the wife vested in them at her death.

2d Division. 1. WILLIAM KERR, slater in Houston, and Janet Brown or K executed on 20th February 1845 a mutual trust-dispositio ment, whereby they disponed to trustees therein named th perty, heritable and moveable, which should belong to them them at the time of the death of the first deceaser. The which the trust-deed was granted were as follows:—"First, fo all the just and lawful debts of us, the said spouses, due at the first deceaser of us: Second, at the death of the first de our said trustees shall and are hereby required to take an our or either of our whole estates, heritable and moveable, bef which shall be divided into two equal halves or shares, one share of which shall belong to the survivor of us in fee, survivor of us shall also be entitled to the liferent of the oth or share thereof, and our said trustees shall hold the said half or share of said whole estates subject to the said liferent in favour of the survivor of us, for behoof of the relatives aftermentioned of the first deceaser of us: Third, at the survivor of us our said trustees shall convey and distribute equal one-half of said whole estates to the relatives of William Kerr, and the other just and equal half of the said heritable and moveable, shall be disponed and conveyed among the relatives of me, the said Janet Brown or Kerr." declared that the provisions contained in the trust-deed in f Kerr were in full of all claim of terce, half of moveables, other claim which she had or could pretend to through the husband. The parties reserved full power to alter the deed joint lives, but declared that so far as not altered it sho although found undelivered at the death of the first deceaser

Mrs Kerr died on 1st May 1850 without issue, and an inv whole estate of the spouses was taken by the trustees. W

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pectively it appeared that Anne Kerr, the first party, was the only son entitled to claim the provisions made in the trust-deed as to illiam Kerr's half of the estate.

The parties to whom Mrs Kerr's half of the estate was destined in the st-deed were represented by the second parties to the case if the pro-ions did not vest till the death of William Kerr, and by the second and rth parties if they vested on the death of Mrs Kerr.

The third party, Ann Kerr, claimed in virtue of a gratuitous disposi-n of a house, granted to her by William Kerr a few months before his ith.

The following questions were submitted for the opinion and judgment of e Court:—"(1) Whether the mutual trust-disposition and settlement ecuted by William Kerr and Janet Brown or Kerr was revocable by e survivor of the spouses, and if so, to what extent? (2) Whether if the id trust-deed was revocable it was revoked by the said William Kerr whole or in part, and if in part, what part? (3) In the event of its ing held that the said trust-deed was irrevocable *quoad* Mrs Janet own or Kerr's half are the parties to whom the said half is destined titled to the whole estate left by the said William Kerr, or if not, to hat part of it? (4) Whether the provisions in favour of the parties to hom Janet Brown or Kerr's share was destined by the said trust-deed ated in them on the death of the said Janet Brown or Kerr? or, whether ting was postponed till the death of the said William Kerr? (5) On e assumption of the said trust-deed being wholly irrevocable, does the atuitous disposition granted by the said William Kerr in favour of the ird party fall to be set aside as having been granted in prejudice of the ghts of the other parties hereto, or any of them, under the said trust-ed?"

Argued for the second and fourth parties;—The deed was not revocable, cause (1) a provision was made under it for the wife, who in considera-on thereof gave up her *jus relictæ* and terce;[1] (2) In the deed power of vocation was reserved only during the joint lives of the spouses, and it as there declared that so far as not altered the deed should be valid hough found undelivered at the death of the first deceaser; (3) Third arties had an interest in the deed, and their interest emerged on the eath of the predeceaser. Even if the deed were revocable, the only evocation which could be pointed to was the spending by Mr Kerr f more than half the estate. If that were revocation then it was nly as to his own half, and the relatives of Mrs Kerr were entitled to he whole of the estate which was left in payment of Mrs Kerr's share f the estate *quoad* which there was no revocation. In this view it as *ultra vires* of Mr Kerr to grant the gratuitous disposition to Ann Kerr.

Argued for the first and third parties;—The deed was a donation be-ween spouses, and was therefore revocable. The giving up by the wife f the legal claims which she might have on the death of her husband id not bar revocation, because these were rights which she might never e in a position to claim. Then Mrs Kerr having brought her husband no ocher, the deed was gratuitous, and the husband had power to revoke.[2]

[1] Hepburn v. Brown, 2 Dow's App. 342; Anderson v. Garroway, Jan. 27, 837, 15 S. 455; Rust v. Smith, Jan. 14, 1865, *ante*, vol. iii., 378; Jardine . Currie, June 17, 1830, 9 S. 957; Kidd v. Kidds, Dec. 10, 1863, *ante*, vol. ., 226.

[2] 1 Fraser (Personal and Domestic Relations), 479; 1 M'Laren (Wills and c.), 254; Steven v. Dunlop, Feb. 1, 1809, F.C.

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Again, if the deed was revocable, it was revoked (1) by the husband holding the whole estate himself after the wife's death, and (2) by his disposition to his neice, Ann Kerr, *quoad* the subject of that disposition.

At advising,—

LORD JUSTICE-CLERK.—The questions in this case arise on the terms of a trust-disposition executed by William Kerr and his wife on 20th February 1845. These questions are, first, Whether this deed was revocable by the survivor of the spouses? secondly, Whether, if the deed was revocable, it was revoked by the husband? and thirdly, Whether a certain conveyance made by the husband after the death of the wife stands good? Lastly, a question is raised as regards vesting.

I am of opinion that the trust-deed was not revocable by the survivor, and I shall shortly state the grounds on which I have arrived at this result. The deed is in some respects peculiar. It is a postnuptial settlement, there having been no antenuptial contract between the parties. We are told in the special case that part of the property belonging to the spouses was the result of the industry of the wife. The two spouses conveyed by this deed the whole property then belonging to them, or which should belong to them at the death of the first deceaser, to trustees. The purposes of the trust were—"First, for payment of all the just and lawful debts of us, the said spouses, due at the death of the first deceaser of us: Second, at the death of the first deceaser of us our said trustees shall and are hereby required to take an inventory of our or either of our whole estates, heritable and moveable, before conveyed, which shall be divided into two equal halves or shares, one equal half or share of which shall belong to the survivor of us in fee, and the said survivor of us shall also be entitled to the liferent of the other equal half or share thereof, and our said trustees shall hold the said other equal half or share of said whole estates, subject to the said liferent of the same in favour of the survivor of us, for behoof of the relatives and others artermentioned of the first deceaser of us: Third, at the death of the survivor of us our said trustees shall convey and distribute the just and equal one-half of said whole estates to the relatives of me, the said William Kerr; and the other just and equal half of the said whole estates, heritable and moveable, shall be disponed and conveyed and divided among the relatives of me, the said Janet Brown or Kerr." The deed goes on to make certain bequests to the relatives of the husband and wife. It reserves full power to alter these presents during their joint lives; the wife declares the provisions in her favour to be in full of her legal claims; lastly, there is a precept of sasine for infefting the trustees in the heritable subjects conveyed. The deed professes to be a mutual deed, and I think that this is its true character. In the first place, considering that there was no antenuptial contract, and that the wife renounced her legal rights, was it more than a reasonable provision for her? She gets a liferent of the joint property of the spouses if she survives her husband. This does not appear to me to be excessive; and the *mortis causa* provisions to her relatives are certainly not so excessive as to raise a presumption that this part of the deed was a donation on the husband's part. We have been referred to cases in which it was held that mere renunciation by the wife of her legal rights will not necessarily make a deed of this kind remunerative. But here there are other elements. The wife makes over her hope of any succession which might accrue to her: this was regarded by Lord Curriehill in the case of Kidd as an important element. Again, she had contributed by her industry to the property which was the subject of the mutual settlement. Looking to the current of authorities, and particularly to the case of Kidd, I should have been of opinion that even if the deed had stopped here it would have required the joint consent of both parties to revoke the deed. But, further, I hold that it must be considered to have been delivered and acted upon at the death of the first deceaser. The trustees were directed to make an inventory of the whole property of the spouses, and they did so. The effect of this was to make revocation by the husband impossible. In short, taking the inventory constituted the amount of that inventory, to the extent of one-half, a debt due by the husband to the trust-estate. There was a

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ept of sasine on which the trustees might have, and probably were bound to
taken infeftment. And in this question of succession, which is not one
creditors, I think we must take the case as if the trustees had taken infeft-
t. If so, the right of the husband would have resolved into a *jus crediti* for
rovisions to which he was entitled under the mutual settlement. It may
question whether it was intended that the trustees should take personal pos-
n of the property. Probably they did right in allowing the husband to re-
in possession. But be that as it may it makes no difference in the rights
rties. From the wife's death the husband became a debtor to the amount
e-half of the inventory.

e next question is about the conveyance of a part of the property to Ann
, the party of the third part. The result has been that the husband has
one-half of the joint estate, and the loss must therefore fall upon his share.
ubject conveyed by him must, if required, be brought back to the wife's
f the estate. Whether this would be the case if the property had been a
ic subject, of which the market value had depreciated in the husband's
s, I give no opinion. What he has actually spent must plainly be imputed
s share.

n the second question, I think it very doubtful whether, supposing a power
vocation in the husband, he did anything amounting to revocation. But on
it is unnecessary to express an opinion.

n the question of vesting we have as yet heard no argument.

he other Judges concurred.

ounsel was then heard on the question of vesting.
t advising,—

ORD JUSTICE-CLERK.—We must take the case as if the trustees had at the
's death divided the estate into two equal parts as directed by the deed.
one-half became the absolute property of the husband. The fee of the other
was held by the trustees, subject to the husband's liferent, for the relatives
e wife specifically mentioned in the deed. The first alternative of the fourth
tion accordingly falls to be answered in the affirmative.

ORD COWAN and LORD NEAVES concurred.

ORD BENHOLME.—I am not inclined to dissent from your Lordships. The
doubt which I had was that if we decided that the wife's half vested at her
h we must then decide whether the interest which the wife's relatives took
heritable or moveable, in order to determine the persons who are now en-
d to it. I am disposed to consider that the interest in question was a *jus*
iti in a mixed subject, and therefore moveable.

THIS interlocutor was pronounced:—"The Lords, having heard counsel on the special case, are of opinion, and find (1) that the mutual trust-disposition and settlement of Mr and Mrs Kerr was not revocable by the survivor of the spouses: (2) That the parties to whom Mrs Kerr's half of the trust-estate is destined are, to the extent of one-half the amount of the inventory, No. 8 of process, entitled to the same, but to that extent only, and that the same vested in them on the death of Mrs Kerr; and (3) That the gratuitous disposition granted by William Kerr in favour of the third party falls to be set aside so far as may be required to make up one-half of the inventory: Find the parties to the special case entitled to payment of their expenses out of the trust-funds, and remit," &c.

M'EWEN & CARMENT, W.S., Agents for all the Parties.

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Jex-Blake v. Senatus of University of Edinburgh.

SOPHIA LOUISA JEX-BLAKE AND OTHERS, Pursuers.—*Lord-Adv. Young—Sol.-Gen. Clark—Fraser—M'Laren.*

THE SENATUS ACADEMICUS OF THE UNIVERSITY OF EDINBURGH, Defenders.—*Watson—Lancaster.*

The Right Hon. JOHN INGLIS, Chancellor of the University of Edinburgh, Defender.

University—Right of Women to Study and Graduate—Universities (Scotland) Act, 1858 (21 *and* 22 *Vict. c.* 83), *sec.* 12, *sub-sec.* 2—*Process—Reduction—Writ—Contemporaneous Exposition.*—The University or College of Edinburgh was founded in the sixteenth century. From the date of its foundation till 1869 it was carried on as an institution for the education of male students only. In that year, in consequence of an application made for the first time by women for admission as students, the governing bodies, professing to exercise statutory powers which they possessed "to effect improvements in the internal arrangements of the University," made the following "regulations":—

(1) Women shall be admitted to the study of medicine in the University; (2) the instruction of women for the profession of medicine shall be conducted in separate classes, confined entirely to women; (3) the professors of the Faculty of Medicine shall for this purpose be permitted to have separate classes for women; (6) all women attending such classes shall be subject to all the regulations now or at any future time in force in the University as to the matriculation of students, their attendance on classes, examination, or otherwise.

Certain women having subsequently entered upon a course of medical studies at the University, by matriculation and attendance at certain classes, and found that, in consequence of certain professors refusing to teach separate classes, they could not complete the course prescribed by the University for medical degrees, and without which they could not practise the medical profession, raised an action against the Senatus Academicus of the University, concluding for declarator (1) that the pursuers were entitled to attend any of the classes at the University; (2) that they were entitled to receive the instruction necessary for graduation in medicine and to obtain degrees, and (3) that the Senatus should be ordained to make the regulations necessary to give effect to these rights.

Held (*diss.* Lord Justice-Clerk, Lords Deas, Ardmillan, Jerviswoode, and Gifford, *decl.* Lord President) that in respect of the language of the deeds of foundation and the contemporaneous interpretation by usage, female students were not entitled to study or to graduate in the University of Edinburgh, and that the regulations of 1869 were *ultra vires* of the University Court; and (2) (*diss.* Lord Justice-Clerk and Lord Gifford) that a reduction of the regulations was unnecessary.

Opinion (*per* Lords Deas, Ardmillan, Jerviswoode, and Gifford) that although through disuse ladies had lost their claim to be admitted to the University as of right, the regulations of 1869 were within the competency of the University authorities, and gave the pursuers a claim not only to instruction, but to graduation.

Opinion (*per* Lord Justice-Clerk), that the question being one of purely academical administration, and the action having been raised to enforce the duty of the Senatus Academicus under the existing constitution of the University, the regulations of 10th November 1869, which had been regularly passed, must, as between the parties to this action, be assumed to be part of the *de facto* law of the University, on which the pursuers were entitled to rely, and which the defenders were bound to obey until they were rescinded, or until the question of their legality was raised and determined with the superior University authorities who passed them, and were the proper parties to defend them; and therefore that the defence of the regulations of 1869 being *ultra vires* of the University Court, was irrelevant as against the present pursuers, and inconsistent with the academical position of the defenders. Further, that under the regulations of 1869 the pursuers could not insist upon University instruction, but that if they

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obtained University instruction, and proved themselves duly qualified, they were entitled to degrees.

Opinion (*per* Lords Cowan, Neaves, and Ormidale), that in any view, inasmuch as the Senatus had no power to do what was craved in the petitory conclusions, it would be contrary to the practice of the Court to pronounce a declaratory decree which could have no practical effect.

Whole Court. Lord Gifford.

THIS action was raised in the following circumstances :—On 21st June 1869 Miss Jex-Blake made an application to the Senatus Academicus of the University of Edinburgh, stating that she and other ladies had a desire to enter upon medical study in the University, and requesting that they would recommend to the University Court "to sanction the matriculation of women as medical students, and their admission to the usual examinations, on the understanding that separate classes be formed for their instruction by the medical professors of the University, or by recognised extra-academical lecturers."

This application was referred to the Medical Faculty, and on 2d July the report of the Medical Faculty was presented and agreed to by the Senatus. That report recommended the admission of women to the study of medicine in the University on certain conditions, which were, to a certain extent, embodied in the regulations afterwards enacted by the University Court. The resolution of the Senatus Academicus was reported to the University Court on 5th July, and was remitted to a committee of that body for consideration. On 23d July that committee reported that the matter should be proceeded with under section XII. 2 of the Universities Act, "as an improvement in the internal arrangements of the University." In terms of that enactment the Court directed the resolutions of the Medical Faculty to be laid before the General Council of the University for their consideration at their next meeting. The General Council, at their meeting on 29th October, approved "of the resolution of the University Court respecting the admission of women to the study of medicine in the University of Edinburgh." On the 10th November 1869 the University Court resolved as follows :—"1. Women shall be admitted to the study of medicine in the University. 2. The instruction of women for the profession of medicine shall be conducted in separate classes, confined entirely to women. 3. The professors of the Faculty of Medicine shall, for this purpose, be permitted to have separate classes for women. 4. Women not intending to study medicine professionally may be admitted to such of these classes, or to such part of the courses of instruction given in such classes, as the University Court may from time to time think fit and approve. 5. The fee for the full course of instruction in such classes shall be four guineas; but in the event of the number of students proposing to attend any such class being too small to provide a reasonable remuneration at that rate, it shall be in the power of the professor to make arrangements for a higher fee, subject to the usual sanction of the University Court. 6. All women attending such classes shall be subject to all the regulations now or at any future time in force in the University as to the matriculation of students, their attendance on classes, examination, or otherwise. 7. The above regulations shall take effect as from the commencement of session 1869-70."

These regulations were approved by the Chancellor on 12th November 1869, and were thereafter published in the official calendar.

In October 1869 certain of the pursuers were admitted to the preliminary examination in Arts prescribed for medical students. Having passed and received certificates, they, after the issuing of the above quoted regulations, matriculated, and paid the usual fees. Their tickets declared them "Cives Academiæ Edinensis." The other pursuers matriculated in suc-

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cessive sessions. They all attended classes, either in the University or extra-mural school sanctioned by the ordinary University regulations; but about October 1871 it was ascertained that the professors whose classes it was necessary to attend to complete the curriculum were not prepared to conduct separate classes for ladies. Miss Jex-Blake thereupon applied to the Senatus; but they having declined, by a majority, to take any measures by which the pursuers might be enabled to complete their education, on 21st November 1871 she applied to the University Court. On 8th January 1872 the University Court made the following answer:—"The University Court have had under consideration the letters of Miss Jex-Blake and Miss Louisa Stevenson, of 21st November 1871, and other relative documents laid before them, on behalf of the women who have been admitted, by the regulations of the Court of November 10, 1869, to study medicine in the University. In these it is stated that certain professors of the Faculty of Medicine have declined to give separate courses of instruction to women, and the Court are asked either (1) To extend, in the case of female students, the privilege granted, by ordinance of the Universities Commissioners, to lecturers, not being professors in a University, of qualifying for graduation by their lectures, which privilege is now restricted to four of the prescribed subjects of study; or (2) To authorise the appointment of special lecturers to give, in the University, qualifying courses of instruction in place of those professors who decline to do so; or (3) To ordain that the professors referred to shall themselves give the necessary course of instruction to women. The second course suggested it is not in the power of the Court or other University authorities, singly or jointly, to adopt. The third course is equally beyond the power of the Court. The Act of 1858 vests in the Court plenary powers to deal with any professor who shall fail to discharge his duties. But no professor can be compelled to give courses of instruction other than those which, by the use and wont of the University, it has been the duty of the holders of his chair to deliver. The first of the proposed measures would imply an alteration in one of the ordinances for graduation in medicine. Such alteration can be made by the University Court only, with the consent, expressed in writing, of the Chancellor, and with the approval of Her Majesty in Council. But to alter, in favour of female students, rules laid down for the regulation of graduation in medicine would imply an assumption on the part of the Court that the University of Edinburgh has the power of granting degrees to women. It seems to the Court impossible for them to assume the existence of a power which is questioned in many quarters, and which is both affirmed and denied by eminent counsel. So long as these doubts remain, it would, in the opinion of the Court, be premature to consider the expediency of taking steps to obtain, in favour of female students, an alteration of an ordinance which may be held not to apply to women. Though the Court are unable to comply with any of the specific requests referred to they are at the same time desirous to remove, so far as possible, any present obstacle in the way of a complete medical education being given to women, provided always that medical instruction to women be imparted in strictly separate classes. The Court are of opinion that the question under reference has been complicated by the introduction of the subject of graduation, which is not essential to the completion of a medical or other education. The University of London, which has a special charter for the examination of women, does not confer degrees upon women, but only grants them 'certificates of proficiency.' If the applicants in the present case would be content to seek the examination of women by the University for certificates of proficiency in medicine, instead of for the University degrees, the Court believe that arrange-

ments for accomplishing this object would fall within the scope of the powers given to them by section 12 of the Universities (Scotland) Act. The Court would be willing to consider any such arrangements which might be submitted to them."

In these circumstances Miss Jex-Blake and nine other ladies raised this action against the Senatus and Chancellor, concluding that "it ought and should be found and declared, by decree of the Lords of our Council and Session, (1) that the pursuers are entitled to attend the classes of any of the professors of the University of Edinburgh, and to receive instruction from the professors in said University, upon making due payment of all fees exigible from students at the University for said instruction; (2) that the pursuers are entitled to receive such instruction in the University as is required to qualify for graduation in medicine; (3) that, on compliance with the regulations of the University as to attendance on classes and otherwise, preliminary to examination for degrees, the pursuers are entitled to proceed to the examination for degrees in manner prescribed by the regulations of the University; (4) that the defenders, the Senatus Academicus, are bound to provide such instruction as aforesaid to the pursuers, and thereafter to admit them to examination as candidates for medical degrees, and, on their being found qualified, to recommend them to the Chancellor of the University for having such degrees conferred upon them; (5) that the defender, the said Right Honourable John Inglis, as Chancellor of the said University, is bound, upon such recommendation being made by the Senatus Academicus, to confer such a degree upon any of the pursuers found qualified and so recommended: And the defenders constituting the said Senatus Academicus ought and should be decerned and ordained to make regulations whereby the pursuers shall receive instruction in the University of Edinburgh as is required to qualify for graduation in medicine, and, in particular, to direct and appoint the various professors whose duty it is to give instruction in medicine to permit the attendance of the pursuers upon their classes along with male students; or otherwise to direct and order the various professors whose duty it is to give instruction in medicine to teach the pursuers, and any other women who may constitute themselves into a class separate and apart from male students, the pursuers always making payment of the proper fees for matriculation and to the professors for such instruction as aforesaid; and the defenders constituting the said Senatus Academicus ought to be decerned and ordained to admit the pursuers to examination as candidates for the medical degrees, and, on their being found qualified, to recommend them to the Chancellor of the University for having such degrees conferred upon them; and the defender, the said Right Honourable John Inglis, as Chancellor of the University, ought to be decerned and ordained, by decree foresaid, upon receiving such recommendation from the Senatus Academicus, to confer degrees upon the pursuers."

The pursuers stated;—(Cond. 2.) "About the year 1561 the Town Council, as representing the community, had formed the resolution to found a college within the city, and in that year they 'thocht gude' and ordained that certain rents previously paid to Popish priests and others should thereafter be applied to more profitable and godly uses, and, *inter alia*, 'to collegis for leirnyng and vpbringing of ye youth and sic other godlie wurkis.' In 1579 an Act of Council was passed ordaining certain parties 'to convene themselves in the ministeris luging the morn, be four houris afternone, for taking of ordour anentis the founding of ane universitie.'" (Cond. 3.) "In pursuance of this object the Town Council applied to Queen Mary and James VI., from whom they obtained grants of a variety of subjects for the support of schools. They also received various

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donations and legacies from private individuals for the same object." (Cond. 4.) "In 1582 King James VI. granted a charter to the provost, bailies, council, and community of Edinburgh, whereby he confirmed a previous charter in their favour, granted by Queen Mary in 1566, and made over to them of new the whole subjects thereby conveyed. In this charter of the king there is the following clause:—'Ac quia intra privilegia et libertatem dicti nostri burgi nunc diversa extant vasta et spatiosa loca quæ præposito, præbendariis, sacerdotibus et fratribus tempore præterito pertinuerunt, maxime apta et commoda pro constructione domorum et ædificiorum ubi professores bonarum scientiarum et literarum ac studentes earundem remanere et suam diuturnam exercitationem habere poterint; ultra et præter alia loca convenientia pro hospitalitate. Ideo nos enixe cupientes ut in honorem Dei et commune bonum nostri regni literatura indies augeatur; volumus et concedimus quod licebit præfatis præposito, consulibus et eorum successoribus, ædificare et reparare sufficientes domos et loca pro receptione habitatione et tractatione professorum, scholarum grammaticalium humanitatis et linguarum, philosophiæ, theologiæ, medicinæ, et jurium, aut quarumcunque aliarium liberalium scientiarum, quod declaramus nullam fore rapturam prædictæ mortificationis; ac etiam præfati præpositus, ballivi et consules ac eorum successores, cum avisamento, tamen eorum ministrorum pro perpetuo in posterum plenam habeant libertatem personas ad dictas professiones edocendas, maxime idoneas uti magis convenienter poterint eligendi cum potestate imponendi et removendi ipsos sicuti expediverit. Ac inhibendo omnibus aliis, ne dictas scientias intra dicti nostri burgi libertatem profiteantur aut doceant, nisi per præfatos præpositum, ballivos et consules, eorumque successores admissi fuerunt.'" (Cond. 5.) "The foresaid grants were confirmed by a charter of King James, commonly called the Golden Charter, passed in 1603. That was in turn confirmed by a charter in 1636 by Charles I. Both charters were afterwards ratified by Parliament." (Cond. 6.) "On 14th August 1626 there was passed a parliamentary ratification of 'diverse infeftments granted to the town of Edinburgh for sustentation of college ministeris and hospitalis.' It proceeds on a narrative of the license and liberty granted to the magistrates and council to erect a college, 'qlk colledge,' it is said, 'has continuellie sensyne flourishit now be the space of thrittie-five yeiris;' of the fact that 'the provost, baillies, counsell, and communitie of the burgh of Edinburgh had bestowit gryit charges and expenses in erectioun of the said college, building of houses, and had voted gryit soumes of money for intertenement of professores of humanitie,' and of the various grants to the magistrates and council therein mentioned. Upon that narrative his Majesty and the Estates of Parliament ratified the whole of these grants and charters, and, farther, ordained 'the said colledge in all time to cum to be callit King James' Colledge; and als, with advyse of the saidis estaitties, hes of new again gevin, grantit, and disponit to them, and their successoures, in favoures of the said burgh of Edinburgh, patrone of the said colledge, and of the said colledge, and of the rectors, regentis, bursaries, and studentis within the samin, all liberties, fredoms, immunities, and privilegis appertening to ane free colledge, and that in als ample forme and lairge manner as ane colledge hes or bruikes within this His Majestie's realme; and gif neid beis, ordaines ane new charter to be expede under His Hienes' gryit seale, for erecting of the said colledge, with all liberties, priviledges, and immunities qlk any colledge within this realme bruikes, joises, or to the samen is knawn to appertene.'"

(Cond. 9.) "The University of Glasgow was founded by a Papal bull of Pope Nicholas V. in the year 1450, which was obtained at the suit of

L., King of Scots. In this bull there was conferred on the Uni-
f Glasgow, its doctors, masters, and students, all privileges enjoyed
?ope's city of Bologna. After a narrative of the advantages to
and to Scotland of erecting a University in that city, the bull thus
:—'Erigimus ac statuimus et etiam ordinamus in ipsa civitate de
udium cujus modi perpetuis futuris temporibus vigeat tam in
a ac jure canonico et civili, quam in artibus et quavis alia licita
quodque doctores, magistri, legentes et studentes ibidem omnibus
is priviligiis, libertatibus honoribus, exemptionibus immunitatibus
m apostolicam vel alias quomodolibet magistris, doctoribus et
ous in studio nostre civitatis Bononiensis concessis gaudeant et
ic venerabilis frater noster Willelmus Episcopus Glasguensis, ac
es sui, qui pro tempore fuerint Glasguensis (Epi.) sint Rectoris,
ii nuncupati, qui habeant supra doctores magistros et scolares, ac
niversitate studii hujusmodi similem facultatem et potestatem,
bet Rector scholarum dicti studii Bononiensis.'—(*Theiner Vetera
ita*, p. 382.) At the University of Bologna women were allowed
ite, and several women filled professorial chairs at that University.
uers mention the following among others who were admitted to
on at Bologna, both before and after the Pope's bull, and many of
upied professorial chairs, viz.:—Bettisia Gozzadini was made
laws in 1236, and lectured on that subject at Bologna, &c. . . .
uers farther aver that women have graduated and been elected as
s in the following other Italian Universities, viz.,—Pavia, Ferrara
a, at which University Elena Lucrezia Piscopia Cornaro graduated
June 1678. Previous to her graduation she was offered a chair
niversity, which she accepted after graduation; also in the fol-
panish Universities, viz., Salamanca, Alcala, and Cordova; also in
wing German Universities, viz., Heidelberg, Göttingen, Giessen,
g, Halle, Marburg; also in the Dutch University of Utrecht, and
wiss University of Zurich; also the following women received
n Paris from the University of France, Emma Chenu," &c.

ursuers further set forth the applications made by them for admis-
ie University, and the various proceedings which followed there-
narrated, with the ultimate failure of the pursuers to obtain
ities necessary to enable them to complete their course of study
in degrees.

ursuers pleaded;—(1) According to the law and constitution of
ersity of Edinburgh women are entitled, on payment of matri-
and professors' fees, to attend the classes of any professor as
and are entitled to demand instruction from such professor,
is bound to give to them. (2) According to the law and consti-
f the University of Edinburgh women are entitled to obtain
n medicine, on proving that they are qualified in point of attain-
d knowledge for that distinction. And the Senatus Academicus,
rovince it is to regulate the teaching and discipline of the Uni-
re bound to provide instruction to them, to admit them to exa-
as candidates for medical degrees, and, on being found qualified,
mend them to the Chancellor, in order that he may confer such
pon them. (3) The pursuers having paid their matriculation
e for one, some for two, some for three years, on the faith of
mitted to continue their course of study with a view to a pro-
nd having gone on with this course of study by attendance on
es of professors, and this with the knowledge and consent of the
Academicus, the latter are now barred from pleading that women
entitled to receive instruction at the University, or to obtain

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medical degrees. (4) According to the laws by which Universities are governed, and apart from any special circumstances connected with the University of Edinburgh, women were entitled to demand and receive instruction from the professors in their ordinary classes, and also were entitled to graduate; and the University of Edinburgh being modelled on the constitution of such other Universities, and being subject to the same laws, women are entitled to all such privileges from the University of Edinburgh.

The Senatus averred;—(Stat. 1.) "The University of Edinburgh acquired the status of a University for the first time in 1858. Prior to that time it was merely a College or teaching body." (Stat. 2.) "The conferring of degrees is a privilege, not of a College, but of a University alone. The conferring of degrees by the College of Edinburgh was a usurpation of a right to which it was not legally entitled. No such power was conferred on it by any of its charters, or by the Act of 1621. The practice became legalised in respect of use and wont only." [In their answers to these articles the pursuers explained as follows:—"Denied that the University of Edinburgh acquired the status of a University for the first time in 1858. It has in public documents and histories been called, sometimes a University, and sometimes a College; and at the first conference of gentlemen, who met in Edinburgh for the purpose of founding it, their resolution declared that they had met anent the founding of 'ane Universitie.' Reference is made to the second article of the condescendence. Denied that the power of conferring degrees is competent only to a body called a University; and explained that that word is and has always been held convertible with *collegium*. It was applied to any understood class of persons, or to a public corporation, or to the members of a municipality, or to the members of a 'general study.' It was used to denote either the whole body of teachers and learners at any place, or the whole body of learners, or the whole body of teachers and learners, divided either by faculty, or by country, or by both together. In Papal bulls, and in charters of foreign Universities, the words *collegium* and *universitas* are interchangeably used, and bodies called *collegia* have conferred degrees as uniformly as bodies called Universities. In Scotland the two words and the two bodies have always been regarded the same. In the calendar issued by the defenders for the year 1872-73 they state 'that the University at Edinburgh was founded in 1582 by a royal charter granted by James the VIth,' and they exercised the power of graduation at the first possible period, viz., in August 1587, when forty-seven students, of the first who attended the institution, under the first Principal, Rollock, at its opening in 1583, were duly graduated masters of arts; and from that date down to the present time the University or College of Edinburgh has continued to grant degrees."] The Senatus further stated,—"In no one of the Universities of Great Britain have women at any time been admitted as students, or allowed to graduate. Recently the University of London resolved to admit women to examination, and to grant them certificates of proficiency, but without matriculating them, or admitting them to graduation. In order legally to effect even this change it was found necessary to obtain a supplemental charter, conferring upon the University express powers in addition to those contained in the original charter. The said supplemental charter and the original charter are referred to. The uniform practice of the University of Edinburgh has been in accordance with that of the other Universities of Great Britain. At no time since the foundation of the institution have women been received as students, or admitted to graduation." (Stat. 4.) "In none of the charters or other documents connected with the University of Edinburgh is there any mention or recognition of women as students or

graduates. In the earlier charters language is used which does not admit of the distinction of gender being marked; but in later documents, when language which does admit of this is employed, such as the Acts of the Commission of Parliament of visiting colleges, of date 15th May 1695, and the various reports of the Royal Commissions specified in section 23 of the Universities (Scotland) Act, 1858, students of the male sex only are alluded to or recognised." (Stat. 8.) "From an early period in the history of the University it has been the custom to admit students to matriculation. This at first consisted in the student signing a declaration to the effect that he would be diligent in his studies and loyal to the University. No fee was originally paid at matriculation, but about the end of the 18th century a fee of 2s. 6d. was required. The fee was originally devoted to the maintenance of the library, to the use of which the student, in respect of his matriculation, became entitled. In the certificate given to the student he was described as 'academiae alumnus et bibliothecae civis.' The amount of the fee was raised, and the purposes to which it was devoted were extended, so as to include the payment of certain college officers, until the whole matter was the subject of consideration by the Town Council and Senatus in 1811, when the fee was fixed at 10s. In 1833 the sum was again raised by the Town Council to £1, and it was ordered that the payment should be for the use of the library, museum, and the services of certain college officers. At this time the phraseology of the ticket was altered from 'civis bibliothecae' to 'civis academiae,' but this alteration did not impart the acquisition by the students of any additional rights or privileges." (Stat. 11.) "The defenders, the Senatus Academicus, have no power to compel professors to admit the pursuers to their classes, or to teach them in separate classes. Neither before the Universities (Scotland) Act, 1858, nor since the passing of that Act, has the Senatus Academicus of Edinburgh possessed or even attempted to exercise any power to compel the obedience of the professors on such points, or to lay down and enforce any such regulations as the pursuers seek to have enforced. Nor has the Senatus any power to alter the regulations for graduation contained in the ordinances issued by the Commissioners under the Universities (Scotland) Act, 1858."

The Senatus pleaded;—(1) All parties not called. (2) The pursuers are not entitled to decree in terms of any of the conclusions of the summons directed against the defenders, the Senatus Academicus, in respect that the said defenders have no power, either by the use and wont of the University, or according to the provisions of the Universities (Scotland) Act, 1858, to make the regulations specified in these conclusions, or to perform any other of the duties therein sought to be imposed upon them. (3) The pursuers are not entitled to decree in terms of the first three declaratory conclusions of their summons, in respect that there are no conclusions in the summons whereby the said declaratory conclusions can be given effect to. (4) From the tenor of the statutes and ordinances which have been from time to time laid down with regard to the internal regulation of the University of Edinburgh, especially in the matter of graduation, and having regard to the use and wont of Edinburgh and other Universities, the University of Edinburgh must in law be held as devoted exclusively to the education of male students, and in which males only can claim, or can be invested with the full privileges of students. (5) The Senatus have no power to admit to the said privileges of students any persons who are disqualified according to the tenor of the said statutes and ordinances, and the said use and wont. (6) The resolutions of the Medical Faculty of 1st July 1869, and the regulations published in the Calendar, and quoted in condescendence 11, were not intended to confer,

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and are not in law sufficient to confer, upon the pursuers the full privileges of students, to the effect of entitling them to insist, as matter of legal right, on being taught by the University professors, or on being admitted to graduation. (7) According to the use and wont of the University of Edinburgh the fact of being matriculated as a student does not confer a title to demand, as matter of legal right, the privileges of studentship, or the right to be taught by any professor, or to be admitted to graduation. (8) *Separatim*, and on the assumption that, according to their true construction, the said resolutions and regulations of the University Court, published in the "University Calendar" as aforesaid, must be held as conferring, *inter alia*, upon women a right to demand that they shall be taught in the University, and a right to graduate, to that extent the said resolutions and regulations were illegal and *ultra vires*, and the matriculation which took place in terms of, and in compliance with the said regulations, was illegal and void in law, and cannot be founded on as investing the pursuers with the privileges of students, to the effect of entitling them to insist upon instruction within the University, or upon being admitted to graduation.

The Chancellor stated;—"The defender has always been, and still is, willing and ready, as Chancellor of the University of Edinburgh, to confer degrees upon the pursuers, or any women duly recommended by the Senatus Academicus, upon its being ascertained, by decree of a competent Court, that they are entitled to demand admission as students, and to become graduates of the University."

The Chancellor pleaded;—(1) The conclusions of the action, in so far as directed against the defender, were unnecessary. (2) In any view, the action as against the defender ought to be sisted, in order to await the issue of the questions arising between the pursuers and the other defenders in the cause."

Professors Bennett, Masson, Calderwood, Lorimer, Charteris, and Hodgson lodged a minute in which they stated their desire that no opposition should be offered to the conclusions of the action, and disclaimed any responsibility for the defences lodged in name of the Senatus.

On 27th July 1872 the Lord Ordinary (Gifford) pronounced this interlocutor:—"Having heard parties' procurators, and having considered the closed record, statutes, charters, and writs founded on, and whole process, recalls the sist, repels the first plea in law stated for the defenders, the Senatus Academicus of the University of Edinburgh, that all parties are not called: Finds that the resolutions or regulations passed and enacted by the University Court of the University of Edinburgh, dated 10th November 1869, and approved of by the Chancellor of the said University of date 12th November 1869, form part of the regulations now in force in the University of Edinburgh, and must receive effect as such: Finds that according to the existing constitution and regulations of the said University of Edinburgh the pursuers are entitled to be admitted to the study of medicine in the said University, and that they are entitled to all the rights and privileges of lawful students in the said University, subject only to the conditions specified and contained in the said regulations of 12th November 1869: Finds that the pursuers, on completing the prescribed studies, and on compliance with all the existing regulations of the University preliminary to degrees, are entitled to proceed to examination for degrees in manner prescribed by the regulations of the University: Finds that the defenders, the Senatus Academicus of the said University, are bound, on the pursuers completing the prescribed studies, and complying with the said regulations, to admit the pursuers to examination as candidates for medical degrees; and on the pursuers being found

qualified, to recommend them to the Chancellor of the University for having such degrees conferred upon them; and finds that the defender, the Right Honourable John Inglis, as Chancellor of the said University, is bound, upon such recommendation being made by the Senatus Academicus, to confer medical degrees upon any or upon all of the pursuers who are found qualified therefor, and recommended as aforesaid: And in terms of the above findings, and to the effect thereof, finds, decerns, and declares under the declaratory conclusions of the summons: Farther decerns and ordains the defenders, the Senatus Academicus, on the pursuers respectively completing the prescribed studies, and complying with the existing regulations of the University preliminary to degrees, to admit the pursuers to examination as candidates for medical degrees; and on the pursuers being found qualified, decerns and ordains the said Senatus Academicus to recommend the pursuers to the Chancellor of the said University for having such degrees conferred upon them, and decerns and ordains the defender, the said Right Honourable John Inglis, as Chancellor of the said University, on receiving the requisite recommendation from the Senatus Academicus, to confer upon the pursuers respectively the medical degrees for which they are recommended: *Quoad ultra* dismisses the remaining conclusions of the action, excepting the conclusion for expenses, and decerns: Finds the defenders, the said Senatus Academicus, liable to the pursuers in expenses, subject to modification, and, in the circumstances, modifies the same by deducting one-fourth from the taxed amount: Remits the account of said expenses, when lodged, to the Auditor of Court to tax the same, and to report, and reserves all questions of relief as between the minority and majority of the Senatus Academicus: Finds no other expenses due in the cause, and decerns." *

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* "NOTE.—It is not easy to over-estimate the importance of the questions involved in the present action. The decision may affect, in various ways, not only the interests of the pursuers, and of all who are similarly situated, but also the future welfare of the University, and indirectly the well-being of the community at large who are interested in securing the services of thoroughly educated and accomplished medical practitioners.

"The Lord Ordinary has endeavoured to approach the consideration of the questions dispassionately, and free from all prejudices or prepossessions. He has also endeavoured to keep in view that his functions are merely judicial and not legislative, and that his duty is simply to declare and apply the law as it at present stands, and in no way to endeavour to amend it, however strong his convictions of what the law ought to be.

"The object of the present action may be shortly stated to be—first, to declare the right of the ten ladies, who are the pursuers of the action, to prosecute their studies as students at the University of Edinburgh, with a view to the profession of medicine; second, to declare their right, on finishing their studies and being found duly qualified, to obtain from the University, through its Senatus and Chancellor, the usual and customary medical degrees; and, third, and with a view to enforce these rights, to compel the Senatus to make arrangements for the complete instruction of the pursuers, and to do what is necessary for the examination of the pursuers, and for their reception as medical graduates of the University.

"The importance of the question to the present pursuers, and to all ladies who, like them, may contemplate the practice of medicine as a profession, lies in this, that by the provisions of the Medical Act of 1858 no one is entitled to be registered as a medical practitioner without possessing a medical degree from one or other of the Universities of the United Kingdom, or a license equivalent thereto from certain established medical bodies mentioned in the Act. A foreign or colonial degree is not available, and does not entitle to registration, unless the holder thereof has been in practice in Great Britain previous to October 1858.

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The Senatus reclaimed.

After hearing counsel the Second Division ordered written cases to be laid before the whole Court.

Unless the pursuers, therefore, succeed in obtaining degrees, they will be practically excluded from the profession of medicine, for they are not in a position to demand licenses from any of the authorised medical bodies, and it can scarcely be expected that they will prosecute their medical studies merely in order to be hereafter classed along with empirics, herbalists, or medical botanists, or with those who, in common language, are denominated quacks. Without legal registration under the Medical Act of 1858 the pursuers would be denied all right to recover fees, they would be incapable of holding any medical appointment, and they would be subject to very serious penalties if they so much as attempted to assume the name or title of medical practitioners.

"It is a fact, whatever may be its effect in law, that no University in Great Britain has ever yet granted a medical degree to a lady. The medical register of Great Britain only contains the names of two female practitioners—Dr Elizabeth Blackwell and Dr Garrett Anderson. Dr Blackwell obtained her degree in America, and being in practice in Great Britain before 1858 she obtained registration in virtue of the exception in the Act. Dr Garrett Anderson obtained a license from the Apothecaries Hall, London, and is registered as such; but since her admission regulations have been made which prevent any other lady from hereafter obtaining a license from the Apothecaries Hall. Accordingly, the course pursued by Dr Blackwell and Dr Anderson is not open to any of the pursuers, and their only hope of being allowed to practise medicine in Great Britain rests upon their being able to obtain a degree from one or other of the Universities.

"Practically, therefore, the questions are now raised for the first time—Can a lady obtain a medical degree? and, is any lady to be allowed to practise medicine in Great Britain?

"The present action has, of course, only reference to the University of Edinburgh, and the pursuers have the advantage of certain peculiarities in the existing constitution and regulations of that University. At the same time, however, the form of the action is such that its scope is somewhat limited, and various large questions are excluded from the consideration of the Court.

"For example—and this is a peculiarity in the action which must be carefully attended to—the only parties called as defenders are—(1) the Senatus Academicus of the University, and the professors as individual members of the said Senatus; and (2) the Right Honourable John Inglis, the Lord Justice-General of Scotland, as Chancellor of the University. The University of Edinburgh itself, as a corporate body, is not called as a defender, and is not a party to the present proceedings. Neither are any of the governing bodies of the University, excepting the Senatus. Neither the University Court nor the University Council are parties to the action.

"This peculiarity in the action led to the first plea in law for the Senatus, that 'all parties are not called;' and this is the first question of which the Lord Ordinary must dispose.

"The attention of the Lord Ordinary was not called to this plea before closing the record, and as a preliminary plea it ought to have been disposed of *in limine*. But perhaps this is of little consequence, as the Lord Ordinary is of opinion that the plea cannot be given effect to as a prejudicial plea stopping process, and he has accordingly repelled it.

"The grounds upon which he has repelled this plea, however, are that it is only sought in the present action to fix and define the duty of the Senatus and of the Chancellor under the constitution of the University as it at present stands, and to declare the rights of the pursuers in relation to the Senatus and to the Chancellor. The Senatus and the Chancellor are alone called, because they are the only parties complained of, or whose duties it is thought necessary to fix and define. The action assumes that the University itself, and all the other con-

The Senatus argued;—The University, from its foundation until 1869, had existed solely for male students. If the pursuers were successful this

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tituent members or parts thereof, are ready and willing to do their duty to the pursuers, and therefore none are called as defenders excepting the Senatus and the Chancellor. Indeed, it appears from the defence lodged for the Chancellor that even he need not have been called as a party, for he states that he 'has always been, and still is, willing and ready as Chancellor of the University of Edinburgh to confer degrees upon the pursuers, or any women duly recommended by the Senatus Academicus, upon its being ascertained by decree of a competent Court that they are entitled to demand admission as students, and to become graduates of the University.'

"The position thus taken by the Chancellor cannot fail to recommend itself to every one. He stands quite apart from the whole controversy, and is no way mixed up therein. He is ready, as the representative and head of the University, to confer its degrees upon all who may be found entitled thereto, and who are duly recommended for graduation by the Senatus.

"As the only question, therefore, is a question between the pursuers and the Senatus, the Lord Ordinary has repelled the plea that other parties are not called. But then it follows, from the principle upon which this preliminary plea has been repelled, that there is in the present action to be no attempt to impugn in the slightest degree the existing constitution of the University. None of its existing regulations or ordinances are to be challenged to be illegal or *ultra vires*—the pursuers are not to seek to extend or alter any of its laws, but are only to ask that these laws, exactly as they stand, shall be enforced and applied. In short, everything connected with the existing constitution of the University is to be taken as right, and the Senatus are simply called upon to carry out that constitution, and to give effect to laws and regulations already enacted.

"It will be at once seen how much this view narrows the field of controversy. It is possible that in some respects this restricted view may operate to the disadvantage of the pursuers, but probably in other respects it will be for their benefit. The Lord Ordinary has no doubt that the point has been well and maturely-considered by the pursuers and their advisers, and that they have adopted the course which, on the whole, seemed best suited to accomplish the object in view.

"Before proceeding to consider the merits of the action, the Lord Ordinary deems it proper to make one or two preliminary observations of a general nature.

"The Lord Ordinary is clearly of opinion that by the law of Scotland—indeed, he may say that by the law of every civilised country—there is no inherent illegality in women prosecuting the study of the science of medicine, using the word in its largest sense, or in their engaging in the practice of medicine as a profession.

"It would really be a waste of time to argue in support of this proposition, and it was not impugned by the counsel for the defenders.

"There is no natural impropriety in a woman becoming an educated and accomplished physician or surgeon, and no unsuitableness or impropriety in her practising the profession. Indeed, some branches of the profession are peculiarly appropriate to women, and peculiarly inappropriate and unsuitable to men. For example, in obstetric practice, and in numerous diseases of women, a male practitioner is singularly out of place; and nothing but the deadening effect of habit would ever reconcile the community to that anomaly both in name and in reality,—'a man midwife.'

"The practice of all civilised nations, indeed of uncivilised nations also, testifies most loudly at once to the fitness and to the suitableness of many if not most of the branches of the medical profession being undertaken by women. From the earliest times in Italy medical degrees were conferred upon and medical honours held by women, and at the present date women are allowed fully and freely to graduate in Italy, France, Spain, Switzerland, Russia, and America, as well as in several other countries. Indeed, Britain is almost the only country in which the right of women to graduate in and practise medicine has not been

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inveterate custom would be overturned. This custom had only explained the original charters and ratifications, as it had never been the intention fully recognised. One object of the present action is to try whether the right accorded in other countries does not also exist in Scotland.

"If, then, in Scotland there is no inherent illegality in women studying medicine and obtaining degrees therein, it is scarcely necessary to add that there can be no inherent illegality in women practising medicine as a profession. It would indeed be strange if women, merely on account of their sex, were by law excluded from a high and honourable calling, for most departments of which they are peculiarly fitted, and for some departments of which they seem to be by nature almost exclusively designated. The law of Scotland, like that of many other countries, has in many instances been unjust to women, but it has never gone as far as to exclude them from the legal practice of medicine as a profession.

"Keeping these general observations in view the Lord Ordinary will now proceed to consider very shortly the constitution and existing regulations now in force in the University of Edinburgh, so far as they relate to women.

"I. It was broadly maintained by the counsel for the Senatus, in a very powerful and able speech, that the University of Edinburgh was founded, and existed, as an educational institute for male students exclusively—that none but males were entitled to be admitted or to matriculate as students; that males alone were entitled to become members of the University, or to receive instruction therein; and that the privileges and rights of graduation were reserved for males alone.

"If this proposition be well founded there is of course an end of the whole case. The Lord Ordinary, however, has felt himself quite unable to affirm this proposition, but has come ultimately, without any hesitation at all, to the conclusion that there is no foundation for this first and general contention of the defenders.

"(1) The charters of the University give no countenance to the supposition that women were in all circumstances to be excluded from its benefits. The rights, liberties, and privileges conferred upon the University are all expressed in the most general terms, and are all quite consistent with provision being made for the instruction of females as well as of males within the walls of the University, and by its professors duly appointed. Even where the masculine form of noun or pronoun is made use of in speaking of the students the Lord Ordinary cannot doubt that that is done not to exclude females, but merely in conformity with ordinary brevity of expression, detailed enumeration of sexes or of classes being avoided, and the masculine or first sex being used to include everybody. In truth, it is notorious that in common language, and long before Lord Brougham's Interpretation Act was passed, nouns and names of the masculine gender were often used as including females also.

"(2) The reference in the charters to other Universities, and the conferring upon the University of Edinburgh the whole 'liberties, privileges, and immunities quhilk any colledge within this realm bruikes,' though perhaps not very important, certainly favours the view that women were not excluded.

"There was much controversy on this point whether by reference the whole privileges which belonged to the University of Bologna were not conferred, so far as the Crown had power to do so, upon the University of Edinburgh. The argument was, that as Edinburgh had all the privileges belonging to the older University of Glasgow, and as Glasgow, by the Papal bull of Pope Nicholas V., had all the rights and privileges which belonged to the Pope's University of Bologna, and as in the University of Bologna women were instructed and women received degrees, so women must have the same right in the University of Edinburgh which they had in the fifteenth century in the University of Bologna.

"The Lord Ordinary does not attach much weight to this argument. He rather thinks that the privileges referred to in the Pope's bull were chiefly immunities from local and other taxes, and exemption from the jurisdiction of the ordinary tribunals, and as it is certain that none of these privileges now belong

ıe founders that female students should be admitted. The true point the right to graduation. The pursuers broadly claimed that right as

ıy Scotch University, not much assistance can be got by any party from the s of the Papal bull.

At the same time, however, it seems sufficiently shewn that the Universities cotland were to a great extent constituted upon the model of Bologna and lar institutions in Italy; and it seems a quite fair observation, and one entitled onsiderable weight, that as women were never excluded from the Italian rersities, it cannot have been intended originally to exclude them from those ded in Scotland.

(3) Much stress was laid by the counsel for the Senatus upon the past history practice of the University of Edinburgh, and upon the fact that there is no rded instance of a woman having ever taken a degree therein.

It is impossible to deny that this argument has some weight—perhaps con- rable weight—but the Lord Ordinary thinks it will not bear the stress which defenders lay upon it. At best the practice is merely negative. There is no ınce of a woman ever having been excluded or refused admission or instruc- . If women had originally right to become students or graduates their right not be lost by mere non-usage—that is, by their merely neglecting to use r right. The right in them was one *mercæ facultatis*, like a man's right to d upon his own ground—a right which will not be lost though no building ıld be erected for hundreds or thousands of years. To extinguish such a t there must be a contrary usage—a possession inconsistent with the exercise ıe right—and this does not exist in the present case.

(4) If, then, there is no express exclusion of women, and nothing necessarily ing to their exclusion, it seems fair to fall back upon the inherent legality appropriateness of the study and practice of medicine for women, and to in- hat a medical school founded in the University cannot have as one of its litions the exclusion of the female sex.

(5) But passing from such general considerations the Lord Ordinary thinks nite conclusive of the whole question that by regulations lawfully enacted by petent and sufficient authority provision is actually and expressly made for admission of women to the study of medicine in the University of Edinburgh, actually detailed regulations have been enacted regulating their studies and ninations. These regulations will be immediately adverted to, as they form ding, and, in the Lord Ordinary's view, a conclusive feature in the pursuers' , and they are only noticed here as absolutely and utterly putting an end to defenders' contention that the University of Edinburgh is a University for s only. The first words of the regulations are—'Women shall be admitted he study of medicine in the University.'

The Lord Ordinary holds, therefore, that the defenders have entirely failed heir attempt to shew that the University of Edinburgh is restricted to males usively.

II. The Lord Ordinary is of opinion that the 'regulations for the education romen in medicine in the University of Edinburgh,' enacted by the Univer- Court on 10th November 1869, and approved of by the Chancellor on 12th ember 1869, are valid and binding in every respect, and form an integral of the constitution and regulations of the University as it at present exists.

At the debate it was felt on both sides that these regulations formed almost turning point in the case, and the counsel for the Senatus, sorely pressed by n, boldly challenged their legality, maintained that they were *ultra vires* he University Court to enact, and he asked the Lord Ordinary to treat them nullity. Here, again, the Lord Ordinary thinks that the position taken by Senatus is absolutely untenable.

(1) The regulations in question were solemnly, after much discussion, after consideration, and after due communication with the whole governing bodies he University, enacted by the University Court.

Under the Universities (Scotland) Act of 1858 the University Court has, er certain safeguards, very large and almost legislative powers. It reviews

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the ultimate result of their right to study, and the question was, were they entitled to it. The right to grant degrees was conferred by a refer-

and can alter or reverse the whole decisions of the Senatus. It can (subject to approval of Her Majesty in Council) censure, suspend, or deprive any professor, or even the principal. It can check and control the whole administration of the revenues, and—what is specially important in reference to the present question—it has full power (section 12, sub-section 2)—'to effect improvements in the internal arrangements of the University, after due communication with the Senatus Academicus, and with the sanction of the Chancellor, provided that all such proposed improvements shall be submitted to the University Council for their consideration.

"Nothing can well be broader than the power so conferred. The very care with which safeguards are provided shews the extent of the authority. The admission of women and the regulation of their teaching is so plainly a part of the 'internal arrangements' of the University, that in support of the argument that the regulations were *ultra vires* the defenders had almost nothing to rely upon but the witty fallacy that although the regulations were 'alterations' they were not in the sense of the statute 'improvements.'

"(2) These regulations were enacted with all the required statutory requisites—'Due communication' was had with the Senatus. The matter was submitted to and deliberately considered by the University Council, and the regulations received the final sanction and approval of the Chancellor.

"The Senatus, the University Council, and the University Court, had all the benefit of the very highest legal skill and experience. Most eminent lawyers were members of all these bodies; and the Chancellor, who put the seal of his approbation and sanction to the regulations, holds with universal acceptance the very highest judicial office in Scotland. It was very startling to hear the majority of the Senatus maintain, through their counsel, deliberately and strongly, that regulations to which they themselves had been a party—regulations enacted in such circumstances, and holding such high sanction—were absolutely null and illegal; and when it was seen how essential this contention was to a great part of the defenders' case the weakness of that part of the case became very apparent.

"(3) Still farther, the Lord Ordinary is of opinion that the validity and binding character of these regulations cannot be impugned or challenged in the present action. No reduction of the regulations has been instituted. They have never been said to be illegal or invalid till this was maintained for the first time in the present argument, and the Senatus itself, as well as everybody else, has hitherto admitted their validity, and acted upon them. So satisfied have the Senatus been of the validity of the regulations that they have actually applied to the enacting power—that is, to the University Court—to rescind them; but saving the rights of those who have acted upon them. The attempt failed. The University Court refused to rescind the regulations, and they still stand part of the law of the University.

As has been already pointed out, neither the University itself, nor the University Court, nor the University Council, are parties to the present action; and it is quite clear that the Lord Ordinary cannot, without calling and hearing all these parties, even entertain a motion virtually to reduce and set aside part of their laws. A declarator of nullity of part of the University regulations will require to be brought in a very different way, and with very different parties from the present action.

"In short, the Lord Ordinary thinks that, looking to the form of the present action, and the parties thereto, he must hold that the ratified and confirmed regulations of 10th November 1869 are in all respects valid and integral parts of the University constitution, and all that he has to do is to apply and carry them out according to their true meaning and import.

"It is almost superfluous to add that these regulations have been in full force since their enactment. They have been regularly published in the University Calendar, and it is upon the faith of them that the pursuers have commenced, and to a certain extent prosecuted, at great expense both of money and of time.

ence in the Parliamentary ratification of 1621 to the powers enjoyed by the other Scotch Universities. The University of Edinburgh was the professional study of medicine in the University of Edinburgh. It would be indeed a serious matter to find that regulations on which so much has followed are absolutely void.

"III. The Lord Ordinary is of opinion that, under the constitution and regulations of the University, including therein the regulations of 10th November 1869, the pursuers are entitled in substance to the declaratory decree which they demand in the present action. The Lord Ordinary, however, has found it necessary somewhat to alter the phraseology, and in one or two particulars to restrict the breadth of the decree of declarator sought.

"(1) The Lord Ordinary thinks that the pursuers are entitled to be admitted as students of the University for the study of medicine therein, that they are entitled to be matriculated as students, with all the privileges of students, subject only to the special condition that they shall be taught in separate classes, confined entirely to women.

"The first article of the regulations is in these words—'Women shall be admitted to the study of medicine in the University.' The Lord Ordinary cannot read this otherwise than as entitling the pursuers to be admitted as students—members of the University, with the full privileges of students, subject only to the conditions specified in the regulations.

"It was strongly contended for the Senatus that women were not entitled to matriculation, and that there was a distinction between admission to study and matriculation as a student. The Lord Ordinary has failed to see any substance in the distinction, and indeed he regards this dispute as little more than a difference about words. The origin of matriculation, or of the formal issue of matriculation tickets, seems to have been in the enaction of certain fees for the library and for janitors, but it has come to be regarded as the form in which a student is admitted. It rather appears that certain classes of theological students are or were exempt from matriculation; but surely that did not deprive them of the status of students of the University.

"The reality of the thing—and this is far more important than the name—undoubtedly is that women are to be admitted as students in the University, whatever be the form in which this is done. In point of fact all the pursuers have matriculated repeatedly, and they all hold tickets as '*Cives Academiæ Edinensis.*'

"(2) Now, if students of the University, the Lord Ordinary thinks that the pursuers must have all the privileges of students, subject only to the special conditions under which they were admitted relative to 'separate classes.' The Lord Ordinary cannot assent to the doctrine maintained by the Senatus, that the pursuers were only students by permission, and not students as matter of right. It is impossible to hold that ladies are students with no rights whatever, whereas males are students with legal and enforceable rights. The University has no power to make such a distinction, and, what is of equal importance, it has never attempted to do so.

"(3) It follows that the pursuers are entitled to attend all necessary classes, provided only they can be taught separately. To admit them as students, and yet deny their right to be taught, would be absurd. The provision about separate teaching may create a difficulty; but this is a mere difficulty in detail, which, in the Lord Ordinary's view, ought to be easily and at once surmounted. But this point will be more fully adverted to immediately.

"(4) And lastly; it follows that the pursuers, on completing their studies, and complying with all existing regulations, are entitled, as a matter of right, to demand examination, and, if found qualified, are entitled, equally as a matter of right, to demand full and complete medical degrees.

"The right to medical graduation is really at the foundation of the whole of the present dispute. If the ladies would be content to study as mere amateurs—as mere *dilettanti*—it rather appears that no question would ever have been raised. But their demand for degrees, and the announcement of their intention

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to enjoy all the privileges enjoyed by other Scotch Universities, and they enjoyed the privileges of the Universities of Bologna and Paris

to practise as physicians, has aroused a jealousy which the Lord Ordinary is very unwillingly obliged to characterise as unworthy; and hence this strife.

"But the right to demand graduation is a necessary consequence of the right to study at the University; ordinary medical degrees are not matters of mere favour or of arbitrary discretion. They are the indefeasible right of the successful student—the fitting termination and 'crown' of his completed study. The idea that there may be some students who may study and study successfully but who may not graduate, was never heard of before the present controversy arose, and yet in high quarters a doubt upon this point seems to have arisen.

"The majority of the Senatus, both in their minutes and proceedings, and by their counsel at the bar, have distinctly taken the position that women may be allowed to study, but they must not be allowed to graduate; and the University Court have actually passed, on 8th January 1872, in reference to the present pursuers, the following minute:—'If the applicants in the present case would be content to seek the examination of women by the University for certificates of proficiency in medicine instead of for University degrees, the Court believe that arrangements for accomplishing this object would fall within the scope of the powers given to them by section 12 of the Universities (Scotland) Act.

"The Lord Ordinary is of opinion, without any doubt at all, that the proposal to withhold from successful and fully accomplished female students the regular degrees, and to give them instead mere certificates of proficiency, is incompetent as well as unjust. The proposal is not unnaturally stigmatised by the present pursuers as a 'mere mockery,' and the Lord Ordinary thinks it can only have arisen from an entire misconception of the legal rights of an admitted student of the University. The right to demand a regular degree is, and always must be, an integral part of the right of every lawful student who is found duly qualified, and who complies with all prescribed conditions. The regulations expressly provide that women shall be instructed not merely in medicine, but (section 2) 'for the profession of medicine.' Now, this implies degree, for without a degree they cannot be registered, and without registration they cannot practise 'the profession.' Section 4, again, makes the matter quite clear, for it provides for the admission to certain classes of women who are 'not intended' to study medicine professionally, and the examinations to which women are to be subjected are plainly the examinations preliminary to degrees. The contention that examination means only class or private examinations might almost be characterised as a quibble.

"To the present Lord Ordinary, therefore, the right to demand degrees on all requisites being fulfilled seems indisputable.

"If the present judgment be affirmed, and the right of the pursuers to obtain degrees under the existing regulations be established, the Lord Ordinary feels confident that the Senatus, as well as all other members of the University, will gladly and at once do whatever is necessary to confer upon such of the pursuers as earn it the well merited 'crown.'

"IV. But while the Lord Ordinary has in substance affirmed the declaratory conclusions of the summons, he has found himself obliged to negative the leading petitory conclusions.

"The first petitory conclusion is to ordain the defenders, the Senatus, to make regulations whereby the pursuers shall receive such instruction in the University as is required for graduation in medicine, 'and, in particular, that they should direct and appoint the various professors whose duty it is to give instruction in medicine to permit the attendance of the pursuers upon their classes along with male students.'

"The Lord Ordinary can find no sufficient grounds for pronouncing any such decree, and there are conclusive reasons why no such decree should be pronounced:—

"(1) The defenders, the Senatus, have no power to make such regulations. The University Court and not the Senatus—at least the University Court

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ɔursuers alleged that the University of Bologna had been in use to degrees to females as well as males, and that therefore the Univer-

ıtely—is the body by whom such regulations fall to be made; and neither niversity itself nor the University Court are parties to the present action. ɔ the pursuers can obtain an order upon the Senatus they must shew that ɜnatus have power to do the thing to which they are to be compelled. ıas not been shewn, and, the Lord Ordinary thinks, cannot be shewn.

!) The pursuers seek to have the Senatus compelled to make a regulation ly contrary to an existing regulation solemnly enacted by the University . But the University Court is the supreme, and the Senatus is merely the ır tribunal in this matter. The University Court, under the statute, ɔn 12), has power to review all decisions of the Senatus, and to be a Court ıeal from the Senatus in all cases, but no power is given to the Senatus in ıse to rescind or alter a regulation of the University Court. The Univer- 'ourt, as has already been so often stated, is no party to the present action, s rules cannot be touched. When the University Court has prescribed romen shall be taught in separate classes it is perfectly vain to attempt to ɜl the Senatus to make a regulation that women shall be taught in mixed s, and 'along with male students.'

ɜ) This last difficulty was so strongly felt by the counsel for the pursuers ıe virtually abandoned the first petitory conclusion, and relied upon the ative, viz., that the Senatus should be compelled to order the professors to the pursuers in separate classes. But here the same difficulty arises. The ıs have no power to make such an order—at least their power to do so ot been shewn, and the University Court, which probably has the power, here. The Lord Ordinary would require to be perfectly convinced of the : of the Senatus to compel the professors to deliver double courses of lectures ɔ he could make an order such as is now asked.

ı short, the difficulty of getting professors to lecture separately to women t one of the difficulties which arose upon the very face of the regulations of November 1869, and which the pursuers must be held to have had in view they accepted the condition that they should only be taught in separate s.

he other petitory conclusions seem to follow from the declaratory ones, and ord Ordinary has given decree in terms thereof. They only come into when the pursuers have completed the full requisite course of study, and complied with all the regulations and conditions necessary for obtaining de-

he Lord Ordinary has only to express, in concluding these observations, ırnest hope and belief that the judgment in the present action, whether ıed or reversed, will terminate the unfortunate controversy which has raged ıg. On the one hand, if the judgment is affirmed, and the right of the ers to study, and, on being found qualified, to obtain degrees, is finally it surely cannot be doubted that the Senatus, the University Court, and 'niversity Council will do whatever is necessary to enable the ladies to com- their course of study. At present there seems too much ground for the remark ɔy the regulations these ladies have been induced to enter upon their ɜs, and have been most unfairly stopped in mid-career. It seems to the Ordinary that this has arisen from a misconception—a quite honest mis- ɔtion—as to the pursuers' right to obtain degrees. If this misconception ıoved the Senatus and all the officials of the University will undoubtedly ; combine to fulfil the honourable understanding on which the pursuers induced to commence their studies.

here is really no practical difficulty in doing so. If not the Senatus, at the University Court, has undoubted power to recognise extra-academical ers, whose courses will be reckoned sufficient for the purposes of graduation. ıers of unquestionable standing and ability are ready to give the pursuers ıstruction in separate classes which state of health or want of time prevents rofessors in the University from imparting. Let such teachers be authorised

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sity of Edinburgh had that power. That argument was fallacious. The privileges referred to in the ratification were personal privileges, such as exemption from taxation. Further, the alleged admission of ladies to the University of Bologna was not supported by sufficient historical evidence, and, at most, only amounted to certain learned ladies having obtained degrees, and not to their being admitted as students to the University. The true practice to be looked to was that of our own Universities, and in them females had not been admitted. That practice was in accordance with the language of all the documents connected with their foundation, the services expected from the students, and the regulations for their conduct.

The Lord Ordinary assumed that the right was one *meræ facultatis*. There was no evidence that ladies ever had a right at all, but assuming that they had, they had lost it by disuse. They were not to be permitted to force their way into our Universities, and break up their present prosperous working, when they had for so many centuries allowed them to grow up, and their regulations to be framed exclusively for men.

The recent decisions as to the franchise afforded an additional argument against the contention of the pursuers. It had been decided both in England and Scotland that females were not entitled to the franchise,[1] but if they were entitled to graduate they would become members of the General Councils of the Universities, and as such would be entitled to the franchise under the Act of 1858.

The regulations of 10th November 1869 only permitted females to study as a tentative measure, and gave no claim to insist on instruction or graduation. To have gone further would have been *ultra vires* of the University Court under sec. 12, sub-sec. 2, of the Universities (Scotland) Act of 1858. So far as the regulations went beyond the resolutions of the Medical Faculty approved of by the Senatus and the University Court they were *ultra vires* of the University Court.

The petitory conclusions ought to be dismissed. They craved that the Senatus be ordained to do what they had no power to do. That being so, the declaratory conclusions fell also to be dismissed, as they could merely declare an abstract right without shewing how it was to be made operative.

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to give part of the curriculum qualifying the pursuers for degrees. It is apparent from the correspondence referred to on record that this would have been done had not the doubt arisen whether the ladies were entitled to demand degrees, and whether medical degrees could be lawfully conferred upon them. That doubt the Lord Ordinary by the present judgment has endeavoured to dispel.

"On the other hand, if the present judgment is reversed, and if it be finally fixed that by the law of Scotland a woman cannot be a legal student at the University of Edinburgh, and cannot legally obtain a degree, then, though on the other side, the whole controversy will equally be settled. The ladies will only have to deplore that they have been misled by those most authoritative-looking regulations of 10th November 1869, and to seek their remedy against the existing law from some new legislative enactment.

"As the pursuers have been practically successful the Lord Ordinary has awarded them expenses, but only against the Senatus, not against the Chancellor. These expenses, however, are subject to modification, because the pursuers have failed in making good very important petitory conclusions. To avoid possible misconception, the Lord Ordinary has thought it right to reserve questions of relief between the majority and the minority of the Senatus who disclaim the present defence."

[1] Chorlton v. Lings, Nov. 9, 1868, 4 L. R. (C. P.) 374; Brown v. Ingram, Dec. 19, 1868, *ante*, vol. vii. 281.

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The pursuers argued;—(1) The pursuers had been unfairly treated by the University. They were induced to matriculate, and to spend, some one, some two, and some three years in attendance on the medical classes, and were now refused the means of completing their curriculum. Means ought to be devised by the University to enable them to do so. If it was inconvenient for the present professors to give the requisite lectures special lecturers ought to be appointed, or attendance allowed on extra-mural lectures. Special lecturers were at present appointed in place of Dr Wyville Thomson and Dr Hughes Bennett. (2) The University Court did not exceed their powers in issuing the regulations under which the pursuers matriculated, and although degrees were not mentioned in these regulations they might be claimed as of right by any student who matriculated and had studied and passed the usual examinations. The University of Edinburgh had the power and the duty of conferring degrees on all students, whether male or female. It possessed, under the Parliamentary ratification of its prior charters of 1621 all the privileges and powers of the other Scotch Universities, and their privileges and powers were conferred by a reference to the two parent Universities of Bologna and Paris. In particular, by a bull of Pope Nicholas V., dated in 1450, all the privileges of the University of Bologna was conferred on Glasgow, and in Bologna ladies had been admitted to graduation and to hold professorships. The language of the bulls and charters founding our Scotch Universities did not limit their benefits to male students, and although no doubt many of their regulations had been framed solely with a view to these no argument was to be drawn from that, as they were so framed because male students had alone taken advantage of the Scotch Universities. It had been argued that if females were permitted to graduate they would obtain the franchise. That was not so. There were many members of General Councils who could not exercise the franchise,—peers, graduates *honoris causa*, and graduates under twenty-one. The University Courts were Registration Courts, and would exclude female members of councils from the franchise if they ought to be excluded. (3) Ladies had been admitted to the Universities not only at Bologna, but at Lyons, Montpelier, Paris, Göttingen, St Petersburgh, Moscow, and America. (4) The history of Scotland afforded a sufficient explanation why ladies did not attend the Universities. For four centuries prior to the Revolution of 1688 the country was continually disturbed, and people thought more of personal safety than of study. After the Revolution of 1688 the Rebellion of 1745 broke out, and it was only of late years that the country was fully settled. Prejudice, also, took a long time to change. The present case was one of first impression, and must be judged of as if the charter of erection had been granted yesterday. The Court were called on to give that *benignior interpretatio* to the charter which would accommodate existing institutions to the social tendencies of the age.

The following opinions were returned, the Lord President declining, as Chancellor of the University:—

Lord Deas.—In the way this case has been pleaded by the parties the first important question arising for consideration is, whether females are entitled, as matter of legal right, without the necessity of any express sanction from the authorities of the University, to become students at the University, and to obtain, on the same conditions with male students, such honours and degrees as the University can confer.

If the fact that, in the order of nature, no superiority, moral or intellectual, can be attributed to the one sex over the other were pertinent to the present question I should at once answer that question in the affirmative. The development of the moral and intellectual faculties is no doubt moulded and varied by

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sex; and this variation contributes largely to the happiness of the human race. But, balancing what is most to be esteemed in the one sex against what is most to be esteemed in the other, the scales cannot well be said to preponderate on either side, or, at least, not on the side of the male sex. Nor can I doubt that there are at all times such a number of females who would profit by such studies as are pursued at Universities as to make it desirable that means of prosecuting these studies should, as far as practicable, be available to them.

But the present question is altogether different. It is true that, in the charters and Acts of Parliament which form the written constitution of the University of Edinburgh there is no express exclusion of females from the privileges of the University. But, at the same time, it is clear enough that, down to the date of the recent regulations quoted in the record, all the arrangements as to teaching and graduation in the University proceeded on the footing that the students were all male students, and, until one or more of the present pursuers came forward, no female seems ever to have proposed to become a student in that University. That, I think, is of itself conclusive against now giving effect to the pursuers' claim as matter of pure legal right, because, without some regulations specially made for the purpose, the pursuers could not practically have been accommodated in the class-rooms and taught by the professors. And if, by the lapse of some centuries, regulations have become essential as a condition precedent to the admission and graduation of females, it seems to me to follow that the authorities of the University must have a discretion as to whether any or what regulations, with a view to such admission and graduation, are practical and expedient, consistently with the interests and discipline of the University. My opinion, therefore, is, that except in so far as this action seeks to vindicate the rights of the pursuers as recognised in the regulations of 1869, no effect can be given to the conclusions of the action, either declaratory or petitory.

But this leads to the second, and not less important question, whether the enactment of the regulations of 1869 was within the power or competency of the authorities of the University.

I am not disposed to hold an action of reduction to be necessary to raise that question. The regulations were no doubt duly and formally enacted by the authorities of the University, in so far as they had power under the constitution to enact them; and I think it was the duty of the defenders, the Senatus Academicus, to act upon and carry out these regulations according to their true spirit and intent, so long as they were not rescinded. Still, if it could be shewn that these regulations were *ultra vires* of the authorities of the University I think there would be no incompetency in recognising that view in this declaratory action.

My opinion, however, is, that the regulations were not *ultra vires*. There was nothing in the terms of the written constitution of the University to exclude females. If females had applied at the outset they might or might not have been admitted, according to the views taken of the expediency and propriety of admitting them. But I fail to see that there would have been any illegality or incompetency in admitting them. The purpose of the institution was the education of the human mind,—a purpose applicable equally to males and females. The females of these days were apparently not desirous to relieve men of the heavy labour and responsibility they undertake in following the learned professions for the support of their wives, families, and dependents; and they refrained, perhaps wisely, from seeking that kind of education which, by fitting them for such labours, might have deprived them of the exemption which they happily enjoyed. There is no record of any resolution to exclude females. So long as none presented themselves they could, of course, neither be refused nor admitted. But, on the very first occasion when they did present themselves, the regulations now in question were issued to aid them in their object. It was the absence of any such regulations, and not the absence of power to make regulations, which stood in the way. So long as no females came forward as students it was inevitable that the discipline, rules, and usages of the University should adapt themselves to the only body of students who then existed in

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the University, namely, male students. But the same power which enabled the authorities of the University to make regulations suitable for the one set of circumstances, enabled, and still enables them, I think, to make regulations suitable for the other.

The decisions finding women not entitled to the parliamentary franchise can, I think, have little weight here. Women must either have had the right to the franchise absolutely or not at all. There neither is nor ever was any regulating body in a position, with reference to the franchise, analogous to the position of the authorities of the University with reference to the matriculation and accommodation of students in the University. Does, then, the fact that the authorities of the University never had occasion till now to regulate the admission and accommodation of female students in the University prove either that they never had any power in that matter or that they have lost that power? The decisions as to the franchise do not seem to me to afford any solution of that question.

A practical difficulty has been urged, with some force—that the authorities of the University not having authorised mixed classes, and having no power to compel the professors to form separate classes for females, the regulations are substantially useless and inept. This does not, however, appear to me necessarily to follow. The professors may be willing. Many of them have been so; and to have all obstacles in the way removed except one, which is merely contingent, is a boon to females which cannot be treated as of no value. The tickets and certificates of extra-mural lecturers, as well as of professors in other colleges, have been, and I understand still are, accepted as sufficient with reference to certain branches of study, and it does not prevent this from being a substantial advantage to students that the authorities of the University have no compulsory powers over the teachers or professors from whom these tickets and certificates are to be obtained.

The references made to Bologna, and certain other foreign Universities, although they do not appear to me to establish the plea of abstract legal right, have unquestionably a bearing upon the question of discretionary power. The defenders say in their case that the statutes of the University of Bologna "do not in any way recognise or contemplate the existence of women in any capacity in the University, or the colleges which composed it. On the contrary, their whole scope and bearing, fairly considered, excludes any such idea." If that be so, the instances in which University honours and privileges have been conferred upon and exercised by women in that University, and in other Universities similarly constituted, become all the more palpably examples of the exercise of discretionary power, under a constitution analogous to what the defenders allege to be the written constitution of the University of Edinburgh.

The existing regulations bear that women shall be admitted to the study of medicine in the University. The pursuers, under the first conclusion of their summons, ask to be found "entitled to attend the classes of any of the professors of the University;" and although they specially claim to be found entitled to medical instruction, and to obtain medical degrees, the third conclusion of their summons seems broad enough to comprehend all kinds of degrees which the University can confer. If they were to be held entitled, as matter of abstract legal right, to become students at the University with a view to the medical profession, without obtaining the sanction of the University authorities, it would seem logically to follow that they are entitled to claim instruction in all the classes, and to obtain all the honours or degrees which male students can obtain. The anomaly of being dubbed, in the masculine gender, doctors of laws, bachelors or masters of arts, or doctors of divinity, would, of course, be no greater than that of being dubbed doctors of medicine. The masculine gender must in either view continue to be used. Admittedly a lady cannot be a mistress of arts in the University, whatever she may be in the drawing-room. But if, as matter of legal right, she could claim to become a doctor of medicine, she would necessarily, I think, have the same right to claim all other University degrees, and consequently to become, in the language of Aikenside, "by commutation strange a reverend divine." My opinion, however, is that no such

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right can be claimed independently of recognition and regulation by the authorities of the University.

It is true that, in the view I take, it must be within the competency of the University authorities to extend still farther than they have yet done the privileges of females in connection with the University, and to afford additional facilities for the exercise of these privileges. I am not, however, startled by that being a legitimate consequence of the argument. The authorities of the University have, hitherto at least, done nothing so extravagant either in the way of admitting or restricting the admission of females as to justify the interposition of this Court, and it is not to be presumed that they are likely to do so. Their refusal in the meantime to sanction mixed classes is an instance of the caution and discrimination to be expected from them. I do not mean to suggest that the law could have pronounced such classes illegal if the University authorities had sanctioned them. But the small proportion of female students as compared with male students of itself afforded a reasonable objection to such an arrangement. Somehow, either sex feels uneasy when shut up with an overwhelming majority of the other, and if the regulation had sanctioned mixed classes only the grievance might have been regarded by many females as greater than it is now. A central division of a class room, such as there is, or once was, in the chapel of Pentonville prison, whereby both sexes could see and be seen by the speaker, and neither sex could see or communicate with the other, or some analogous contrivance, might possibly have suggested itself to meet the difficulty, had there been funds at command, and a large enough number of female students to justify the necessary expenditure. But in the actual circumstances the restriction to separate classes was not only within the competency of the University authorities, but was a fair and reasonable exercise of the discretionary powers with which I think the law has invested them.

As to the expediency of ladies becoming medical practitioners it is enough to say that it is a fair subject for difference of opinion. To suggest jealousy of the rivalry of women as entering into the objection would be altogether absurd. Those who entertain the objection no doubt conscientiously believe that the result would be to diminish the delicacy and respect by which the female character in well-bred society is so advantageously surrounded. On the other hand, it must be admitted to be remarkable how, in trying circumstances connected with severe suffering, or with danger to life or health, nature throws a veil over delicacy and preserves it uninjured. The fictitious character of Rebecca, the Jewess, commented on in the argument, is not an inappropriate illustration. With consummate knowledge of human nature the author makes the urgency of circumstances supersede all delicacy, and yet tempts his reader to say in the classical words of an older writer, "the starry fable of the milky way hath not her story's purity."

There still remains a third question, what are the rights of the individual pursuers under the existing regulations?

To that question I answer that the pursuers are entitled to receive instruction from those of the medical professors who may arrange to teach them in classes separate from male students; and that if they can thus obtain and produce evidence of having completed the prescribed course of study, and shall successfully undergo the examination prescribed for male students, they will be equally entitled with male students to medical degrees. The right to eventual graduation is, I think, fairly implied under the second head of the regulations, which provides for "the instruction of women for the profession of medicine," contrasted with the fourth head, which provides, conditionally, for the instruction of "women not intending to study medicine professionally." The pursuers have expended time and money on the faith of the regulations, as set forth in the third plea in law, and a construction which would defeat the plain object of the regulations is, I think, altogether inadmissible.

Upon the whole, I am for adhering to the specific findings in the Lord Ordinary's interlocutor, and to the intent and effect of these findings—but to no other or further effect—decerning and declaring in terms of the declaratory con

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clusions of the summons. *Quoad ultra* I think the defenders should be assoilzied from the declaratory conclusions.

As regards the petitory conclusions with reference to examination and graduation, I think these should be dismissed as premature, in so far as directed against the Senatus Academicus, and as out of place in so far as directed against the Chancellor, who has all along been ready and willing to act upon such recommendations as may be duly made to him. From the remaining petitory conclusions, I think, there ought to be decree of absolvitor.

LORD ARDMILLAN.—In this very interesting and important case we have had the benefit of ample and elaborate pleadings, prepared with great industry, learning, and ingenuity. If some of the questions which have been argued were necessary for decision of the case before us the disposal of these questions would certainly be matter of great difficulty. I have felt much impressed by the literary and historical interest of these questions regarding the origin and early history of our own Universities, and of the seats of learning in other countries. But in the view which I take of the cause immediately before us the materials for decision are to be found within more narrow limits.

This action has been raised by Miss Jex-Blake and the other ladies who are pursuers against the Senatus Academicus of the Edinburgh University. The Chancellor of the University is a nominal defender. But the position which, with his wonted impartial dignity, he has taken, is one of neutrality; and the Senatus Academicus is to all intents and purposes the only defender. The pursuers can get no decree in this action except against the Senatus; and although this may be considered as only matter of form I agree with the Lord Ordinary in viewing it as practically of some importance. On the one hand, if the existing constitution of the University does not support the pursuers' claim as against the Senatus, then the pursuers cannot succeed, whatever may be the grounds on which, if they had other parties in the field, they might challenge that constitution. On the other hand, if the existing constitution of the University does not afford grounds for resisting the pursuers' claim, then the Seuatus, bound to accept that constitution, and acting in the administration of that constitution, cannot have a good defence against the pursuers' claim, even though a party in a different position might challenge some part of that constitution. In short, I am of opinion that the decision of this cause must turn, not so much on the more general questions which have been so ably argued in regard to the origin and history of the Scottish Universities, as on the more immediate and practical question, what is the meaning, the authority, and the effect, of the University regulations of 1869.

The object of the action is to obtain declarator of the right of these ladies, the pursuers, 1st, to prosecute their studies as students at the University of Edinburgh with a view especially to the profession of medicine; and 2d, to obtain from the University as the result and reward of successful study the usual medical degrees on being examined and found duly qualified. To these effects and for these ends decree of declarator is craved. I do not at present advert to the further conclusion for enforcing the pursuers' right to instruction and graduation if so declared. In regard to the mode of pursuing their studies, if entitled to do so, a different question is raised, which I shall afterwards notice.

Whatever may be said in the way of illustration or argument, no question is here involved as requiring present decision, except the right of the pursuers to medical instruction and medical graduation in the University of Edinburgh. The pursuers declare this to be a very important question for them, and of course I assume it to be so. It is certainly a novel question. The claim on the part of women to such instruction, and to graduation as the crown of it, is in Scotland an absolute novelty. Never once during the centuries which have elapsed since the institution of this University has a woman ever taken a degree. Nor does it appear that a woman ever claimed it. It is true that no woman has ever been refused a degree. But there is force, and great force, in the remark that the claim which might have been made at any time during the last three hundred years has now been made for the first time, and that in the argument

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before us the claim has been maintained as matter of right existing at common law, in which, as your Lordships are well aware, it has always been held that the consuetudinary element has great weight. Still this argument from custom is not conclusive. The absence of women from the classes of the University, which is a mere matter of fact, is according to long and uniform custom. The exclusion or rejection of women, which implies power to exclude—power in existence and in exercise—has no support or authority in custom. If the University had rejected the claim it may be that the uniform custom would have been viewed as supporting the rejection. But we shall see that this was not the case; for in regard to these pursuers there has been no rejection.

I am not prepared to concur with the Lord Ordinary in holding that there is such an original inherent legality, fitness, appropriateness, and expediency in the study and practice of medicine by women as to be of itself sufficient to overcome the presumption arising from the contrary custom of centuries, and even sufficient to sustain a right to enforce admission, and to render the exclusion of women from the medical school of the University unlawful.

On the other hand, I do not perceive any necessary or natural impropriety, or any inherent and essential illegality, in the study and practice of medicine by women, supposing them to be duly qualified. The question whether the practice of medicine by women is appropriate and desirable is one on which difference of opinion may well prevail, and we have had much able and interesting argument to illustrate as matter of history the views on the subject which have prevailed at different times, and in different countries. I do not feel it necessary to enter on that controversy. Though I have carefully, and with much pleasure, perused the pleadings, I do not think it necessary to express an opinion on that point; and it is sufficient for me to say that neither argument nor authority has been adduced to satisfy me that such medical study and practice by women is essentially and necessarily wrong, and consequently must be held illegal. I do not think it is so. The uniform and long-continued custom of the Scottish Universities has created some presumption against it, which the pursuers must meet. But it is not, in my view, necessarily wrong, nor inherently opposed to moral or legal principle. It is possible that the claim which these ladies now make for present medical study, and ultimate medical graduation, may be supported by the authority of University regulation, if such regulation be clearly expressed, competently enacted, and capable of legitimate practical application.

It is on the solution of this question, touching the nature, authority, and effect of University regulation in Edinburgh, that the case before us must, in my opinion, really turn. I am prepared to negative both of the extreme propositions which have been presented. I do not think that, in the absence of University regulation, and in opposition to long and uniform custom, women are entitled to demand and enforce admission as students into the medical classes of the University with a view to graduation, merely because of any essential suitableness in the practice of medicine or any inherent lawfulness and propriety in their claim. On the other hand, I do not think that their claim for admission to such study and such graduation is essentially and necessary so inappropriate, unreasonable, and illegal as to be beyond the reach of University regulation. There is nothing to prevent the rejection of the claim, or to prevent the concession of the claim by the University. I do not think that the University of Edinburgh is by law so exclusively devoted and restricted to the education of male students only as to render incompetent and unlawful a resolution by the Medical Faculty and a regulation by the University Court sanctioning the admission of women as students of medicine with a view to graduation under reasonable and legitimate conditions. I do not see that law has imposed on this Alma Mater the command "Bring forth male children only." I see no reason to doubt that the University Court, acting in accordance with, and after due communication with, the Senatus Academicus, and with the sanction of the Chancellor of the University, and approval of the University Council, had power to resolve and enact by regulation, either that women should be excluded from the study of medicine in the University of Edinburgh, with a view to graduation and practice of medicine, or that women should be admitted to such study, and with such view.

The matter is, in my opinion, within the scope of legitimate University regulation. There is no such weight and power of inherent right as to entitle women to force their way into the medical classes. There is no such taint or noxious quality of wrong in the demand of women for such admission as to forbid admission, and to require an inflexible and inexorable exclusion.

Several illustrations occur to one. Application for the first time, and therefore contrary to uniform custom, may be supposed to have been, at different periods of our history, made by a Roman Catholic, or by a Jew, or by an Indian or a negro. Can it be said that the University could not by vote and resolution have admitted these persons? But the argument for exclusion in respect of custom alone implies that all these persons must have been inexorably shut out, and that the University could not have admitted them. I am not able to arrive at that conclusion.

I therefore proceed to consider the import and effect of the regulations by the University Court in 1869, and I do not pause to comment on any of the objections which have been taken in point of form to these regulations. None of the technical objections which have been urged by the defenders are, in my opinion, well-founded. The procedure in regard to the proposal, consideration, and adoption of these regulations was correct enough, and in accoradnce with the statutory requirements.

The University Court has under the Act of 1858 very wide and varied powers and discretion. In particular, the University Court has power, under section 12 of the statute, "to effect improvements in the internal arrangements of the University."

I do not say that every alteration in the arrangements of the University which the University authorities adopt is necessarily an improvement. It is possible to conceive a case, though scarcely possible to anticipate it from such a body, where an alteration might be proposed and adopted which is not an improvement. But certainly an alteration in the internal arrangements of the University in regard to the admission of students to the study of medicine—the alteration being embraced in the resolution of the Medical Faculty, agreed to by the Senatus Academicus, adopted and embodied in regulations by the University Court, approved by the University Council, and sanctioned by the Chancellor of the University—cannot possibly be considered by us, sitting in the Court of Session, as otherwise than an improvement in the opinion of the University; and it is a matter of University administration, on which the University Court was entitled under the statute to give an authoritative deliverance. By the approval and adoption of it the University declared it an improvement. The Senatus is a Court of the University,—an official portion of the administrative power and authority of the University; and in my opinion they are bound by the existing constitution. They cannot repudiate and set at nought the resolutions which have been adopted by the legitimate University authorities.

The claim of women for the Parliamentary franchise has in England and Scotland been rejected. The rejection has been founded on here.

I do not think that the decisions on the subject of the franchise are quite in point.

In the first place, the quality or character of the contrary usage was different. The franchise, sustained by whatever qualification the law required, is a public right; and for centuries that public right was exercised in accordance with universal national usages, and, both in England and in Scotland, was limited exclusively to men. That long and uninterrupted national usage, in such a matter as the elective franchise, assumed a constitutional character. The right to study medicine in a particular University is of a different character; and while contrary usage is an important consideration it has not the same weight as in the case of the electoral franchise. Then, there are no direct institutional authorities adverse to the right to pursue medical studies as claimed by these pursuers. But in England there were important authorities, such as that of Lord Coke and Mr Serjeant Heywood, adverse to the claim of women to the franchise. Therefore it appears that both usage and institutional authority were opposed to the claim for franchise.

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In the second place, the right to sit in Parliament was recognised as a co-relative right to the right to vote for a representative. The case of a peeress in her own right, who cannot sit or vote in the House of Lords personally or by proxy, was considered as analogous and appropriate by Mr Justice Willes, in whose very luminous and instructive opinion the question of the female claim to the franchise is fully disposed of. The report of the decision of the franchise question in our own Court is very brief—Brown v. Ingram, 19th December 1868, 7 Macph. 281. But I was one of the three Judges who decided it; and I recollect, and have notes confirming my recollection, that I referred to the right to sit in the House of Commons or the House of Lords as not only cognate but relative to the right of franchise, and as substantially involved in the question raised. That also is an important distinction,—a peculiarity not here present.

In the third place, the meaning and result of the decision in the case of the franchise was that it was a question for Parliament, and to be decided by Parliament. The view which I take of this claim for University study is, that it is a question for the University, which the appropriate University authority might dispose of by decision for or against the claim. In the meantime, and in so far as regards these pursuers, the University Court, having, as I think, sufficient power, has decided in favour of the claim. That decision may be reconsidered. But, in the meantime, it has been given; and the effect should be the same as it would be in the case of the franchise if Parliament had resolved to confer the elective franchise on women. On these grounds, I think that the decisions on the question of the franchise are by no means conclusive on the question now before us.

Let us next consider what is the true meaning of the resolution and regulation of the University Court. The words are before us. I need scarcely quote them again. I cannot doubt that, according to these regulations, the pursuers are entitled to admission to the study of medicine,—certainly not in mixed classes along with men, but in such separate classes as can be arranged with the professors of medicine. I am further of opinion that, under these regulations women are entitled to matriculation as students (as I understand they have in point of fact matriculated) and that they also are entitled to be admitted to examination with a view to the medical profession, for that end or object qualifies the whole claim made, and the whole arrangements sanctioned.

Lastly, I am of opinion that women, being entitled to enter on such study, and to be admitted to examination with the view to the medical profession, are, on the completion of their studies, on their complying with all the conditions imposed by law, and on passing their examination, and being found duly qualified, also entitled to demand and obtain the usual medical degrees. I think that the University *gradus*, to which their title is recognised and their admission sanctioned, is incomplete without graduation, assuming that, as the end of the study and the result of the examination, the women who seek graduation are found qualified. I agree with the Lord Ordinary in holding that graduation is "the indefeasible right of the successful student,—the fitting termination and crown of completed study." To admit the pursuers to the study of medicine with a view to the profession of medicine, and to admit them to the testing of that study by examination, and then to refuse them graduation if duly qualified, would be to mock them after encouraging them to hope and stimulating them to effort. It would truly be to lead them into a delusion and a snare. There may be difficulty in taking the first step of admission. That difficulty—arising chiefly from the novelty of the claim and the prevalence of a long and uniform contrary custom—must be admitted. That difficulty I have felt, and fully appreciate. The import and authority of the University regulations has from my mind ultimately removed that difficulty as regards this action and these pursuers. But if their admission has been sanctioned, and the first step taken, and their course of instruction regularly pursued, and their studies completed, and their qualification ascertained by due examination, I have little difficulty in arriving at the conclusion that the usual result must follow, and that graduation must crown the studies of those who have been thus admitted, and who have successfully laboured in University education with a view to the medical profession.

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ll are permitted to pursue medical studies it cannot be that the University ree—the reward and token of success—is reserved for one sex only. I am refore of opinion that the pursuers are, to this extent, entitled to succeed in declaratory conclusions of this action.

nother question has, however, been raised, on which I must say a word before onclude. I mean, the manner in which (assuming the rights of the pursuers be declared as I have above explained) they can obtain the end they aim at.

think that the Lord Ordinary has judged rightly in confining his interlo- or to the declaratory conclusions. I confess I do not see my way at present go further.

In the first petitory conclusion the pursuers crave a decree ordaining the natus Academicus to make regulations for the instruction of the pursuers, and their ultimate graduation; and particularly the pursuers crave decree ordain- the Senatus to direct the various professors whose duty it is to give instruc- in medicine to permit the attendance of the pursuers in their classes "along th male students." This proposed mode of prosecuting the study of medicine women—this proposed attendance in classes along with male students—has en, I think, rightly negatived by the Lord Ordinary.

In the first place, I am of opinion that the Senatus (who are the defenders) ve not the power to direct or effect an arrangement for the attendance of omen in mixed medical classes, as here concluded for. It is not the part of e Senatus to direct a change of such importance; and it would be a change pposed to the express words of the regulation of the University Court—the ry regulation on which the only case which the pursuers can present must and. That regulation, which, as the pursuers must contend, and do contend, s the force of University law, declares in express terms that the medical struction given shall be in separate classes; and I cannot discover any autho- ty or any principle to support the conclusion against the Senatus for reversal f the regulation of the University Court.

But, even if the power of the Senatus to direct the arrangement for mixed lasses, as desired by the pursuers, were conceded, I should still be of opinion at this Court ought not to ordain the Senatus to direct such arrangement.

I fully and respectfully recognise the high qualities, capacities, and vocation f women. I recognise especially the fact that the elevation of women in omestic and social position is one of the blessed fruits of Christianity. There re few, indeed, who hold intelligent and virtuous women in higher estimation han I do. It is very much for their own sake, and on account of the respect hich I entertain for them, that on this particular point I feel it my duty to ate my decided opinion that the promiscuous attendance of men and women 1 mixed classes of medical study, such as anatomy, surgery, and obstetric ience, with concomitant participation in dissection, demonstration, and clinical xposition, is a thing so unbecoming and so shocking—so perilous to the delicacy nd purity of the female sex—to the very crown and charm of womanhood—nd so reacting on the spirit and sentiment which sustains the courtesy, reverence, and tenderness of manhood—that the law and constitution of the University, bound to promote, and seeking to promote, the advancement of morality as ell as knowledge, cannot sanction or accept such attendance.

I suggest no doubt in regard to the motives which impel the pursuers to make heir present demand for attendance on mixed classes, in order to attain the ducational ends which they have in view. I give them credit for the best notives; but I entertain the strongest opinion, that the welfare of the University, the character of the medical school, and the best interests of the ladies hemselves, would be put in peril by conceding to them the privilege—I would all it the fatal boon—of attendance in mixed classes in medical study.

The second or alternative petitory conclusion is for decree ordaining the professors whose duty it is to give instruction in medicine to impart that instruction to the pursuers and other women in separate classes.

It is not quite so clear in this matter as in that of the mixed classes that the Senatus has not the power to make an order on the professors to the effect craved in this alternative conclusion. But I am of opinion that they have not the

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power. I think that the University Court might probably have power to make such an order if it were right to do so. But the University is not a defender, and the University Court is not a defender, and, under these conclusions we can only pronounce a decree against the Senatus Academicus. Whether, having regard to the terms of the regulations of 1869, in which a command or direction to the medical professors is scrupulously avoided, the Senatus can in this action be competently decerned to issue to the professors a command or order which the University Court refrained from issuing, seems to me extremely doubtful. But, even assuming the competency, I am, after some hesitation, now of opinion that, if there is no arrangement made, as "permitted" by the regulations, between the pursuers and the medical professors, then the Senatus ought not, under this action, to be decerned and ordained by this Court to issue an order upon the subject. The regulations have left it on a permission; and I think it was so left by the University Court advisedly, and in order to secure both to the medical professors and to the ladies the opportunity and the power of adjusting, by arrangement, the question of attendance in separate classes. It is an appropriate matter for arrangement; though it is certainly true that the inducements and facilities for arrangement may be diminished by the irritation of a lawsuit. Besides, there are obvious practical difficulties in the way of arrangement for securing medical instruction to a few ladies in separate professional classes, to be taught by eminent gentlemen, whose engagements within and without the University are numerous and important. Still, arrangements may not be hopeless. At all events, compulsion or authoritative direction was not contemplated in the resolutions.

Another suggestion for the prosecution of the medical studies of the ladies, and for their ultimate graduation, if their right shall be declared, has been adverted to in the pleadings, and is noticed by the Lord Ordinary. I mean the recognition by the University, and by the Medical Faculty, of extra-academical teachers, whose lectures and instructions might be reckoned sufficient for the purposes of female graduation, the ladies being ascertained by examination to be duly qualified. Such recognition, in the event of the failure of arrangement, and of declinature by a medical professor in the University to open a separate class for ladies, might perhaps meet some of the difficulties in the way of giving practical effect to a decree according to the declaratory conclusions of this action. But in regard to any such plan nothing can be done at present. It must be left as matter for arrangement.

I have only to add that I think the leading questions presented to us so important to the administration, the good order, and the whole interests of the University, as to raise no doubt of the right of the defenders to insist for judicial determination of these questions; and I feel sure that, in the course which they have taken, they have been actuated by no unworthy motive, and that if the law is declared against the pleas of the defenders they will deal honourably and liberally with the pursuers.

Though not in all respects concurring in the views of the Lord Ordinary, I substantially concur in the result at which he has arrived; and I think we should adhere to his judgment, as limited to the declaratory conclusions of the action. Beyond these declaratory conclusions I cannot go; and in regard to the petitory conclusions I think that the defenders are entitled to absolvitor.

LORD JERVISWOODE.—I had an opportunity of perusing a proof-sheet of the opinion of Lord Deas in this case, and I have carefully reconsidered that opinion since it has been circulated.

I concur, without reservation, in the general course of reasoning of that opinion, and in the conclusion at which Lord Deas has there arrived; and I therefore prefer to refer to it as the basis of the judgment which ought, in my view, to be pronounced, rather than to run the risk of error in the course of unnecessary repetition.

LORD ORMIDALE.—It is not only unnecessary, but would be quite beside the legal question which the Court has now to determine, to consider whether it is,

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r is not, desirable that women should possess, equally with men, the rights and rivileges claimed for them in the present action. The only question which the ourt has to determine is, whether by law women do, or do not, possess these ghts and privileges.

It is certainly a circumstance not a little remarkable that if women have lways possessed the rights and privileges referred to, as maintained by the pur- iers, no instance of their having been ever either claimed or exercised is alleged) have occurred before the present controversy arose, since the establishment of niversities in Scotland about four centuries ago. On the contrary, it is allowed y the pursuers to be taken as an acknowledged and indisputable fact that there as never been any such instance. Nor can the pursuers say that by Papal bull, oyal charter, or other instrument having reference to the foundation of the cottish Universities, the admission of women as students at any of them is xpressly recognised. The utmost the pursuers contend for is, that while by hese instruments the right of women to be students is not expressly recognised, either is there in any of them an express exclusion of women as students. But although this may be so, it is not unimportant to observe that the language, not only of the founding writs of the Scottish Universities, but also of some at least of their disciplinary regulations, are, according to their ordinary and natural sense, indicative rather than otherwise of an understanding, to say the least of it, that males alone were contemplated to be admissible as students, as in point of fact they have hitherto exclusively been. This is of itself sufficient to raise a very strong presumption that the rights and privileges now claimed by the pursuers were never intended to be, and in reality never were, conferred on women.

It will not do to argue, as the pursuers do, that the turbulent condition of the times and state of society in Scotland satisfactorily account for this. That these causes may have to some extent retarded the progress of education and learning in the Universities in Scotland is intelligible enough; but that they should have operated adversely to the female and not to the other sex is scarcely intelligible at all, and has certainly not been shewn to have been the case. The fact, indeed, of the warlike struggles which prevailed in Scotland during the period referred to—engaging as they must have done the young men of the country—not having led to the education and training of the youth of the opposite sex to medical and other peaceful professions, might be founded on with more plausibility and effect by the defenders, in support of their view that females were not admissible as students at Universities.

Having regard, then, to what has been the long, uniform, and uninterrupted usage, not only of the Edinburgh, but all the other Scottish Universities since their establishment centuries ago, it cannot well be questioned, I think, that it must hitherto also have been the general understanding of the country that women had not the right of admission as students at any of them. And if so, the presumption against the existence of any such right, or that it ever was intended to be, or was ever in point of fact conferred on women, seems irresistible.

It is a well established principle of law that writings, even Acts of Parliament, more especially those of ancient date, the terms of which leave their true meaning and effect doubtful or obscure, may be cleared up and interpreted—not controlled or altered—by the usage or possession which has followed upon them. Not only is this principle well and firmly established, but it is also one of very general application. It has been held to operate alike in the interpretation of Acts of Parliament of an old date, ancient charters, and other writings, whether relating to contracts between individuals, or to the constitution of public rights and trusts affecting local as well as national interests. Thus, in the case of the Magistrates of Dunbar v. the Heritors of Dunbar, 10th April 1835, 1 Sh. and M'L. p. 134, Lord Brougham, in reference to the question how far usage was admissible to interpret the true meaning and effect of a statute, observed—"When the statute uses a language of doubtful import the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed sense: *optimus legum interpres consuetudo*, which is sometimes termed contemporaneous exposition; and where you

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can carry back the usage for a century, and have no proof of a contrary usage before that time, you fairly reach the point of contemporary exposition." So also in the case of Macdonald v. The Governors of Heriot's Hospital, 7th April 1830, 4 W. and S. 98—a case of contract between individuals—Lord Wynford in the House of Lords, in moving the affirmance of the judgment of this Court, observed that "old writings might be expounded by contemporaneous usage," and that "there can be no means of getting at the meaning of old instruments so satisfactorily as that of seeing how the parties acted under them at the time they were made, and have since continued to act." So also in the recent cases of White v. The Kirk-Session of Kinglassie, 14th June 1869, 5 Macph. 867, and Flockhart v. The Kirk-Session of Aberdour, 14th November 1869, 8 Macph. 176, where the question was whether certain property and funds which had been constituted by ancient writs in trust "for behoof of the poor of the parish," without specifying particularly what description or class of poor was meant, it was decided, on interpreting the writs by the usage and possession which had followed on them, that the property and funds in dispute fell to be administered under the Poor-Law Amendment Act of 1845 by the heritors and kirk-session for behoof of the legal poor of the parish—Lord Curriehill, who gave the leading judgment in the former of these cases, concluding his observations as follows:—"I think that the usage which has followed on the title by which this trust was constituted, and under which it was held at the time of the passing of the Act of 1845, and the manner in which it has been possessed and dealt with, satisfactorily explain that according to its true import the trust thereby created was for behoof of the poor of the parish in the sense of the 52d section of the Poor-Law Amendment Act." And in accordance with these precedents—and many more, in varying circumstances, might be cited in the law and practice of Scotland—there may be noticed, as illustrative of the same principle in the law and practice of England, the case of the Attorney-General v. Drummond, 1 Drury and Warren, p. 353, where, in reference to a question touching the objects of a trust, and the parties entitled to participate in the benefits of it, Lord Chancellor Sugden observed (p. 368 of the report), "One of the most settled rules of law for the construction of ambiguities in ancient documents is that you may resort to contemporaneous usage to ascertain the meaning of a deed. Tell me," said his Lordship, "what you have done under such a deed and I will tell you what it means."

What, however, is perhaps of still greater importance and applicability to the present case are the very recent decisions of the Courts, both of Scotland and England, on the right of women to the exercise and enjoyment of the electoral franchise. In the case of Brown v. Ingram, 19th December 1868, vol. vii of the 3d series of the Court of Session Cases, p. 281, in Scotland, and of Chorlton v. Lings, 9th November 1868, vol. iv. Law Reports, Common Pleas, 374, in England, it was determined, without any dissent on the bench, that women have no such right; and it is clear from the published reports of the cases that this determination was arrived at, not in respect of women being expressly debarred, by statute or otherwise, from exercising the electoral franchise, but mainly, if not entirely, in respect of the immemorial usage which had prevailed in the matter. The report of the case in Scotland, although very brief, expressly bears that "their Lordships rested their decision upon the fact that there was a long and uninterrupted custom in Scotland limiting the franchise to males." And in reference to some exceptional instances to the contrary of a very old date, founded on in the English case, Lord Chief-Justice Bovill is reported to have remarked—"But these instances are of comparatively little weight as opposed to uninterrupted usage to the contrary for several centuries; and what has been commonly received and acquiesced in as the law raises a strong presumption of what the law is, at least throws upon those who have questioned it the burden of proving that it is not what it has been so understood to be."

I am unable, therefore, to see how, in the face of these authorities, and the well-established principle of law illustrated by them, women are now for the first time, and after centuries of a uniform and uninterrupted adverse usage, to be found entitled to the enjoyment and exercise of the rights and privileges

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aimed for them in this action. Nor can I see that the usage of the Bologna : any other foreign University can affect a question which must be governed r the usage of this country alone. The reference in one of the founding arters of the Edinburgh University to the rights and privileges of the other cotch Universities, and in that way indirectly, through the founding writs of e University of Glasgow, to a Papal bull conferring certain rights and privi- ges on the University of Bologna, can, I think, be held at most merely to late, in the words of the Lord Ordinary in the note to his judgment in the esent case, to "immunities from local and other taxes, and from the jurisdic- on of the ordinary tribunals; and as it is certain that none of these privileges ow belong to any Scottish University, not much assistance can be got by any rty from the Papal bull." Not only do I think that no assistance can be got om the Papal bull referred to, but that the fact that, notwithstanding the ference made to it in the establishment of the University of Glasgow, and in e establishment of the University of Edinburgh to that of Glasgow, these niversities have not been saved even from local and other taxes, or from the risdiction of the ordinary tribunals, is very significant, as shewing that it never as intended, and cannot be held, that a Scottish University, founded subse- uent to the Reformation, as the University of Edinburgh was, should, in respect f a bull issued by the Pope, in a country where at the time he was held to be all ut omnipotent, stand in the anomalous and unconstitutional position of enjoy- ng rights and privileges unknown to and inconsistent with the laws and usages f Scotland. Besides, the alleged usage of the University of Bologna and other oreign Universities, on which the pursuers so largely found, is not, on their wn shewing, so satisfactorily explained and established as to be relied on as vidence at all in the judicial determination of any litigated cause. In no view, herefore, can I see that the alleged foreign usage can be held in the present ispute to obviate the effect of the long and uninterrupted usage of every Uni- ersity in Scotland.

And just as little can it, in my opinion, be taken as sufficient to obviate the ffect of this long and uninterrupted usage in Scotland adverse to the rights and rivileges now claimed for women, that such rights and privileges are of the ature of *res meræ facultatis*, and therefore that, as it has not been shewn that uch rights and privileges have ever been claimed and refused, the non-exercise f them is of no consequence; for any such view as this obviously proceeds on he assumption that the alleged rights and privileges originally existed and still xist. But that is the question in dispute; and if my previous reasoning be ound, and the authorities I have referred to at all in point, there can be no oundation for any such assumption.

On the leading, and as it appears to me the fundamental question, therefore, nvolved in the present controversy, I can entertain no doubt that women are ot entitled by and under the constitution of the Edinburgh University, as it xisted prior to the regulations immediately to be noticed, to the rights and rivileges claimed by the pursuers.

It is maintained, however, and is apparently relied upon by the Lord Ordinary s the chief support of his judgment, that the right of women to be educated for he medical profession in the University of Edinburgh has been established, if t did not previously exist, by the regulations of the University Court of 10th November 1869. Now, although it may be, and I think it is, matter of regret hat anything should have occurred, however unintentional, calculated to mis- ead the pursuers, or to inspire them with expectations which are incapable of ulfilment, I am quite unable to see—giving to these regulations all the effect hat can legitimately or reasonably be ascribed to them—how the Senatus Academicus, who are the only parties besides the Chancellor called as defenders n the present action, have the power, even were they willing, to afford to the ursuers the University education and privileges they claim. The Senatus is ubject to the control of the other governing bodies, and especially of the Uni- ersity Court. The latter, again, have, by the regulations referred to, merely ound that women may receive medical education at the University in classes y themselves, separate from the male sex; but the pursuers have entirely

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failed to shew how in existing circumstances, or under the present constitution and establishment of the University, arrangements for that purpose could be made and enforced. Certain it is, at least, that according to the University Act of 1858, independently of everything else, the Senatus Academicus are by themselves powerless in the matter. It is impossible to assume, and assuredly it has not been shewn, that the Senatus can, by any power or means they at present possess, provide separate classes for the education of women, and yet the Lord Ordinary in the note to his judgment says that he thinks "the pursuers are entitled to be admitted as students of the University for the study of medicine therein, and they are entitled to be matriculated as students, subject only to the special condition that they shall be taught in separate classes confined entirely to women." But how, and in what manner, such separate classes are to be for the first time established in the University has not been explained. Who are to be the professors or teachers of such separate classes? Surely not the present professors of the University, who received their appointments upon a totally different footing. Again, if separate professors or teachers are to be appointed for such separate classes, who are to appoint them, and by whom are they to be paid? Surely not the Senatus Academicus, or the Chancellor of the University, or both together. And, as already explained, the Senatus Academicus have not in existing circumstances the power to admit women as students to be educated in the ordinary classes along with males, and accordingly the Lord Ordinary has himself remarked that "when the University Court has prescribed that women shall be taught in separate classes it is perfectly vain to attempt to compel the Senatus to make a regulation that women shall be taught in mixed classes along with male students." In short, the more the regulations referred to are examined the more clearly will they appear to be insufficient to support the action as laid by the pursuers.

It is, indeed, an important and very serious question whether these regulations were within the competency of the governing bodies of the University, all or any of them, to enact, and whether they can be recognised as having any effect at all. The University Court, by whom they were enacted, could have had no power to do so except under the Universities Act of 1858. Now, the only power bearing on the matter which they have, or are said to have, under that Act, is that which is contained in the 12th section, authorising them "to effect improvements in the internal arrangements of the University." But it appears to me to be very clear that this neither warranted nor contemplated any alteration of the previously existing constitution of the University. I think the words "improvements in the internal arrangements" must be taken to mean, as the words themselves necessarily import, not changes on or beyond, but within and in accordance with the constitution as it existed. And it would be strange indeed if a power had been given to the University authorities, or any of them, to change the constitution of the University by the enactment merely of regulations from time to time as they saw proper, altering, it might be, one day what they had enacted on another. The University Court is only one of the governing bodies of the University, and it cannot be supposed that they were, either separately or in combination with the other governing bodies, intended to have had any power conferred on them by the Act of 1858 beyond its purpose, as expressed in its preamble, viz., "To make provision for the better government and discipline of the Universities in Scotland, viz., the Universities of St Andrews, Glasgow, Aberdeen, and Edinburgh, and for improving and regulating the course of study therein."

If, therefore, it is to be held, as I think for the reasons already stated it must, that by the fundamental constitution of the University of Edinburgh, as it stood prior to and under the Act of 1868, women were not admissible as students, or had the other rights and privileges claimed by the pursuers, and that it were necessary to challenge the validity and binding nature of the regulations in question as going beyond the constitution of the University, and as being *ultra vires* of the University Court to enact, I should think that this could be done, and may be held to have been effectually done by the defenders, notwithstanding of there being no reduction at their instance, for I can observe no trace of such a

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chnical objection of bar in the record. Be this, however, as it may, these gulations when closely examined will, for the reasons already stated as well as hers, be found to be of little or no efficacy. Most assuredly they create and ipose no obligation or duty either on the Senatus or the Chancellor, who are e only defenders called in this action. So far as they relate to the teaching of omen as students in the University they merely enact (1) that "Women shall admitted to the study of medicine in the University of Edinburgh; (2) that e instruction of women for the profession of medicine shall be conducted in parate classes, confined entirely to women; and (3) that the professors of the culty of Medicine shall for this purpose be permitted to have separate classes r women." Taking these regulations together, as they must in order to be in-lligible at all, it is very obvious that there is nothing enforceable in them as ainst the Senatus Academicus, the Chancellor, or the professors. The professors e merely "permitted" to have separate classes for women if they please, but at cannot be converted into an obligation upon them to have such classes hether they please or not. The pursuers do not maintain anything so absurd, nd, accordingly, their action or complaint is not directed against the professors, r any of them. And what is their complaint or ground of action against the enatus Academicus and Chancellor, the only defenders they have called? If ey could have said and had said that either of these parties had improperly terfered to prevent the professors having separate classes for women, one could nderstand that an action, in some form or other, might lie against them, in rder to put an end to such improper interference, but no allegation, or plea, or round of action to this effect is to be found in the record. It is clear, indeed, om the pursuers' statement and pleas in the record, as well as from their argu-ent in their written case, that their complaint is, not that the defenders or any ther party had prevented or attempted to prevent them enjoying the full benefit, —whatever that may be,—of the regulations in question, but that arrangements ave not been made whereby the difficulties and obstacles in the way of their ttaining their objects under these regulations as they stand might be removed. hey accordingly, finding that the professors did not choose to open separate lasses for the education of women, would appear to have made various efforts, hich they set out in the record, to have the difficulties thus arising obviated or vercome. But it also appears that these efforts of the pursuers proved unavail-ng; and, in particular, it appears on their own shewing, in the 19th article of heir condescendence, that the University Court,—not the Senatus or the Chan-ellor, the only defenders here,—on the 8th of January 1872, shortly before the stitution of the present action, declined to assist the pursuers further than they ad previously done in the attainment of their objects.

So standing matters, the present action was brought, containing several decla-atory conclusions in the broadest and most comprehensive terms of the pursuers' ight to be admitted as students and to receive education in the University of dinburgh, not in separate classes, providing the professors were pleased to open uch for them in terms of the regulations, but independently of the regulations nd the conditions they impose altogether, and these declaratory conclusions are llowed by various petitory ones, intended obviously for the purpose of enforcing he decree asked for in terms of the former. In short, it is manifest, I think, eyond all question, that the object of the pursuers, looking not only at the con-lusions of the summons, but also at their statements and pleas in the record, as to obtain something quite different from what they could obtain under the egulations. This, indeed, is sufficiently obvious from the note of the Lord Or-inary. Thus the pursuers, in the first petitory conclusion, insist that the Senatus hall be ordained to make regulations whereby they may receive such instruction in the University "as is required to qualify for graduation in medicine," and, in particular, to use the words of the Lord Ordinary, "that they should direct and appoint the various professors whose duty it is to give instruction in medicine to permit the attendance of the pursuers upon their classes along with male students." But the Lord Ordinary remarks upon this that there are "no sufficient grounds or pronouncing any such decree, and there are conclusive reasons why no such decree should be pronounced." The Lord Ordinary then proceeds to deal with

benefits they desire is noticed by the Lord Ordinary towards the e
where he says that "if not the Senatus, at least the University
doubted power to recognise extra-academical teachers whose course
cient for the purposes of graduation. But in making this observa
Ordinary would appear to have overlooked the fact, brought out b
themselves in the nineteenth article of their condescendence, that t
Court have refused, before this action was instituted, to adopt an
Nor do I see how the University Court could be compelled to do
this action, to which they have not been called as defenders at all, e
it were within their power. Clear it is, however, in my apprehen
have no such power, for, as explained by them when they refused t
which had been made to them on the subject before this action wa
proposed measure would imply an alteration in one of the ordinan
tion, and that such alteration can be made "by the University C
the consent expressed in writing of the Chancellor, and with the ap
Majesty in Council." It is not said, however, that the consent of t
or the approval of Her Majesty has been obtained or even appli
compulsitor can be given, and none is asked for in the present ac
the University Court, or any of the other governing bodies of th
could be compelled to take the requisite steps for obtaining for the
benefit of extra-academical classes.

In no view, therefore, that I can take of the conclusions of the
mons have I been able to see how they can be given effect to
within the competency of the Court to pronounce in the present
Lord Ordinary has, no doubt, by assuming that the regulations of t
Court of 10th November 1869 are valid and binding, and must
as forming part of the constitution of the University, given effect t
declaratory conclusions, subject always to the conditions imposed
lations. But this, in substance and reality, amounts to no more
pursuers may, if they can get it, receive instruction in medicine in t
in separate classes. It has been shewn, however, and is indeed mad
part of the pursuers' complaint, on which their action is founded,
not get such instruction, as the necessary means for giving it, in th
which it can be given, do not exist. And it has also been shewn, a
ledged by the Lord Ordinary, that neither the Senatus nor any
governing bodies of the University, or all of them together, have

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that effect. Nor have they at any time or in any shape, so far as I can dis- proposed to amend, restrict, or modify the conclusions of their summons to fect or extent. It is true that in their argumentative case it is stated that ht be "of some importance to the pursuers that their ground of action . be affirmed, even to the limited extent of having it found that they are no personal disabilities to be the recipients of University degrees, because case the pursuers would have a moral claim to the intervention of the rsity to complete their studies, even if it should be held that the pursuers ; legally compel the University to take the necessary steps." But while rsuers make this incidental observation in their argumentative case they liately go on to state what the real objects of their action are, viz., those ded for in their summons, and certainly not those which are given effect the judgment under review. I can, indeed, very well understand that . decree as that which has been pronounced by the Lord Ordinary is cal- l to operate prejudicially in place of favourably to the pursuers, for, in ice to any other steps they may find it necessary to take for the purpose of ng their objects, it might be urged against them that as they had already ed or got a decree, it must be held to be the measure of their rights, d which they can have no further claim.

ust own, therefore, my inability to see any reason for thrusting upon the rs a decree for which they do not ask, and which can be of no practical them. And as to giving them a decree which is not concluded for,— may possibly be prejudicial to them,—and which, at any rate, can only as a "moral" lever to assist them in obtaining in some other form what annot get in the present action,—it appears to me that to do so would be ry to sound legal principle, and, as I believe, unprecedented in the practice Court.

he view I have taken of this case, as now explained, it is unnecessary to on the question whether, if the pursuers were to succeed in qualifying elves by the requisite University education, they would be entitled to all nours and privileges of graduation, for, obviously, matters are not advanced position which calls for, or admits of, the satisfactory determination of ch question.

ve only further to remark that, if the pursuers have failed, as I think ave, to support their claims consistently with the constitution of the rsity, whether considered in connection with the regulations of the 10th of nber 1869, or independently of these regulations, it is unnecessary to in- whether any other, and what remedies are open to them. I may, however, mitted to remark that if it be desirable, and for the interests of the country I do not say it may not—that women should receive University educa- qualify them as medical practitioners, it rather appears to me that it is Crown or Legislature, and not this Court, to determine upon what foot- d under what arrangements this should be done.

the reasons I have now stated I am of opinion that the interlocutor under r is erroneous, that it ought to be recalled, and that the defenders are en- to absolvitor from the present action as laid.

D MURE.—I am unable to view this case, as raised in the summons and , as one in which the main question to be disposed of is, whether the pur- in respect of the regulations passed by the University Court in November are entitled to decree to a qualified extent, in terms of some of the declara- onclusions of this action, with a view to their admission to graduation in ine in the University of Edinburgh, in the event of such additional regula- being made by the University authorities as will enable the pursuers to , which they cannot at present do, that instruction within the University is essential to graduation, and which, by assoilzieing the defenders, the s Academicus, from the two leading petitory conclusions of the summons, as to be admitted that the pursuers, even under those regulations, are not d to demand, and are therefore not in a position to enforce.

arger question, and one of more general importance is, in my opinion, dis-

mentary ratification of the 14th of August 1621, by which the U established; and which, while they do not contain any express females from University rights and privileges, conferred upon th then constituted, all the rights, liberties, and privileges which pert other College in the realm. And the pursuers' claim, as I und rested not so much on the express words of the charter and P ratification of 1621, as upon the fact that by these deeds there w upon the College of Edinburgh all the privileges which pertained Colleges in Scotland which were founded by Papal bulls, by whic tained that these Colleges, and the University of Glasgow in pa placed in all respects on the same footing as the University of Bolog females appear to have been occasionally admitted to corporate p graduation.

As regards this reference to the usage at Bologna it does not that the pursuers can take any benefit by it; because, having r conflict of evidence which there is in the information which has bee the Court in regard to the admission of females to graduation at B not satisfied that there is evidence sufficient to instruct that any usa that University of the nature contended for on the part of the p even if there were such evidence it appears to me that in considering of usage, as bearing upon the construction of the charter of a Scotch it is by the usage of Scotland, and not by that of Bologna or of Universities, that the question must be disposed of. Putting asid reference to the usage at Bologna as having no direct bearing o case, I do not think that the language of the Papal bulls tends in s strengthen the pursuers' claim. Because, while in the foundation Edinburgh University, taken by themselves, there is no express females, neither are there any words expressly descriptive of th those for whom alone the University was founded. The language bulls, however, is different in this respect, inasmuch as in the preamble of all these deeds men only are expressly mentioned as t whom the Universities were founded, while the passages in each applicable to the granting of degrees rather appear to me to have so as to apply to the male, to the exclusion of the female sex. question now at issue had been raised upon the terms of these de themselves, and apart from any question of usage, I should have h culty in holding that they were either calculated or intended to fou sity except for the education of male students. But when the four

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hich are so fully explained by Lord Ormidale in his opinion on this branch of
e case, in which I entirely concur, based, as that opinion is, upon the applica-
on of rules of construction which have been laid down in a series of decisions
the Court of last resort of the most authoritative description, as well as upon
e decisions applicable to the analogous question of the admission of females
the elective franchise to which he refers.

The pursuers having thus, as I conceive, failed to shew that they have any
gal right to demand admission to the privileges of students in the University,
hile it is beyond question, on the other hand, that under the foundation deeds
ales have that right, the remaining branch of this case must, I apprehend, be
alt with on the footing that the main fundamental object and purpose of the
unders of the University of Edinburgh was to establish an institution for the
ucation of the male sex, and that the University is, therefore, one which by
s constitution is limited to males. And if that be so it appears to me to follow
at the defenders will be entitled to be assoilzied from the whole conclusions of
e present action, unless it can be shewn that, in respect of some regulations
hich the governing body of the University was empowered to pass, the pur-
ers are entitled under this action to insist upon being admitted to the study of
edicine to the extent that may be necessary to enable them to proceed to
aduation, and are entitled to obtain a decree to that limited and qualified
ect.

The disposal of this question, however, involves the consideration of the true
eaning and effect of the regulations passed by the University Court in Novem-
er 1869, because two very different constructions appear to have been put
pon them. In one view of these regulations they may simply mean that
omen may be admitted to study medicine in the University in separate classes
the professors of the Faculty of Medicine see it to be proper to have separate
asses for them, without laying down any rules relative to graduation or other
niversity privileges. And if this be the true meaning and only import of the
gulations they appear to me not only to afford no support to the pursuers'
tion as laid, but insufficient also to warrant a declaratory decree to any limited
nd qualified extent. And they are in that view, moreover, regulations which I
m not prepared to say that it may not have been within the power of the Uni-
ersity Court to adopt.

But there is another view which may be taken of them, and that is the one
hich I understand has been adopted and given effect to by the Lord Ordinary,
iz., that they amount, and were intended to amount, to a declaration that
omen were entitled to be admitted to the study of medicine in the University
s matter of legal right, and to all the rights and privileges of students, in-
uding graduation, subject only to the condition of the pursuers being able to
btain instruction in separate classes. And if this be the true meaning of the
gulations they cannot, I conceive, be founded upon by the pursuers to
tablish the claim, or any part of the claim, made by them under the present
tion, unless it can be shewn that the University Court, as the governing
ody of the University, had a discretionary power, either at common law or in
spect of the provisions of the Act of 1858, to make regulations for the admis-
ion of females as well as males to the rights and privileges of students.

Now, upon this point I am very clearly of opinion that at common law the
overning body of a University of this description has no power to alter the
onstitution of the institution with the management of which they have been
ntrusted. And I have been unable to look upon the regulations as so inter-
reted, and which are to have the effect of conferring upon females the right of
dmission to all the privileges of a University which was founded exclusively
or male students, in any other light than that of an alteration of the constitution
f the University which it was beyond the power of the governing body to enact.
Neither have I been able to bring myself to see that, under the provisions of the
ct of 1858, any greater powers in these respects were conferred upon the Uni-
ersity Court. That Act of Parliament was passed for the better government
'and discipline of the Universities in Scotland" as then constituted; and by
he 12th section the University Courts are empowered "to effect improvements

decide—any general question as to the constitution of all the U
Scotland, or even any general question as to other studies or other
the studies and curriculum enacted in the University of Edinburg
fession of medicine. The judgment which I pronounced applies
the University of Edinburgh, and is confined to the case of la
therein "for the profession of medicine." It rests entirely and exc
the regulations passed by the University Court on 10th Novemb
approved of by the Chancellor on 12th November following; an
the judgment does not and cannot go beyond these regulations. I
on the one hand, that the pursuers cannot claim anything which
tions do not give them expressly or by necessary implication: and
hand, that the Senatus of the University, who are the only defend
fuse to give effect to these regulations according to their true and f
meaning.

In pronouncing the judgment under review, therefore, I simpl
find that the regulations were valid and binding, and that the Uni
so far as the regulations related to their functions, were bound
out, and to give them effect; and I endeavoured to read the regul
ascertain what were the rights of the lady students and the duties o
under these regulations. If the judgment in any respect goes bey
beyond the enforcement of such rights and duties, then I have erre

Apart from the regulations, and independent thereof, I am of opi
ladies could not as a matter of right demand admission as students i
sity. Without these regulations the answer would be conclusive th
no arrangements made for the instruction of female students in m
know of no power short of statute which could compel the Univers
of any University to make such arrangements. Arrangements o
must almost of necessity be different in different Universities. It
and expedient in one University to make arrangements for the
females either in medicine or in music, or in any particular science, v
be impossible or inexpedient to do so in another University. I
appears to me the matter is one of arrangement to be effected by th
authorities of each University—an arrangement which cannot be
forehand or forced upon any University, but which, when once ma
enacted, must be obeyed and carried out by the individual members
sity, and by the subordinate bodies of which the University consi

versity, to make the arrangements for female students in medicine which are contained in the regulations of 10th November 1869? I can see no incompetency and no illegality in these regulations. They transgress no statute, they offend no rule either of law or of morality; and if they introduce a novelty this is no more than could be said of many improvements which are loudly called for in the interests of education. The University Court is the ultimate Court of appeal for the regulation of the whole studies within the University. To it is finally committed by statute the discretionary power "to effect improvements in the internal arrangement of the University," certain safeguards being provided under which this power shall be exercised. I am of opinion that the University Court legitimately exercised this power in enacting the regulations now in question. I think they did so in due and competent form. I think the formal objections taken by the defenders, the Senatus, are quite unfounded; and it humbly appears to me that to refuse to give effect to these regulations would be virtually to interfere with the final discretion vested in the University Court, and to review a decision of that Court upon its merits. I think that the Court of Session cannot do this, for it is not to the Court of Session or to the civil Courts of the country that the internal regulations of the University are committed.

Still further, if it be intended to challenge the abstract legality of the regulations of 10th November 1869 I think it very unfortunate that this question should arise in the present form. The legality of these regulations was unchallenged for nearly three years. They have been acted upon by the pursuers, and it may be by others. Their validity and their legality has been assumed even by the Senatus itself, for the attempt to get the regulations altered or repealed, which was made by the Senatus on 11th November 1871, implies that until repealed the regulations were effectual. On the faith of these regulations the pursuers have been allowed to prosecute their studies, to spend their time and their money, and now, without any action of reduction, without any declarator of illegality, and without calling the University Court or the University Council, or the University itself as a corporation, it is demanded that these regulations shall be utterly disregarded and treated as an absolute nullity. I am not prepared to do this. I think that to do so would be unjust as well as illegal.

I am quite aware that in the argument and pleadings for the pursuers they have maintained rights independent of the regulations. They have put forward some claims not warranted by the regulations, and some claims inconsistent therewith. They have pleaded their case much too high,—for example, in their demand for mixed classes instead of separate ones, and in various other particulars. The conclusions of the action are far too broad. But this is no good ground for throwing out the action altogether. Because a pursuer asks too much is no reason for refusing that to which he is justly entitled.

In reference to this point, however, I may remark that perhaps the judgment under review falls short in not giving *absolvitor* from some of the conclusions of the summons instead of merely dismissing them. I certainly intended to decide as emphatically that the pursuers are not entitled to demand or compel teaching in mixed classes as to decide that they are entitled to attend separate classes when such are provided, and to all the privileges which successful students can claim. This, however, is matter of form rather than of substance, and while it may modify the form of the interlocutor it would not affect the grounds upon which, I think, judgment should proceed.

I have only one other remark to make. It is true that the judgment does not contain in itself, and cannot contain, the means for securing to the pursuers, or compelling the defenders to give to the pursuers, a complete medical education. This may require the appointment of additional professors, or the sanction of extra-academical teaching, and the Senatus, who are the sole defenders, have no power by themselves to do this. It is possible, therefore, that the ladies, for want of teachers, may be hindered in getting their degrees, but this seems to me to be no reason for not enforcing the regulations so far as they go. Above all, it seems to me no reason for negativing the demand of the ladies that if they procure the teaching, and if they successfully complete their studies, they shall

and otherwise they are entitled to proceed to examination for d
grees; fourth, that the Senatus Academicus is bound to provide su
to the pursuers, and thereafter to admit them to examination as
medical degrees, and, on their being found qualified, to recommend
Chancellor of the University for such degrees; and fifth, that the
bound to confer such a degree upon any of the pursuers found qu
recommended. The pursuers further conclude that the Senatus
should be ordained to make regulations whereby they may receive
tion in the University as is required to qualify for graduation in m
in particular, that they should direct and appoint the various medi
to permit the attendance of the pursuers upon their classes along
students, or otherwise to teach the pursuers, and any other wom
constitute themselves into a class, separately from the male studer
ment of the proper fees; and that the Senatus Academicus shoul
to admit the pursuers to examination for medical degrees, and,
found qualified, to recommend them to the Chancellor for such
that the Chancellor should be ordained to confer such degree up
pursuers who may be so recommended.

Under these conclusions the pursuers maintain that they are e
whole rights and privileges competent to male students in the
Edinburgh, subject only to the condition that their instruction in
be conducted in classes confined entirely to women, should the Sen
cus so direct. The question thus raised for the decision of the
whether the pursuers, being females, are by the law and consti
University of Edinburgh entitled to the rights and privileges clai

In order to arrive at a satisfactory conclusion upon this questi
be necessary to consider, first, what the rights of women are, acc
law and constitution of the University of Edinburgh, independe
gulations passed on 10th November 1869 by the University
education of women in medicine in the University; and, second
these regulations any rights were conferred upon women which ca
pursuers' claims.

I. It cannot, we think, be disputed that when the University
and its charters were granted and ratified, the sole object contem
education of the male youth of the community in languages, philoso
medicine, law, and the other liberal sciences, and that the educati
in the University was not thought of or provided for. The educat
in the various branches taught in Universities was contrary to th
tions of all classes and the opinions of the time; and the arrange

tions were passed by the University Court, no woman has been admitted, or has even claimed to be admitted, within its walls as a student. In none of the other Scotch Universities have any women ever been admitted as students. This long-continued and uninterrupted usage of nearly three centuries shews, in our opinion, what was the intention of the founder, and what is the true interpretation of the general words in the charters and Act of Parliament establishing the University of Edinburgh, *nam consuetudo est optima legum interpres.* An illustration of the force and importance of long-continued usage is to be found in the cases which occurred in this country and in England regarding the right to the franchise claimed by women after the passing of the Acts in 1867 and 1868 to amend the laws relating to the representation of the people. The decisions in these cases appear to us to be direct authorities on the question now under consideration, and against the view entertained by the Lord Ordinary, that the right of women existed in abeyance, or depended only upon the University authorities making regulations and arrangements for its exercise.

Having regard, then, to the terms of the University charters and of the Act ratifying the same, and to the long and uninterrupted usage which has followed thereon, we are of opinion that women are not entitled by the law and constitution of the University of Edinburgh, as the same existed in 1869 before the regulations of the University Court were passed, to attend the classes of the professors, or to receive instruction within the University as students, or to obtain University degrees.

The pursuers in support of their claims have founded upon what they allege to have been the practice of the University of Bologna, and of other foreign Universities from the earliest times. It appears to us that the pursuers have failed to establish that women were admitted as students in any of these Universities until very recently; and further, that even although this had been established, such practice could not affect the decision of the question now raised by the pursuers, which must be determined by the law and constitution of the University of Edinburgh, and not by the constitution or by the practice of any foreign University.

II. The next question for consideration is, whether the pursuers are entitled to prevail in the conclusions of their summons, in respect of the regulations for the education of women in medicine passed on 10th November 1869 by the University Court. In dealing with this question we think it right to say that these regulations are contained in the extract from the minutes of the University Court, of date 10th November 1869, which were approved of by the Chancellor on 12th November 1869, and that these regulations are not to be extended by the previous resolutions of the Medical Faculty or of the Senatus Academicus. It is only the University Court which is empowered by the Universities Act to make improvements in the internal arrangement of the University.

1. By the Universities (Scotland) Act, 1858, section 12, the University Court is empowered "to effect improvements in the internal arrangements of the University, after due communication with the Senatus Academicus, and with the sanction of the Chancellor." But there is no power conferred upon the University Court to make any change upon the law and constitution of the University. The power given is to improve the internal arrangements of the University. This is administrative, not legislative, power—power, recognising existing rights, to make suitable arrangements for their exercise, but not power to confer the rights of students on a class or division of the community who had not such rights before.

By the regulations of 10th November 1869 the University Court enacted that 'women shall be admitted to the study of medicine in the University;" that 'the instruction of women for the profession of medicine shall be conducted in separate classes confined entirely to women;" and that "the medical professors shall for this purpose be *permitted* to have separate classes for women." Considering as we do that women were not then entitled by the law and constitution of the University to be admitted as students of the University, we are of opinion that the University Court was by these regulations (limited as their extent in

from such of the medical professors as chose to give them such ins
professor was enjoined to give them such instruction, and the w
professors might have refused to give it. A number of them did
they change their minds the pursuers cannot, as they admit, compl
of study within the University required for a degree. Further, no
in these regulations as to the right to a degree; and, so far as we
are no provisions which, even by implication, confer upon wom
receive a full University course of instruction in medicine, the rig
on passing the usual examinations.

3. It appears to us also, although we do not rest our opinion
under the ordinances of the University Commissioners, enacted und
conferred by the Universities Act with reference to the University
men are alone entitled to receive degrees in arts and medicine. Th
can only be altered under section 19 of the Universities Act by t
Court, with consent of the Chancellor of the University, and with
of Her Majesty in Council.

On these grounds we are of opinion that the interlocutor of the I
should be recalled, and that the defenders should be assoilzied
clusions of the summons.

At advising,—

Lord Cowan.—The opinion which I have formed in this import
repeated consideration of the very able written pleadings now befo
is in conformity with that adopted by those of the consulted
consider that the defenders should be assoilzied from the concl
summons.

The main propositions sought to be established in this actio
enough stated in the 1st and 2d pleas in law set forth in the re
That, according to the law and constitution of the University o
women are entitled, on payment of matriculation and profes
attend the classes of any professor as students, and are entitle
instruction from such professor, which he is bound to give them;
according to such law and constitution women are entitled to obtai
medicine, on proving that they are qualified in point of attainmen
ledge for that distinction. The conclusions of the summons di
these matters for the decision of the Court, on the ground of lega
pursuers to have decree of declarator—(1) That they are entitled
classes and to receive instruction from any of the professors on the
with other students; (2) that they are entitled to have in

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regard to the special position in which the pursuers are placed, under the regulations of November 1869 and relative proceedings of the University authorities. To some extent these questions run into and affect each other, inasmuch as it may be said that the regulations of November 1869 have affected and now form part of the law and constitution of the University. But the course of pleading and the opinions of the consulted Judges require that the more general question should be, in the first place, separately considered.

On this all-important question, however, it is unnecessary for me to dwell, seeing that all the consulted Judges, without exception, have returned opinions to the effect that the legal rights asserted by the pursuers cannot be maintained or enforced irrespective of the regulations, and their effect on the constitution of the University. In this view I entirely concur. I cannot hold it to be doubtful that by the original charter and Parliamentary ratification in 1621, and the other documents forming the foundation of the University of Edinburgh, the institution was framed on the footing of providing for the education of male students alone; and that any doubt suggested as to the true effect and meaning of these constitutional documents, because of the non-express exclusion of females, has been removed by the usage that has followed for three centuries. The reasoning on this point contained in the opinion of Lord Ormidale has my entire concurrence.

On this essential part of the argument it requires to be kept in view that the exclusion of females does not rest, as some of my brethren consider, on the mere want of regulation by those who had, prior to the statute of 1858, authority to determine the internal arrangements for the education of students, *i.e.*, the Magistrates and Council of the city. I cannot concur in the view that if females had presented themselves for matriculation their demand was open to refusal solely on the ground that no regulations existed such as those recently passed: Nor can I accede to the proposition which is at the basis of the opinion of Lords Deas and Jerviswoode, "that it was the absence of any such regulations, and not the absence of power to make regulations, which stood in the way." The objection, as I view it, does not rest on so shallow a ground, but springs from a deeper source, viz., that no power was conferred by the original foundation of the University on any parties connected with its government to admit females for education within its walls. Being an institute for male students, and actually regulated and managed accordingly, it formed an inherent part of its constitution that females could not be admitted to its benefits. A radical change behoved to be made by the Legislature or the Crown ere the admission of female students could have been or can be sanctioned by the University authorities.

On this branch of the argument, however, I may observe that the proposition referred to is scarcely consistent with the denial of the legal claims asserted in this action. Supposing the Magistrates and Council prior to 1858 to have had power to pass regulations for the admission and education of female students in the University, it would seem to me that they were under obligation to have exercised that power, and might have been compelled to do so. It cannot be thought that the non-exercise of powers of regulation actually possessed should be permitted to exclude from instruction any part of the community for whose behoof the University was established. The possession of the power to make regulations with regard to the education of females as much as of males may fairly enough be held to lead, as a necessary inference, to the recognition of a legal right in female students to have instruction. Had I been able to adopt the proposition that the University authorities all through its existence had power to pass such regulations as are before us I would have been inclined to sanction rather than to refuse the legal right.

This leads directly to the second matter for discussion, viz., the legality and effect of the regulations of 1869. Viewing this question in its purely legal aspect some matters have been stated in the argument which require to be eliminated from its true merits.

I cannot consider it at all legitimate to bring into this argument a discussion as to the intellectual superiority or inferiority of the sexes. And it appears to

My understanding is, that the pursuers themselves plead no such
tion; and it would indeed have been singular had it been otherwis
the defence of all parties not having been called was specially re
early stage of the litigation. Although the Senatus Academic
called as defenders this discussion must be held to proceed on the
as if the University Court, or the University Council, or the Uni
as a corporation, had been called as parties. The question whet
done by the University authorities was beyond or within their pow
be put aside or in any way affected by the form in which the act
brought. The effect of any other conclusion would merely be to de
sion of the cause till these parties were in the field. And this ce
desirable for any of the parties interested, least of all for the pursue

Another observation I must make in reference to the jurisdiction
in such manners as the present. The Court have no power to revie
fere with any legitimate regulations passed by the University autho
ing the internal arrangement or management of the institution. It
it is alleged by individuals or by corporate bodies, whose rights or
at stake, that these authorities have gone *ultra vires*, and enacte
which they had no power at common law or under their statutory
to enact, that their proceedings can be at all interfered with judicia
the regulations of 1869 were within their powers they are altoge
the control or review of this Court. There is no jurisdiction here t
And assuming the admission of females to the medical classes t
within the power and competency of the University Court the
might have sanctioned the education of students, male and fema
classes, or might have been made applicable, and may still be, to t
of females, not to the medical faculty only, but to their admission a
the faculty of arts, or of law, as well as of theology. In short, assu
the power to admit females to the University no regulation pa
authorities with regard to their education, whether along with or s
the other sex, could be reviewed or in any respect controlled by thi
say that hitherto the power has been acted on with so much discret
call for "judicial interposition" is entirely to mistake the matte
interposition could legally take place. And here, in my apprehen
chief importance of the inquiry whether the regulations of 1869
not within the power and competency of the authorities by whom th

examination and graduation, whether for the medical or any of the other faculties. This seems to me to be the issue on which the decision of this case depends.

Now, second, the statute 1858, which conferred so great a boon on the higher educational seminaries of Scotland, sets forth in its preamble that it is expedient for the advancement of religion and learning "to make provision for the better government and discipline of the Universities in Scotland," "and for improving and regulating the course of study therein." All the statutory enactments and provisions which follow are in strict accordance with the object of the statute thus announced. The better government and discipline, and the improvement and regulation of the course of study, are alone within the purview of those enactments. A Chancellor is to be elected and a University Court to be constituted in each of the Universities. The powers of the Senatus Academicus are regulated, and a General Council is appointed to be constituted, to consist of the members having the qualification specially set forth. Then by section 12 the powers conferred on the University Court are enumerated, to which it is not necessary to refer for the purpose of this argument farther than to notice the second and third subdivisions of the section. By these the Court is (2) to effect improvements in the internal arrangements of the University, after due communication with the Senatus, and with the sanction of the Chancellor, and (3) to require due attention on the part of the professors to regulations duly enacted as to the mode of teaching, and all other duties imposed on them. The University Court has no other power or authority whatever conferred on it by the statute. Assuming the passing of the regulations of November 1869 to have been within their power I do not think that there is any well-founded objection to them in respect of the steps taken, or of the mode adopted in their enactment, as is contended for by the defenders. The radical, and to my mind fatal objection, to which they are exposed, is that the Court exceeded its statutory power in recognising by these regulations the right of female students to matriculate with the view to examination, and graduation as the inevitable result in the event of success in their studies. I consider this to be an essential innovation on and change of the law and constitution of the University as then established. Such enactment cannot be regarded as falling within the objects of the statute, and as little, in my apprehension, can it be regarded as an "improvement in the internal arrangements of the University." Taking the condition of things as they stood under the existing constitution, and, *inter alia*, the fact that the only students admitted within its walls were male students, the Court are authorised to effect all manner of improvements on the internal arrangements made or to be made for their education, and for that end to take care that the professors pay due attention to such regulations as are enacted by the Court as to the mode of teaching and their other duties. In all this I do not perceive a trace of intention on the part of the Legislature to confer any authority, or of power actually conferred, to innovate on the established constitution of the Universities of Scotland in a matter so essential and inherent as that with which these regulations have dealt, and so to change their whole character as to recognise a right in females to matriculation,—or, in the words used by the senior counsel for the pursuers at the oral pleading, and not abandoned in the written argument, to make provision for boys and girls being equally eligible for matriculation in all or any of the faculties. I seek in vain for any expressions that can be held to have that import, and I see no provision empowering the Court to compel the professors to instruct any other class of students than such as have from the institution of the University been admitted within its walls.

And, third, the admitted inability to give practical operation to the regulations by judicial decree may be fairly enough viewed as a conclusive test in the present inquiry. The proposal is that the Court should to a certain extent and effect recognise the rights claimed by the pursuers, but, *quoad ultra*, assoilzie the defenders from the declarator, and dismiss the conclusions which seek enforcement of those rights. The Senatus has no power to compel the professors to give the required instruction. And we have seen that the University Court has no authority to pass regulations to secure such instruction at the hands of the professors. Hence it is that an operative decree cannot be pronounced, and thus it

That there is nothing improper or unbecoming in women, if d
practising medicine—that women who are so employed, especially
ought to receive a scientific education beyond that which mere emp
can secure for them—are questions which I conceive can be ans
one way. From the earliest times of which there is any recor
practitioners have been not only admitted, but found necessary.
department, as in every other, knowledge is power; and the wel
the safety of the patient may be measured by the skill of the atte
present summons raises no such questions, nor are its conclusio
with by any such considerations. Females may obtain medical i
means of what has been termed extra-mural teaching, without i
those institutions which are appropriated and necessarily appro
other sex.

The main and most important question we have to determine i
whether women are entitled to matriculate, and to obtain their ed
University of Edinburgh just as if they were males. Whether w
qualified, are incapable of holding degrees, or of receiving acaden
are totally different, and, in my opinion, altogether subordinate qu
true that in the present summons the latter question is put only
with and as a consequence of the former. But I think it necessary
those two matters of inquiry; because I observe that in the arg
pursuers it seems to be maintained that because foreign Univer
several instances, conferred degrees upon women, therefore it must
that they allowed the matriculation and instruction of female stu
Universities. But if I mistake not there is no well authenticat
the latter practice, although undoubtedly there are many instances

The two things are in themselves altogether different, and hav
connection. The Universities of the Continent might well have th
marking out for honours and distinction accomplishment and learn
as well as in males. But that females should be entitled to qualify
such honours, by obtaining their education in Universities, is a to
matter. Now, that is the primary object of this summons, with
pursuers would place no value upon any other concession. N
sion of their summons embraces the matter of degrees, except
with University education as a preliminary to the attainment o
tion.

University, the Magistrates and Town Council of Edinburgh, or any others, could have had power to authorise the admission of women as students in the University.

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In regard to the regulations of 1869 I am of opinion that the Act of Parliament passed in 1858, under which the Senatus professed to act in passing these regulations, gave them no power of so far subverting the original constitution of the University as to admit female students within its walls for matriculation and regular education in any of its faculties. On this branch of the case I have had the privilege of seeing and deliberately considering the judgment which my brother Lord Cowan has just now delivered, and I concur with his Lordship in all that he has said.

To conclude, I agree with him, and with the majority of the whole Judges in thinking that the defenders ought to be assoilzied from the whole conclusions of the action.

Lord Neaves.—I am of opinion that the interlocutor under review ought to be recalled, and that the defenders ought to be assoilzied from the whole conclusions of the action.

I am of opinion that the Universities of Scotland—and by the nature of the case I feel compelled to look incidentally to the whole University system—were instituted and maintained for the special and exclusive purpose of conferring the benefits of the higher education upon male students without the necessity of their resorting for that purpose to foreign countries. The three earlier of the Scotch Universities, which were established in different parts of Scotland and at different periods during the fifteenth century, and that of Edinburgh, more immediately here in question, which had its origin about the time of the Reformation, and was ultimately established in the beginning of the seventeenth century, had all the same object—one which Themistocles declared to be so noble—that of converting a little state into a great one. That object was successfully attained in Scotland, and attained mainly, as I can conceive, by means of those great educational arrangements which were designed to produce able, learned, and accomplished men, for the salvation of the state and the advancement of the public welfare,—learned and able divines for the service of religion, learned and able lawyers for the practice of the law, skilful and enlightened magistrates and judges for the administration of justice, and wise and prudent politicians and statesmen for the great purposes of national legislation. The purpose, I take it, was to confer a complete and generous education, which Milton has defined to be, "that which fits a man to perform justly, skilfully, and magnanimously all the offices, both private and public, of peace and war."

I need not dilate upon the considerations which lead me to take this view of the original design of these institutions, for the real evidence on that subject must impress itself on every one; and I think I may say that the whole of the consulted Judges have arrived at the conclusion that the purpose contemplated in founding these Universities was the education of young men. That view seems to be confirmed by a general reference to the charters of the Universities, to the history of the country, to the state of public feeling upon such subjects; and I agree with the majority of the consulted Judges that the long usage which has followed, and which all of our brethren admit to be an important element, is here a conclusive consideration. From the year 1411 to about the year 1860, a period of 450 years, there is no instance produceable of a woman having been educated at any Scottish University. I need not dwell on the legal importance of that fact, which is so well demonstrated and enforced in some of the opinions we have received; and I do not think that any satisfactory or even plausible answer has been made to it.

The attempt at an answer consists in this, that the resort to an University is merely optional—what is called in law *res meræ facultatis*, a mere privilege—which the party entitled to it may enforce or not as he pleases, and which cannot be lost *non utendo*; and the case is put of an abstinence from University study by Roman Catholics, Jews, Indians, or negroes. It is asked, "Can it be said that the University could not, by vote and resolution, have admitted these

To a great extent this has always been our own law. In some
been relaxed from special considerations; in others it has even
extended. Women could not be tutors by the Roman law, but they
to be so by our law, from our having come to consider that tutory
Romans regarded it, a public office, but merely a private and dom
for which women might be perfectly well qualified. They were lo
with us from being witnesses, except in cases of necessity, and t
competent as instrumentary witnesses only as the result of recen
From judicial offices they have always been excluded, and are neith
nor qualified to act upon juries, unless it be on that limited kind of
must consist entirely of females. Generally speaking, it will be co
no political office can be held by any female, with one illustrious
exception.

In this state of the law—there being an undoubted category by wh
in consequence of their sex, are excluded from certain functions
males—it becomes a question depending upon the general evidenc
the actings of parties, whether the privileges, honours, and functior
with University education were designed for men alone, as they h
enjoyed, or were designed for young men and women indiscriminate

This seems to me to be the first and great question in the case. I
to think that it is the only question, but it is certainly the leadi
and it is put forward as such by the pursuers in their first declar
sion—namely, that it should be declared "that the pursuers are
attend the classes of any of the professors of the University of Edi
to receive instruction from the professors in said University, upon
payment of all fees exigible from students at the University for said
This is a very clear proposition, and one which, if decided in t
favour, would be conclusive of the whole cause. It is very plain
meaning, and what would be its effect. The Universities were
instituted for the education of male students. Were they also
instituted for the education of females? If so, every female presen
as a student at the door of the College is entitled to be admitted to
the usual terms. If there is not this equality, have male students
and to what extent and effect, and on what clause or rule of law d
ference rest? It seems to me impossible to take any middle co
matter as to abstract right, or to draw a distinction at all betwee

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'the summons, instead of merely dismissing them. I infer from these
ıat the Lord Ordinary now thinks the defenders entitled to absolvitor
ladies' claim to attend the classes of any of the professors, on the
ıt the general right is not supported by the regulations, which are con-
ely to the medical classes. But in speaking of the claim to a general
ord Ordinary seems to give, as his reason for negativing it, that with-
gulations there were no arrangements made for the instruction of
dents in medicine. Now, this may or may not be a good reason for
cluded females from the medical classes prior to those regulations.
ns wholly irrelevant,—at least I cannot follow its connection with the
f general right. Had ladies from the first a right to admission to the
ısses of the University—to the Humanity and Greek classes, to the
Logic and Moral Philosophy, to the Law and Divinity classes? Cer-
ıe branches of instructions needed no special arrangements,—at least
ıem did not. A woman bent upon learning Greek and Latin needed
arrangement for following in the footsteps of the many distinguished
ıo have successfully applied themselves to those studies. If they had
ı attend those classes the exclusion must have rested, not upon matters
echanical arrangement, but upon the principle that the University life
tended for them, but for the other sex.

ds me to the consideration that very weighty reasons may have operated
ional mind in constituting and continuing the Universities as exclusive
: the academical education of young men. It is not necessary that we
opt all the views of our ancestors in this respect. It is enough if we
ıch views existed and were entertained with an earnestness that acted
ı the national will, which, after all, is the great foundation of all laws
e institutions. It is a belief, widely entertained, that there is a great
in the mental constitution of the two sexes, just as there is in their
ınformation. The powers and susceptibilities of women are as noble
f men; but they are thought to be different, and, in particular, it is
. that they have not the same power of intense labour as men are en-
th. If this be so, it must form a serious objection to uniting them
same course of academical study. I confess that, to some extent, I
ıis view, and should regret to see our young females subjected to the
incessant work which my own observation and experience have taught
ıider as indispensable to any high attainment in learning. A disregard
ı inequality would be fatal to any scheme of public instruction, for, as
n that the general mass of an army cannot move more rapidly than its
nd slowest portion, so a general course of study must be toned and
down to suit the average of all the classes of students for whom it is
and that average will always be lowered by the existence of any con-
ıumbers who cannot keep pace with the rest.

this the special acquirements and accomplishments at which women
but from which men may easily remain exempt. Much time must,
o be, given by women to the acquisition of a knowledge of household
family duties, as well as to those ornamental parts of education which
ıch to social refinement and domestic happiness; and the study neces-
ıastering these must always form a serious distraction from severer
vhile there is little doubt that, in public estimation, the want of these
rts and attractions in a woman would be ill supplied by such branches
lge as a University could bestow.

his I assume that regard is to be had to the average powers of the
nd, and not to the different position of remarkable and exceptional
nd, in reference to this subject it may be noticed that we are apt to get
r of the question by comparing extraordinary women with ordinary men,
ıe true rule is, to compare together the ordinary run of both sexes, and
ı please, to compare the rarer examples of superior excellence among men
n—the Agnesis, the Lady Jane Greys, the Martineaus, and the Somer-
ı the Galileos, the Bentleys, the Adam Smiths, and the Isaac Newtons.
ı no reason why a false delicacy should prevent us from considering

far as I know, it has always been the rule in our grammar schc
females. This has certainly been the case in the distinguished gr
with which we are all acquainted in this city, and to which many
much. The same rule has unquestionably been observed in all ou
and surely there are very cogent reasons for such a system.

The period of life attained by the youth who are there educ
sixteen to twenty-two, is the most of all susceptible of the more t
of our nature; and, without the slightest suggestion of anything i
gree culpable, how is it possible to feel secure that, with a number
and women assembled together at a University, there shall nc
attachments and premature entanglements, that may exercise a bligl
on all their future life? What effect it might exercise upon th
studies it would be hazardous to conjecture. It might, in some ca
strange emulation; it might in others lead to total idleness amor
schoolfellows. In any view, he would be a bold man who would c
at a College, and send out some hundreds of young men and wom

"Inter sylvas Academi quærere verum,"

with whatever number of chaperons he might try to guard them.

One other consideration I must here touch upon as likely to h
public feeling in this matter.

Our Universities were necessarily corporations. Our individua
generally so as well, and it deserves to be remembered that this
of corporation was very different from those modern associations
porate privileges have been conferred by statute or otherwise.
company now-a-days is little better than a trading partnership, ar
require little or no personal qualification, the great object being tc
their funds and to get a good return from them, with certain speci
transference or transmission. A corporation of that more ancient
Universities and Colleges belong was a very different institution.
be called a body politic, for its functions, its benefits, and its reasc
were much more of a public than a private character. Many, ir
corporations were, directly and influentially, political, as conne
municipal institutions.

Now, it appears to me that, as a general rule, the members of su
were exclusively male, and that no woman could be a corporator.
that in some peculiar cases, as in some trading guilds, there m
custom of extending, at least partially, the benefits of some corp
to the widows or even to the daughters of guild brethren, but, i
tion was both created and limited by the custom. In the higher

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Upon all these grounds I am satisfied that the non-attendance of women at the Universities in times past, which is an indisputable fact, was not a mere accident, or a mere arbitrary abstinence from the enforcement of a legal privilege, but arose from a consciousness, shared by them with the whole community, that the Universities were not instituted for them, though women would undoubtedly receive indirectly the benefits the Universities were calculated to confer, in making better men of their fathers, their brothers, their husbands, and their sons.

I have dwelt thus long on a point virtually conceded by all the consulted Judges because I think the condition of matters prior to the late regulations is of the utmost importance, and because the strength and solidity of the considerations which determined the old practice and constitution of the Universities enable us better to decide whether these could be, and have been, effectually changed in the case of the University of Edinburgh.

The argument here in favour of the ladies' claims arises out of the power given by the late Act of Parliament (21st and 22d Vict. 1858). The University Courts there established have this power conferred on them, videlicet, "to effect improvements in the internal arrangements of the University, after due communication with the Senatus Academicus and with the sanction of the Chancellor;" and on 10th November 1869, the University Court of Edinburgh made a regulation that "women shall be admitted to the study of medicine in the University."

It is upon this and other relative regulations that the interlocutor under review must now be considered as exclusively based. This view of their case does not seem to be satisfactory to the pursuers, who complain of it as evading their just legal demands, and leaving their position to rest on a very precarious and slippery foundation. I do not wonder at this feeling, and I confess that, if the pursuers' claims were to be held as entirely dependent on the regulations of the University Court I should consider this state of things as a great calamity to all concerned. If the admission of women to the study of medicine is to be held a mere matter of regulation it is of course liable to be changed, modified, or repealed from time to time, as the enacting body may think proper. This is inherent in the nature of such regulations, and the consequence would be that no reliance could be placed on the continuance of the privilege or permission thus given, which might be suddenly withdrawn or curtailed, to the great disappointment and injury of those interested. There could be no fixity of tenure in such circumstances. No class in the community, no individual woman, could trust to medicine as an available professional opening, and no justice could be done to a system thus imperfectly introduced. In the meantime, the question, involving, as it does, important interests and exciting considerations, would remain a subject of keen and bitter contention, and make the University Court a permanent battle-field between the partisans of the opposing factions. How far this would conduce to the interests of science, and to the peace or prosperity of our Universities, it is not difficult to conjecture.

But apart from these views I consider that the regulations in question, admitting women to the study of medicine in the University of Edinburgh, are wholly illegal, and palpably beyond the statutory power conferred upon the University Courts. Those Courts are empowered to effect improvements in the internal arrangements of the University, but the proposal to confer on women a right of admission to the study of medicine, not previously possessed by them, appears to me to be not an internal regulation, but an external innovation, and that, too, of the most serious kind. I cannot consider it to be mere matter of arrangement whether one-half of the population has or has not a right of admission to the University. To admit those who, in consequence of their sex, had no legal claim to University study, and to declare that they now should have such a claim, appears to me to be an essential and fundamental alteration, or rather subversion, of the established consuetudinary constitution of the University, which it is wholly beyond the power of a University Court to effect.

I do not suppose it can be maintained that the University Court can make any change they please. I should think even that if the University Court here

have put upon them—I consider it quite unnecessary, in order to se
that a reduction of them should be brought. The University
authority over the University or over the Senatus Academicus,
the province which the statute has assigned to it. Beyond those
no standing, and its dealings and declarations are mere waste paper

I ought, at the same time, to advert to the view that these regul
import, in any practical form, what they are said to infer; and i
they are liable to the observation that they do not at all support t
sought to be deduced from them. Accordingly, the declarator wh
Ordinary has pronounced comes, on the face of it, to be a mere *br*
that can have no effect and can lead to no result.

Women, it is said, are admitted to the study of medicine, but th
they find classes that they can attend; they are only to be taugh
classes, and professors are permitted to have separate classes; but
professors are enjoined to have such classes, and it cannot be said
fessor is bound to have them, while, as to graduation, nothing wha
This, then, is a decree which is wholly unenforceable, and can estal
or available right. It is not the business of a Court of law to p
clarators that lead to nothing, and this Court has always refused to

It is clear that the pursuers themselves see the case in this ve
hence it is that with strict logical propriety they rested their act
first of their conclusions, namely, that they are entitled to attend
any of the professors upon payment of students' fees. Had they n
proposition they would have had a plain and enforceable right,
professor refusing to receive them would then have been guilty of
duty. But as that general right seems now universally given up, an
tions alone relied upon by the Lord Ordinary, and those Judges wh
him, there seems no solid ground left on which the action or decree

Before concluding I shall make one or two observations on some
points that have been referred to in the argument.

I agree in thinking that the examples which have been cited, of
nected with foreign Universities, have no bearing on the case. Th
after all come to very little, and chiefly amount to this, that,
honorary titles conferred on women, it has happened that in one or t
a wife or daughter was allowed to read her husband's or father's
indulgence which might be easily conferred by the autocratic aut
Pope or Emperor for the time being, to whom the Universities

tion of women in Scotland, and the course of our national history generally, to be wholly unsuccessful. Though naturally and willingly keeping aloof from public life, the condition of Scottish women in the 15th and 16th centuries was anything but slavish or degraded, nor were they considered as very timid or submissive. The evidence of Don Pedro d'Ayala, who was the Spanish Ambassador at the Court of James IV., is conclusive on this subject, and it is acknowledged that he was a keen and correct observer, as his character of that noble but unhappy monarch too plainly shews. The Scottish women, he tells us, "are courteous in the extreme," and, he adds, "they are really honest, though very bold." "They are absolute mistresses of their houses, and even of their husbands in all things concerning the administration of their property, income, or expenditure." Such women could not easily have been stopped from asserting a legal right intended for them, but they were doubtless aware that their proper place was at home, learning to rule their husbands, and bring up their children, with those happy domestic results of which Scotland has so much reason to be proud.

In deciding this case, as I am bound to do, upon strict legal grounds, I do not take up the time of the Court in saying much as to the personal feelings which it is calculated to excite. I will say this, however, that I have felt great sympathy with these ladies, both as to the object they had in view and as to the position in which they have been placed. I think that, from very natural motives and with the best intentions, but with unfortunate results, their friends have led them to form expectations which could never be realised in the way contemplated. Again, I think it very natural for those ladies who feel a vocation in that direction to wish to make themselves useful, and to earn an honourable independence, and I have no doubt there are departments of medical or surgical practice in which women may be fitly and successfully employed. There was an important branch of surgical practice in which their sex was long exclusively engaged, and which continued indeed to be their appanage from the time when Moses was found in the ark of bulrushes down till the beginning of the sixteenth century; for in 1522 a doctor was burnt alive in Hamburg for personating a woman in an obstetric case. That branch of practice in women's hands may now be looked upon with some contempt, but this I think a great mistake, and it might probably with great advantage be associated with other branches of domestic practice, for which women would be well adapted. This might surely be done without any material change in the constitution of the Universities. The rules of the London University, with its advanced notions, throw some light on this subject, for they refuse to accord to women the honour of graduation. In fact, any grievance of the pursuers arises out of the Medical Act of 1858. It is for the Legislature to determine the matter; but, if it was thought right, that Act might be amended by opening a somewhat wider door for medical qualification. The case certainly affords no ground for subverting the constitution of our Universities, or affecting the dignity and weight which belong to the highest honour attending the medical profession. The national object here is, and ought to be, to accomplish and adorn the character of a British physician, not only with all medical and physiological science, but also with the highest philosophy, intellectual and moral, and with all the resources of literature and learning which can aid him in his high functions. Any change that would incur the risk of lowering the standard that now exists, and which we have seen exemplified in so many of our great physicians and professors, is infinitely to be deprecated, and such a danger, I think, would be incurred by the revolution in the medical teaching of our Universities that has here been attempted to be brought about; while at the same time it would otherwise affect, and, in my opinion, deteriorate our Universities in a way unknown to any period of their history.

LORD JUSTICE-CLERK.—As I was a member of the University Court of the University of Edinburgh during the period to which part of the proceedings refer, I should gladly have been relieved of the duty of judging in this case. But as your Lordships and the rest of my brethren have not thought that cir-

or social expediency, our individual views are merely units hard on the sum of public opinion. The question of expediency, as far concerned, has been settled for us by the only competent authority

On the merits of this action my opinion coincides with that of the other consulted Judges who adhere to him. Lord Gifford, addition to his note, has very concisely expressed the views whi I think this is a question of purely academical administration, and be relegated to that department from which it is unfortunate for it ever was removed.

I am anxious in the outset to bring the case back from the wide dissertations by which it has been adorned and obscured to the which are raised in this summons. It is an action which has for its limit to define and enforce the duty of the Senatus Acade Chancellor of the University towards the pursuers, as matriculat the matters raised in the summons. No decree which can be pro action can go beyond this, and any such decree can only affirm a operative duty on the part of the defenders under the existing r their authority is regulated and defined.

However wide, therefore, the demands made in this summons m they must be read in the light of the position and obligations of t executive body of the University. This has been brought to a plea stated for the defenders, that all parties were not called; meant that they could not be required to do any act which was by the existing rules of the University, and that the summons r in which their academical superiors were the proper contradicto Ordinary, on the ground that no such question could be raised un summons, repelled that plea, and I do not understand that it is n sustain it. It therefore may be held as fixed that the summons farther effect than to enforce the duty of the defenders as defined rules of the University.

Although, therefore, such a course would have excluded an i most elaborate discussion, I greatly regret that the argument has fined within these limits. The pursuers manifestly could not existing laws of the University without bringing into Court t entitled to defend and had power to enforce them. The Senat on the other hand, who justly pleaded that their duty was obedie laws, and that they were not bound to answer to a challenge of th are entitled to insist on the question being confined to their pre not question the legality of the very laws which they plead they h

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matriculate as students with a view to the prosecution of the study of medicine, provided their instruction was conducted in separate classes confined entirely to women, and for this purpose the professors were permitted to have separate classes. The sixth of these regulations was as follows:—"All women attending such classes shall be subject to all the regulations now or at any future time in force in the University as to the matriculation of students, their attendance on classes, examination, or otherwise."

Under these regulations the pursuers passed the preliminary examination in arts prescribed for medical students, matriculated in the ordinary manner, and received their tickets of matriculation; were registered as students of medicine in the Government Register; and finished the first portion of the medical curriculum by attending the prescribed classes. Some of them passed the examination in the middle of the curriculum; but at this point their farther progress was arrested by two elements. The first was, that they could not find professors willing to teach them in separate classes. This difficulty might perhaps have been got over had not the Senatus Academicus raised the second, by intimating very clearly that they intended to resist the admission of any of the pursuers to graduation, and raised doubts whether to do so would not be contrary to law. They ultimately applied to the University Court to rescind the regulations of 1869. The University Court declined to rescind the regulations, but finding the legal question raised, although not indisposed to aid the pursuers, they held their hand, and the pursuers accordingly raised this action.

The conclusions of the action accordingly raise these two practical questions: The first is, whether the professors in the Medical Faculty are bound to teach the pursuers, either in separate or in mixed classes, under the existing laws of the University? The second, whether the defenders are bound to admit the pursuers to graduation on their complying with the other regulations of the University?

Although the pursuers, driven, as they thought, to vindicate their legal rights, have endeavoured to solve their difficulties by the first of their conclusions, I think there is manifestly no ground on which it can be supported. The University Court has defined the conditions under which alone they can be admitted to study within the University, and these conditions leave it optional to the professors to teach or not, but prohibit them from teaching in any but separate classes. There is therefore only one practical question which remains to be considered, and that is, whether under the regulations of the University Court, and subject to the conditions therein expressed, the defenders were bound to admit the pursuers to graduation? On that question I entertain no doubt whatever. These regulations had no object, and no meaning, as regarded those women who intended to follow medicine as a profession but to enable them to qualify for graduation, nor do their terms in my opinion admit of any other interpretation. In the faith of these regulations the pursuers have entered on the course of study prescribed, and incurred the delay and expense of going through a considerable portion of the curriculum. To deny them the degree which was essential to their entering the profession, with a view to which they studied, on the pretext—for it is no better—that no such end was ever contemplated, is in my opinion entirely unjust and unwarranted, and that all the more that the evils said to be connected with the admission of females to the University attach only to the study which is permitted, while the honour can injure no one and is only valuable as the passport to the medical profession, with which as a body the defenders have no concern.

That this question of graduation, from whatever cause, is in reality the sole matter in dispute, is sufficiently evident from the pleading of the defenders themselves. No doubt they devote a large portion of their argument to prove that women never have been and never ought to be admitted to University study; but in the sequel they disclose with sufficient clearness that if the pursuers would have contented themselves with mere certificates of proficiency, and would have abandoned their claim for graduation, they might possibly have fared better, and they suggest that a charter like that granted to the London University might have removed all the difficulty as long as the right to gradua-

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tion was denied. All these alternatives imply University study, and therefore the cardinal point of the case is the right to graduation. My opinion is, that on completing the curriculum as matriculated students the pursuers are entitled, by the existing rules of the University, to be admitted to graduation, and indeed I have found little in the shape of argument addressed to prove the contrary.

This, in my opinion, is sufficient for the decision of this case. It is, however, maintained by the defenders that the University Court had no power to pass these regulations. They say that by the constitution of the University no woman can be permitted to enter within its walls either for study or for graduation, and that the regulations themselves, and all that has followed on them, are a mere nullity, and can receive no effect.

I think this answer entirely irrelevant. Questions may no doubt arise between the superior and the subordinate powers in the University as to the legality of orders given by the former; and that these may be legitimately called in question I do not doubt. But when a student has entered the University, and has duly conformed to the rules on the faith of which he entered, it can be no defence on the part of the Senatus Academicus to his claim to graduate that the rules under which he was admitted are liable to legal objection. The duty of the Senatus is to obey the *de facto* law of the University, and any other principle would be not only subversive of academical discipline but would lead to the greatest injustice, as I think is the case here. The matriculation of the student creates an implied contract between him and the University authorities that if he comply with the existing rules they will confer the benefits in the hope of which he resorted to the University. They cannot, after the student has performed his part of the engagement, refuse to fulfil theirs on the pretext that the contract was made under rules which it was beyond the power of their academical superiors to make. They cannot compel the student, as a condition of his obtaining graduation, to take upon himself the defence of the laws of the University. His sole duty is to obey them, and if their lawfulness is to be disputed that must be done in a question with those who made them, not with the student who trusted to them.

I have therefore no difficulty in finding this defence wholly irrelevant as against the present pursuers, and inconsistent with the academical position of the defenders. But as the question of the legality of these regulations has been so largely discussed I shall shortly state the views which I entertain in regard to it.

The challenge has been founded on two grounds—the original constitution of the University, and the usage of many centuries. The latter element has some plausibility; the former seems to me quite unsupported, but, on the best consideration I have been able to give them I think both grounds are fallacious.

On this part of the question both parties have resorted to extreme propositions, which, while they have added to the interest, have been far from increasing the pertinency of the argument. The contention of the pursuers,—that females are entitled at once, and subject only to the same regulations as male students, to be admitted to the University, and that the authorities are bound to make needful preparation for their reception,—is in my opinion a hopeless one, against which the long-continued usage is conclusive. On the other hand, it has surprised me to find it contended, in the name of the Senatus Academicus, that it is a mistake to suppose that the University of Edinburgh ever had by its original constitution a legal right to confer degrees on any one, and that the practice to the contrary was probably a mere assumption. We must reduce this controversy within more reasonable limits.

I am of opinion that it is clear, from the terms of its foundation, that the University of Edinburgh was intended, like that of Glasgow and that of Bologna, the prototype of both, for the instruction of the community. I can give no weight to the criticisms, which are failures even within their own narrow limits, on the use of masculine nouns and adjectives in these foundations. One example will suffice. The words of the bull of Pope Nicholas V., founding the University of Glasgow, were actually pleaded to us as indicating that the education of males was alone contemplated, because one ground of granting was said to be "ut viros

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lucat consilii maturitate conspicuos, virtutum redimitos ornatibus," &c. But purpose would continue to be as true as it was then were the pursuers to eed in all for which they have contended. It will always continue to be main object for which this and the other Universities were founded, to train rorthy men for the service of the state. But the words which immediately w truly express the generality of the objects in view, "Sitque ibi scientiarum irrigans, de cujus plenitudine hauriant universi literarum cupientes imbui imentis," which includes every member of the community who is desirous of iting by the fountains of knowledge. It is a public highway, along which who are anxious enough and strong enough are at liberty to travel, without inction of age, or rank, or creed, or sex, or nation,—such is the import of the ds, and such is admitted, with one exception, to be their import. Does it ify that from time to time the regulations of different Universities have ed, sometimes introducing domiciliary regulations which might exclude one s, or financial regulations which may exclude another, or religious observances ch may exclude a third? These and such like may limit, and practically do it, the members of the community who immediately profit by these institu- s to the merest fraction of those for whom they were intended. But this acts nothing from the catholicity of the institution itself. If the same words foundation were applied to any public object,—an infirmary or hospital, a lic library, an institute of science, of language, of painting, or of music,— ld they necessarily include one sex only and exclude the other? Many al instances of the reverse will occur to every one, in which even the joint ly of adults of both sexes is not unknown. The important fact in the present is, that as the University of Edinburgh is at present constituted the regula- s are entirely consistent with its practical administration, and have been nd by experience to be so.

With regard to the argument drawn from usage, it is sufficiently plain that there been any usage the other way this question never could have arisen. t no woman has ever been admitted, or has ever asked to be admitted, to duate in a Scotch University is quite true. But I think the weight due to t fact is considerably misapprehended.

n the first place, before usage can be held to restrict or limit powers which othewise general, the usage must be reasonably connected with the limita- L. Before a University could admit a woman to graduation, some woman st have applied for graduation; and if the Universities never had the oppor- ity of exercising the power, it is difficult to see how the fact of its never ing been exercised can limit the generality of the grant. But it is quite ain that the non-application of women to be admitted as students in the iversity had no connection whatever with the power or want of power on the t of the University to admit them, but on social considerations, obvious ugh in themselves, and which, whatever our judgment in this case, will con- ue to limit the number of female students to a fraction. If the Universities ginally were intended for the benefit of the whole community, the use of the blic right by any one of the community preserves it for all the rest, and it is no moment that hitherto the benefits have only been claimed by the sex, or class, or nation, or creed, who found it suit their objects in life to take ad- tage of them. As members of the community, females were not excluded the original grant, or rather there was no limitation laid on the University ich prevented them from admitting any member of the community, and the ver, in my opinion, remains as unrestricted as it was at the first.

While, however, those members of the public who take advantage of these titutions preserve the right for the rest, in like manner the course and habit administration may come materially to restrict those who demand that that rse of administration should be altered to suit their views. Persons placed circumstances which have hitherto prevented them from availing themselves University instruction are not entitled to require the University either to r their rules to suit their circumstances, or to admit them on conditions pre- icial to the interests and discipline of the great mass of the students. If the nciliary character which at one time prevailed in the other Universities had

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continued to prevail in Edinburgh, it would of course have operated a practical exclusion of the demands of the pursuers. The same thing would have excluded all who resided beyond the University limits. A non-resident could no more have demanded a relaxation of the rule to meet his case than could a woman. So in the English Universities, which have preserved this kind of character longer than any others in Europe, the same rule would unquestionably apply. But time has abrogated these customs which were engrafted on the original general powers of the Scotch Universities, and it has been found to be possible and expedient, without any relaxation of academical discipline, to introduce this new arrangement into the University system. But I apprehend that was a matter entirely within the discretion of the University authorities.

I attach but little weight to the argument drawn from the franchise, or to the notion that a University degree implies a public function. As to the first, the distinction is manifest; as wide as the distinction between the education and cultivation of the intellect on the one hand, and political power on the other. It was the nature of the subject-matter which alone gave pertinency to the allegation of usage in the case of the franchise. The franchise is a public function from which, from its nature, the presumption is that women are debarred unless there be a specific law to the contrary. The usage was justly held to prove that the general terms of the Act of Parliament could not be regarded as a specific law to the contrary. The presumption in the present case is exactly the reverse.

Lastly, as to the supposed public nature of a University degree. The argument on this head, although very able, runs into untenable refinements. There is nothing cabalistic or mysterious in a University degree. It is simply an attestation of academical merit. It may, like the ownership of property, be taken as a test for civil functions, but it does not follow that a woman, although a graduate, is competent to discharge them. While the analogies drawn from the Continental practice do not greatly aid the general argument, I think it has sufficiently dispelled the notion that it ever was the academical law of Europe that a woman could not be a graduate. On the contrary, in the cases which have been handed down to us, the European Universities of yore hailed and proclaimed the successes of those of the gentler sex who were thought worthy of the honours of the learned. I find in Bayle, in his notice of the works of Ronaldini, an Italian mathematical writer, published in 1684 (Bayle, Œuvres, i. 361), that that author published a treatise in which he discussed the question, "If it be competent to confer on women the degree of Doctor in Theology" (Caroli Ronaldinii, Mathematicæ Analyticæ, pars tertia, 1684). His theme was taken from the case of Helen Piscopia Cornaro, "of glorious memory," as the writer says, on whom the University of Padua wished to confer this distinction, but who found, as the pursuers have found, an antagonist, in the shape of Cardinal Barbarigo, the Bishop of Padua, who protested successfully against that theological honour being conferred on a woman, and she was accordingly obliged to content herself with the degree of Doctor of Philosophy. The account of this lady (Cornaro) in Moreri's Dictionary says that this honour was conferred upon her in the presence of many Venetian nobles and other grandees of Italy, and more than a hundred ladies of rank who had come express to Padua to witness so unusual a ceremony. We may smile at the enthusiasm of the seventeenth century; nor is it for us to judge which of the two ancient Universities might best maintain the true academic spirit—one in throwing open their gates with acclamation to those aspirants to their honours, the other in sternly shutting them. But, on the whole, I think the defenders have entirely failed to prove that graduation is, or has ever been held to be, among the great Continental Universities, beyond the ambition of a woman, or that there exist any solid grounds, even could the question be raised in this action, for questioning the power of the University authorities to pass the regulations in dispute.

THE COURT, on 27th June 1873, pronounced the following interlocutor:—"The Lords having resumed consideration of the cause, with the written opinions of the consulted Judges, in conformity with

the opinions of a majority of the whole Judges, recall the interlocutor of the Lord Ordinary of date 27th July 1872: Assoilzie the defenders from the whole conclusions of the summons, and decern: Find the defenders, the Senatus Academicus, entitled to expenses, and remit to the Auditor to tax the same and to report: And in respect it is stated for the defender, the Chancellor of the University, that he makes no claim for expenses, find no expenses payable to him."

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MILLAR, ALLARDICE, & ROBSON, W.S.—W. & J. COOK, W.S.—JAMES ALLAN, S.S.C. —Agents.

GEORGE DEMPSTER AND ALEXANDER DEMPSTER, Pursuers.—*Fraser.*
REV. ROBERT R. RAE AND REV. JOHN E. RAE, Defenders.—*Scott.*

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July 1, 1873.

Dempsters v. Raes.

Issue—Agreement—Reduction—Fraud—Fraudulent Concealment—Essential Error.—Residuary legatees under a settlement brought an action to reduce an agreement between them and other legatees under the settlement, averring that the defenders, taking advantage of the pursuers' ignorance of their rights and the amount of the succession, had by fraudulent misrepresentation and concealment induced them, greatly to their prejudice, to enter into the agreement. The defenders objected to an issue of fraudulent concealment, on the ground that there was no duty to disclose. *Held* (1) that in entering upon the contract there was a duty of disclosure incumbent on the defenders, and that the pursuers were entitled to an issue of fraudulent misrepresentation or fraudulent concealment; and (2) (*diss.* Lord Cowan) that the pursuers' averments were insufficient to found a separate issue of essential error.

2D DIVISION. Ld. Mackenzie R.

THIS action was brought by George and Alexander Dempster, the nearest of kin and heirs-at-law of the late Dr Francis da Cruz M'Cowan, Edinburgh, against the Rev. Robert Reid Rae, and the Rev. John Ellis Rae, second cousins of the said Dr M'Cowan, and legatees under his will, for reduction of an agreement entered into between the pursuers and defenders relative to the succession of Dr M'Cowan, on the ground that the pursuers were induced to enter into it through fraud on the part of the defenders.

The following were the circumstances under which the action was brought:—Dr M'Cowan died on 6th October 1872, leaving a trust-disposition and settlement, dated 25th March 1870, whereby he disponed his whole estate to certain persons as trustees for the purposes therein mentioned. By this settlement several legacies of money and specific articles were made, and, *inter alia*, there was left to the defender Robert Reid Rae a legacy of £500, and to the defender John Ellis Rae a legacy of £500. As regarded the disposal of the residue, after paying the bequests, the deed proceeded thus:—"In the next place, I direct my said trustees, as soon after my death as they may find convenient, or as the state or circumstances of my succession may permit, to realise and convert into cash the whole of my estate and effects (excepting such articles not specially appropriated by me for bequests as my residuary legatee or legatees may desire to be delivered up to them in kind) which shall arise, after fulfilling the other purposes of the trust before specified, and to divide, deliver, and pay over the residue thereof to such person or persons as I may hereafter nominate and appoint to be my residuary legatee or legatees by any codicil or other writing by me clearly expressive of my will, tho' not formally executed, and failing such nomination and appointment, then to my heirs and representatives whomsoever." Dr M'Cowan subsequently left a codicil which, except in so far as it recalled the appointment of one of the trustees, and gave one of the defenders £600 and the other £400 instead of £500 each, did not interfere with the provisions of the trust-deed.

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As nearest of kin and heirs-at-law to Dr M'Cowan the pursuers were entitled to the residue, which amounted to a sum of £9000 or thereby.

The pursuers averred;—(Cond. 8.) "The defenders, immediately after they became aware that they were only to receive the above legacies of £400 and £600, and that the pursuers would each be entitled to several thousands, formed a fraudulent scheme for the purpose of defrauding and circumventing the pursuers, and inducing them to forego their rights under the will, and to divide the estate equally with the defenders, so that instead of the defenders getting only £400 and £600 respectively, each of them should carry off £2500 or thereby." (Cond. 9.) "In pursuance of this scheme the defender John Ellis Rae wrote to the pursuer George Dempster, on 10th October 1872, the day after Dr M'Cowan's funeral, a letter stating,—'You and your brother are not mentioned in the Dr's will, but you have a deep interest in it,' and invited them to come down to Glasgow to him, and that he would go to Edinburgh with them." (Cond. 10.) "Accordingly, the pursuer George Dempster arrived in Glasgow on the morning of 15th October 1872. The pursuer Alexander Dempster arrived there on the evening of that day. The pursuers remained at the defender John Ellis Rae's house all night, and came to Edinburgh with him next morning. Before reaching Edinburgh the defender John Ellis Rae did not communicate to the pursuers any facts regarding Dr M'Cowan's will, or the amount of his estate, or inform them of what had been left to the defenders, or what interest the pursuers had under the will, or what were their rights as next of kin and heirs-at-law, and the pursuers had no knowledge whatever in regard to these matters. The only information given by him to the pursuers was, that he and his brother were mentioned in the will but that the pursuers were not. The defender John Ellis Rae, in pursuance of the defenders' fraudulent scheme, spoke in most unfavourable terms of the trustees to the pursuers, without having, as the pursuers have since learned, any ground for doing so, saying that they were very bad men, bore a bad character, and were not to be trusted, that it would be important for all parties interested in the estate to get rid of them if possible." (Cond. 11.) "The defender John Ellis Rae informed the pursuers that the other defender Robert Reid Rae would meet them in Edinburgh. On arriving in Edinburgh, he took them at once to York Place, to Dr M'Cowan's house, and on the way there they were met by the said Robert Reid Rae, who returned with them to the house. They were there shewn into the dining-room, where David Kerr Smith, a writer, but not practising as such, and whom the pursuers had never before seen, was standing. The defenders at once began to abuse the trustees, stating that the trustees' object was to protract the winding up of the estate, and to cause expense, and that unless the estate could be got out of their hands it might be years before anything could be got out of it. The defenders did not inform the pursuers what the amount of the legacies left to the defenders was, but they represented to the pursuers that as they were not named in the will they could claim no beneficial interest in the estate, but that as they, the pursuers, were the nearest of kin, their co-operation was necessary to get the estate out of the trustees' hands. They therefore proposed that, if the pursuers would co-operate with them, they would throw their legacies into the general estate and divide it equally with the pursuers. This they falsely and fraudulently represented would be a most beneficial arrangement for all parties, and one by which the estate could be taken out of the hands of the trustees, who were trying to hang up proceedings and fritter it away in expenses, so that no party would get any substantial benefit under it. They further proposed that the pursuers should then and there sign an agreement, under which the estate,

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fter all other debts and legacies were paid, except those to the defenders, ould be equally divided amongst the pursuers and defenders."

The pursuers further averred that having perfect confidence in the de- nders they agreed to this proposal, and on Mr Smith's producing a ritten agreement they signed it along with the defenders. That they ever saw the trust-disposition and settlement until after they had signed is agreement, and that they were induced to sign it solely by the false nd fraudulent representations of the defenders. That they signed the greement under essential error as to the nature and effect of the trust- isposition and settlement, as to the nature and effect of the agreement, nd as to their rights as next of kin and heirs-at-law, induced by the raudulent representations and fraudulent concealment of the defenders.

The agreement which was now sought to be reduced was in the following erms:—"Agreement between George Dempster of 31 Arundel Street, ondon, Alexander Dempster, Newport, Isle of Wight, the Rev. Robert leid Rae, minister of the parish of Avondale, and the Rev. John Ellis lae, Port-Dundas, Glasgow.—The parties above-named and designed, eing the nearest relatives of the deceased Francis da Cruz M'Cowan of 7 York Place, Edinburgh, have agreed, and do hereby agree, as follows, iz.,—First, The said parties have renounced and do hereby renounce their espective interests and claims on the estate of the said deceased in favour f one another. Second, That the said parties shall aid and assist one nother to the utmost in the winding up of the estate of the said deceased, nd in order that the same be done as speedily as possible whatever oney may require to be borrowed for this purpose each is to take his hare of the responsibility. Third, That on all legal claims on the said de- eased or his estate being satisfied and paid, whatever residue of the said eceased's estate remains is to be divided in equal portions between s, the parties hereto.—In witness whereof," &c.

In answer, the defenders denied that they had been guilty of misrepre- entation or concealment, and averred that the agreement was entered into t the suggestion of the pursuers.

The pursuers pleaded;—(1) The said agreement ought to be reduced, in espect that the subscription of the pursuers was obtained by fraud on the art of the defenders. (2) The pursuers having signed the said deed nder essential error, induced by the fraudulent representations and con- ealment of the defenders, it ought to be reduced. (3) The defenders aving circumvented the pursuers, and induced them to sign said deed hen under essential error as to the effect of the said trust-disposition and ettlement, and of their rights as next of kin and heirs-at-law foresaid, the aid agreement ought to be reduced. (4) The defenders having, while pro- essing to advise the pursuers disinterestedly as to the course they should ollow, fraudulently represented that it would be a benefit to the pursuers o sign the said document, and fraudulently concealed important facts elating to the succession which formed the subject of the negotiations etween them and the pursuers, and the deed in question having been ranted in consequence thereof, it ought to be reduced."

The defenders pleaded;—(1) The averments in the condescendence are rrelevant, and insufficient in law to support the conclusions of the action, r any of them. (2) The agreement sought to be reduced being a valid nd binding agreement, and no good objection or reason of reduction being verred or existing in fact, the defenders should be assoilzied, with ex- enses.

The Lord Ordinary pronounced an interlocutor approving of the follow- ng issues:—"It being admitted that the writing, of which No. 6 of pro- ess is an extract, was executed by the pursuers and defenders on or about

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the 16th day of October 1872: 1. Whether the pursuers were induced to execute the said writing by fraudulent misrepresentations or concealment made, or caused to be made by the defenders, or either of them, in regard to the pursuers' rights and interests as next of kin and heirs-at-law of the late Dr Francis da Cruz M'Cowan, of No. 27 York Place, Edinburgh? 2. Whether the pursuers executed the said writing under essential error, induced by the misrepresentation or concealment of the defenders, or either of them, as to the pursuers' rights and interests as next of kin and heirs-at-law of the deceased Dr M'Cowan?"

The defenders moved the Court to vary the said issues by substituting a single issue in the following terms:—"It being admitted," &c., "Whether the pursuers executed the said writing under essential error, induced by the misrepresentation of the defenders, or either of them, as to the pursuers' rights and interests as next of kin and heirs-at-law of the late Dr Francis da Cruz M'Cowan, of No. 27 York Place, Edinburgh? or in such other terms as your Lordships may think meet. Or otherwise, to alter and vary the said issues by deleting from both of them the words 'or concealment.'"

Argued for the defenders;—An issue of misrepresentation was sufficient, for there was no duty to reveal incumbent on the defenders.[1] That being so an issue of concealment would not be relevant.

Argued for the pursuers;—In this case a duty to disclose was laid upon the defenders, for they opened negotiations; they knew the position of parties and the amount of the estate, and also knew that the pursuers were ignorant on these matters.[2] Therefore it was necessary to have an issue of concealment.

At advising,—

Lord Justice-Clerk.—The case for the pursuers is that they, being entitled under Dr M'Cowan's settlement to a residue of £9000, were induced by the defenders to execute a contract, by which the defenders, who were mere legatees to the extent of £400 and £600, were to receive an equal interest in the succession with the pursuers. The pursuers expressly aver that in going into that contract they were unaware of their right under the settlement, which was really that of residuary legatees, and of the amount of the succession; and that the defenders knew that they were in that state of ignorance. In regard to the first issue, it was contended for the defenders that non-disclosure of facts could not be made the subject of an issue, because there was no duty to disclose on the part of the defenders, and an elaborate argument was based upon this assumption; but in my opinion the foundation vanishes on which the whole edifice rests. Instead of there being no duty of disclosure, the most candid and full disclosure was incumbent on the defenders. The contract was not an ordinary one. It was a contract between parties who had an interest in a succession, and the proposal was that these interests, being entirely unequal, should without consideration be equalised. If the party who is to lose is in ignorance, and the party who is to gain is well informed, and being aware of the ignorance of the other, takes advantage of that ignorance, it is a case of the grossest fraud. In Railton v. Mathews and Leonard this doctrine was applied in a case not so

[1] Fox v. Mackreth, 1787, 1 White and Tudor's Leading Cases in Equity, p. 115; Gillespie v. Russel, Feb. 28, 1856, 18 D. 677, and June 26, 1857, 19 D. 897; Hogg and Others v. Campbell and Others, March 12, 1864, *ante*, vol. ii. 848; Alexander v. Alexander, Jan. 12, 1866, *ante*, vol. iv. 291; Ritchie v. Ritchie's Trustees, Jan. 13, 1866, *ante*, vol. iv. 294; Richmond v. Railton, Jan. 26, 1854, 16 D. 405; Broatch v. Jenkins, July 5, 1866, *ante*, vol. iv. 1051; 1 Bell's Com. 381; Keats, Jan. 20, 1851, 20 L. J. (C. P.) 76; Smith, June 6, 1871, 40 L. J. (Q. B.) 221.

[2] Wilson v. Caledonian Rail. Co., July 6, 1860, 22 D. 1408; Johnston v. Johnston, March 10, 1857, 29 Jur. 320; Love v. Marshall, *ante*, vol. ix. 291; Railton v. Mathews and Leonard, Jan. 27, 1844, 6 D. 536.

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strong for its application. It was there held that a contract between an employer and the cautioner for a servant or agent in his employment was so much one of good faith that the employer was bound to disclose circumstances within his knowledge which were material to the risk. But the contract in the present case was one into which a person was certainly not entitled to go without putting the other party in full possession of the facts. I am accordingly of opinion that the first issue must be granted, but that to prevent ambiguity the word "fraudulent" should be inserted before concealment.

I think it undesirable to burden the case with the second issue. If the pursuers are wrong in point of fact on the first issue I doubt where there is ground for a separate issue. The ground of action is that the pursuers were ignorant, and known to be ignorant by the defenders, who took advantage of this to make a most unfair bargain. It is not so much any specific error that is alleged as general ignorance. On the whole matter, looking to the substance of the allegations, I consider that the whole case may be perfectly well tried on the first issue.

LORD COWAN.—I concur in approving of the first issue, which seems to me quite appropriate and well fitted to get at the justice of the case. Mr Scott called attention to the defenders' statement that they had stated and explained to the pursuers the provisions of the trust-deed, and their rights to the residue, and if this be proved the defence will be good. But take the pursuers' case as stated on the record, and there is a denial of these statements, and averments are made of a directly opposite character. I therefore concur with your Lordship as to the first issue.

In regard to the second issue, however, I think it should stand as approved of by the Lord Ordinary. It is true that there is no very specific averment on record of essential error as regards the matter of the error. But the whole averments proceed, as I read them, on essential error as the very basis of the pursuers' case; and if that error arose from misrepresentation there should be an issue to bring out that ground of action. In the record it is not only stated that the pursuers were not aware that they would have got the succession if they had left matters alone, but in article 11 of the record this is stated—"The defenders did not inform the pursuers what the amount of the legacies left to the defenders was, but they represented to the pursuers that, as they were not named in the will, they could claim no beneficial interest in the estate." So these Englishmen were led on in the supposition that as their names did not occur in the will they could claim nothing under it. Then, again, in article 17 of the record, there is this averment—"The pursuers executed the said agreement under essential error as to their rights as next of kin and heirs-at-law, induced by the defenders' representations foresaid." Thus I cannot see but that there is sufficient allegation of essential error to justify an issue.

LORD BENHOLME.—I think that under the first issue the whole of the case can be tried, and that the insertion of the word "fraudulent" is all that is necessary to make that issue sufficient.

My objection to the second issue is that there is no sufficient statement of essential error on record. Besides, if the issue were allowed without the word "fraudulent" it would change very much the nature of the *onus*. Now, in this case the *onus* ought to be as heavy on the pursuers as is implied in the word "fraudulent." I therefore think that we ought to refuse the second issue.

LORD NEAVES.—I concur with your Lordships as regards the first issue, although I should have preferred the word "undue" as qualifying "concealment;" but this is not of much consequence. I do not see good grounds for granting the second issue. I do not quite understand the state of mind in which the pursuers allege themselves to have been. They were told that they were not named in the settlement. They must have then thought that they were going into a contract under which they were to get half of an estate in which they had no interest. Their case is not intelligible unless they aver that it was their

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belief that the defenders were entitled to the whole. If "misrepresentation" in the second issue is meant to cover innocent misstatement, I do not think they are entitled to an issue of that kind at all. If it means "fraudulent misrepresentation," then the second issue just tries over again the question involved in the first issue. The first issue is, whether the pursuers were induced to execute the deed by the fraudulent misrepresentations of the defenders; and the second issue comes to this, whether the pursuers fell into essential error in consequence of the fraudulent misrepresentations of the defenders, which error led them to execute the deed. I am of opinion that the first issue, modified as your Lordship suggests, is sufficient for the trial of the case.

THE COURT appointed the following to be the sole issue for the trial of the cause:—"Whether the pursuers were induced to execute the writing No. 14 of process by fraudulent misrepresentations or fraudulent concealment on the part of the defenders, or either of them, in regard to the pursuers' rights and interests as next of kin and heirs-at-law of the late Dr Francis da Cruz M'Cowan."

W. G. ROY, S.S.C.—A. K. MORISON, S.S.C.—Agents.

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July 2, 1873. Fotheringham's Trustees, &c.

ANDREW FOTHERINGHAM'S TRUSTEES, First Parties.—*Black.*
JAMES PATERSON, Second Party.—*Black.*
JOHN HAY AND OTHERS, Third Parties.—*Jameson.*

Succession—Heritable and Moveable—Conversion—Trustee—Power of Sale.—A testator directed his trustees, after certain liferents were satisfied, to divide his estate, which consisted chiefly of house property, into nine equal shares, and to "dispone, assign, and pay over" one of these shares to each of nine persons. The trustees were empowered to sell the whole or such part of the heritable property as they might think proper. *Held* that as a division of the estate was practically impossible without a sale conversion took place, and that the shares of the beneficiaries formed part of their moveable succession.

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THE late Andrew Fotheringham died on 1st October 1861, leaving a trust-disposition and settlement dated 27th December 1844, by which he conveyed to trustees his whole estate, heritable and moveable, and, without prejudice to the said generality, a number of heritable subjects therein described, chiefly house properties.

The purposes of the trust were as follows:—"In the first place, that my said trustees shall, out of the first and readiest of my means, estate, and effects, satisfy and pay my deathbed expenses and funeral charges, with the expense to be incurred in carrying these presents into execution: In the second place, in the event of there being any other debts owing by me at the time of my death, and my said wife being then in her life, I direct and appoint my said trustees to borrow money for paying off the same, and to grant a bond or bonds over the whole or any part of the subjects hereby disponed in favour of the lender, and I appoint the interest to be paid out of the rents, yearly or half-yearly, as the case may be, aye and until the death of the foresaid Mrs Elizabeth Swanson or Fotheringham, my wife, when the principal shall be paid off as soon as my trustees can accomplish the same; but in the event of my wife's predeceasing me, then my whole debts shall be paid out of the first and readiest of my means, estate, and effects, or money borrowed on bond for the purpose, as before mentioned, to be afterwards retired from the annual produce of my subjects."

By the third purpose the trustees were directed to pay to his wife, in the event of her surviving him, the free income of his whole estate, after deducting the interest of money borrowed, insurance, repairs, and other

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essary expenses; and also to deliver to her for her own use and be- f his household furniture and plenishing.

y the fourth and fifth purposes the trustees were directed, after truster's death, or the death of his wife, in the case of her sur- ng him, to pay the free rents of two specified subjects, the first Andrew Richardson and his wife, and the longest liver of them ing his or her life, and the second to James Thomas. "In the enth place, I appoint my said trustees, after my death, or the death ny said wife, in case she survives me, and making the payments re mentioned, and also paying all repairs, insurance, and what- r other expenses may be necessary in regard to the said subjects, or carrying these presents into execution, to devote and pay the free due and remainder of the rents or yearly produce of the said subjects, the first place, in extinction of whatever debts may have been left ng by me at the time of my death, or may be contracted by my tee in the execution of this trust, and have not otherwise been dis- rged; and so soon as these purposes are fulfilled, to pay to the surer of the City and County of Perth Infirmary, for the benefit of that itution, a free year's rent of the said subjects, after deducting insur- e, public burdens, and ordinary repairs and expense of management the year: In the eighth place, after the whole purposes before men- ed are implemented and fulfilled I direct and appoint my trustees to ide the remainder of my said heritable and moveable property into e equal shares or divisions, and to dispose, assign, and pay over one hese to my sister, Catherine Hay, in liferent, and one to each of the John Hay, my brother, Isabella Hay or Comb, Catherine Hay, and et Hay, my nieces, the said William Hay and David Hay, my hews, and Rachel Corner and Elizabeth Fotheringham M'Gregor, es of my said wife, in fee, and their heirs, executors, and assignees ectively: In the ninth place, on the death of the said Catherine Hay, lrew Richardson and his wife, and James Thomas, as these events l severally occur, I direct and appoint my said trustees to dispose, gn, and pay to my own and my wife's relations last above mentioned, their foresaids, the parts of my heritable property so severally life- ed by the said Catherine Hay, Andrew Richardson and his wife, and es Thomas."

he trust-deed contained the following provision:—"And I do hereby ıer authorise and empower my said trustees before named, or to be rwards assumed, after the death of the longest liver of me and my wife, and after the whole debts owing by me, or contracted by my tees in the course of their management, and provision to the City and nty Infirmary have been paid, and the liferents of the said Catherine , Andrew Richardson and his wife, and James Thomas, severally satis- to bring the whole or such part of my heritable property to sale as may think proper, and to grant absolute dispositions to the pur- ers, should they be of opinion that such sale is advisable for more tually carrying the purpose of this settlement into execution."

he heritable property left by the testator was estimated as of the e of £4050 or thereby in all. The yearly rental amounted to £280. moveables left by the testator consisted chiefly of the furniture and rs bequeathed to his widow. The remainder of the moveable estate taken to pay the deathbed and funeral expenses, and the expense of mournings mentioned in the settlement, with some floating debts ch were due by the deceased, and which required to be paid at the . The other debts due by the testator at his death consisted chiefly ans which he had obtained on personal security. Those other debts,

of the fourth purpose of the trust, Andrew Richardson, alte
of the widow, drew the rents of the subjects conveyed to
death. The gross yearly rents of the remaining subjects belo
trust-estate amounted to £270 or thereby, of which there ren
per annum, or somewhat less, after paying public burdens
and also the interest due upon the testator's unpaid debts.

Of the beneficiaries mentioned in the trust-deed the trus
died on 14th April 1872; Mrs Barbara Salmond or Richard
Andrew Richardson, died on 4th April 1869; James Thomas
March 1865; Catherine Hay died on 21st February 1871;
Richardson, who was alive at the date when the present spec
presented, died on 23d June 1873.

As it would be several years before the debts still remaini
paid out of the free rents of the trust-estate, and as the cr
pressing for payment, the residuary legatees called upon t
with the consent of the treasurer of the infirmary mentic
settlement, to sell the whole of the trust-estate, and after
the proceeds the whole debts owing by the trust-estate, an
paying to the said treasurer such sum as had been agreed
charge of his claim under the settlement, to distribute
among the beneficiaries entitled thereto. Negotiations had
progress for adjusting the amount to be paid to Andrew Rich
discharge of his claims, and for his consent to the arrangeme
His death relieved the trust-estate of his liferent, and the spe
accordingly amended.

Janet Hay, mentioned in the settlement, married Robert P
died intestate on 22d October 1866, leaving two children, Jam
beth. A question arose as to the disposal of the share of the resi
to be paid to Janet Hay, and her heirs, executors, and assignee
on whether the said share was to be held as heritable or mov

The parties to this case were (1) the trustees of Andrew Fo
(2) James Paterson, (3) the other residuary legatees unde
ment.

The following questions were submitted to the Court:—"1.
tees entitled, with the consent of the second and third parties
the treasurer of the said infirmary, now to sell the said trus

n;—There was no constructive conversion of what was in its a heritable subject into a moveable subject.[1]
ied;—It was impossible to carry out the purposes of the trust ; a sale, and there was therefore constructive conversion.[2]
lvising,—

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JUSTICE-CLERK.—There are two questions presented to us in this case, eference substantially to the eighth purpose of the trust-deed, which is llowing terms:—"In the eighth place, after the whole purposes before ed are implemented and fulfilled I direct and appoint my trustees to he remainder of my said heritable and moveable property into nine equal and to pay them over to the persons there mentioned.
irst question is, whether the period of division has arrived. I am of that it has, and that the first question should be answered in the affirma- everything required by the previous purposes of the deed has been done. low is dead, the truster's debts will now be provided for, and the only at remains is to divide. So I think that we should answer this question ffirmative.
econd question raises the question whether the share of one of the bene- is heritable or moveable. The general rule, and one mainly fixed by s in revenue cases, is this: where trustees hold an estate with a direc- sell, that estate becomes moveable; but when the trustees are only given o sell, there is no conversion unless it appear that sale is essential to the n of the trust.
eading case on this branch of law is the case of Buchanan v. Angus. lgment in that case was very strong, and if there had been more than eficiaries I think it would have been doubtful. It was a case in which ter directed his trustees, after the discharge of legacies, to pay over the to his brother and sister equally, with power to the trustees, if neces- convert the same into money. The House of Lords held that the settle- d not convert the heritable into moveable estate, and laid down that if t to sell is made to depend on the discretion of trustees, or is to arise case of necessity, there is no conversion.
whatever may be said of that opinion, there is no doubt that in the pre- e we can come to no other conclusion than that the estate cannot pos- main as heritage in the due execution of this trust. A division of the operty into eight shares is substantially impossible without a sale, and trustees are directed to do before they proceed to pay over any part of e only way to divide this estate equally is to convert the heritage into le property. Although the subsequent expressions in this deed indicate truster thought and spoke of the existence of the estate in its existing m, I do not think that sufficient to alter the clear effect of the provisions ighth purpose of the deed.
only other thing in the deed to which it is necessary to advert is the terms in which the power of sale is given to the trustees. The power o be exercised (1) until the fund is liberated, and (2) unless the trustees think that such sale was advisable for more effectually carrying out the of the trust-deed. But if the purpose of the trust cannot be carried out a sale then to sell is what is advisable and what the trustees are here l to do. I think the second question should be answered to the effect e share of Janet Hay or Paterson belongs to her heirs *in mobilibus*.

COWAN.—There are peculiar clauses in this trust-deed, but which are ed for by the nature of the subjects conveyed to the trustees. The value e subjects is stated to be about £4050, and the yearly rental amounts to £280, and from the trustees' statement it would seem that the subjects mainly, if not wholly, of house property, yielding a higher rental than

ith, June 13, 1854, 1 M'Q. 760; Buchanan v. Angus, May 15, 1862, 4 74.
vocate-General v. Blackburn's Trustees, Nov. 27, 1847, 10 D. 166.

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the price if realised would have done of yearly interest. This, I think, explains the second purpose, which directs that, so long as his wife survives, the debts owing by the truster should be paid off by means of money to be borrowed on the security of the trust subjects. The liferent of his whole property was provided to his widow, and it was no doubt with the view of securing to her a higher yearly income that a sale of the subjects was thus postponed while she survived. And hence may be accounted for also the provision made as to the payment of debts thus contracted by the trustees before the division and sale of the residue should take place. Extensive powers, however, are conferred with regard to their realisation of the estate, and, in particular, they are empowered, "after the death of the longest liver of me and my said wife, and after the whole debts owing by me or contracted by my trustees have been paid, and the liferents provided for" have been satisfied, to bring the whole or such part as they think proper of the truster's heritable property to sale, "should they be of opinion that such sale is advisable for more effectually carrying the purpose of this settlement into execution."

From the facts stated in the case it appears that the widow died in 1872, and that the liferents provided of certain small portions of the estate no longer exist. The debts, however, have not been discharged, and the creditors are now pressing for payment, and further, there remains of the rental little more than £100 per annum, after payment of public burdens, repairs, and interest of debt.

Having regard to the terms of the trust-deed and the circumstances set forth in the case, I am of opinion that the trustees are entitled now to exercise their power of sale, and that the first question should be answered in the affirmative.

The second question depends upon the inquiry whether it is to be held that by the directions of the deed there has been effected conversion of the heritage conveyed to the trustees into moveable estate in succession as regards the several shares of the property to be distributed among the children of the testator. The words of the deed are,—"I direct and appoint my trustees to divide the remainder of my said heritable and moveable property into nine equal shares or divisions." Such are the express words employed by the testator as regards the distribution of his estate, and effect cannot, as I think, be given to them without reducing the whole property by sale of the heritage into a divisible fund. A *pro indiviso* conveyance of the property to the nine children will not meet the directory words. There must be division, and that is simply impossible, having regard to the nature of the subjects, consisting of houses and shops. No doubt there follow the words, "and to dispone, assign, and pay over one of these (shares) to my sister in liferent, and one to each" of the parties named "in fee, and their heirs, executors, and assignees respectively." But although the word "dispone" does occur, I do not think it can alter or affect the clear and unambiguous terms of direction contained in the previous part of the sentence, which, as I have said, is not capable of being fulfilled otherwise than by the heritable property being sold. And any difficulty that might have been experienced, or any necessity that might have existed of applying for judicial interposition, are obviated by the power of sale conferred on the trustees. No doubt that power is conferred in words implying that it was to be exercised according to their discretion and as they might judge as to its exercise being advisable for more effectually carrying the testator's purpose into effect. The words are not such as in express terms to make it imperative that they should exercise the power of sale, but they truly have that effect when the truster's purpose in the division of his estate cannot be otherwise carried into effect. There might have been room in the course of the subsistence of the trust-management for the trustees being called on to consider the advisability of a sale, and in whole or in part to exercise the option conferred on them. But when the trust requires to be wound up and the estate distributed the trustees are in effect called on and bound to exercise the authority and power conferred on them by the deed to bring the subjects to sale. Nor does the ninth purpose of the trust, as I read it, present any obstacle to the adoption of this construction. All that it does is to make provision that the subjects liferented by the parties named should be dealt with on the same footing as the rest of the estate upon their several deaths "as these events shall severally occur." In the decision of the House of Lords in the case of Buchanan v. Angus,

4 Macq. 374, the direction as to the residue was different, inasmuch as there was no express direction to divide as occurs in this deed, nor any order to make a division into nine parts. The direction there was simply to pay and make over to two parties equally, share and share alike. For these reasons I am of opinion that the share that would have been taken by Janet Hay had she survived belongs to her children, James and Elizabeth, equally, as her heirs *in mobilibus*. No. 140. July 2, 1873. Fothering-ham's Trustees, &c.

LORD BENHOLME.—I concur. Our conclusion as to the first question has a great bearing on the answer to be given to the second question. The number of shares into which the estate is to be divided, and the fact that one of the shares was to be distributed between a liferenter and fiars, render the case so complicated that the trust cannot well be extricated without a sale. I therefore hold the shares to be of a moveable character.

LORD NEAVES.—I am of the same opinion. The primary direction is to divide; there is not to be a general conveyance *pro indiviso*. When the number of persons among whom the property is to be divided is large it becomes practically impossible to allow it to retain its heritable state. In the case of Buchanan there were only two beneficiaries. Division among two is always easy, according to the old Saxon rule "one deals and the other wales," which always ensures a fair division among two. But to divide a number of heritable properties like these among nine is quite impracticable.

THIS interlocutor was pronounced:—"Find (1) that the trustees are entitled, with the consent of the second and third parties, and of Andrew Richardson and the treasurer of the City and County of Perth Infirmary, now to sell the trust-estate, and after paying out of the proceeds the whole debts due by the trust-estate, to distribute the balance forthwith among those entitled thereto: (2) That the share of the said balance effeiring to Janet Hay or Paterson belongs to James Paterson and Elizabeth Paterson equally, as the said Janet Hay or Paterson's heirs *in mobilibus*, and decern: Find the parties to the special case entitled to payment of their expenses in connection with the same out of the trust-funds, and remit," &c.

W. & J. BURNESS, W.S.—D. F. BRIDGEFORD, S.S.C.—Agents.

ROBERT GILMOUR, Pursuer.—*Millar—Crichton.*
ALEXANDER GILMOUR AND JAMES GILMOUR, Defenders.—*M'Laren.* No. 141. July 3, 1873. Gilmour v. Gilmours.

Trust-disposition for behoof of Creditors—Radical Right—Conveyance—Service—Heir.—An infeftment on a trust-disposition bearing to be for behoof of creditors does not divest the granter of the radical right of property, and his heir cannot complete his title by conveyance from the trustee.

THE late William Gilmour, timber merchant in Glasgow, acquired by purchase eleven different heritable subjects. On 23d February 1848 he executed "a trust-deed for behoof of his creditors, whereby, on the narrative that he was unable to meet his engagements, and in order to prevent preferences, and with a view to the equal distribution of his estate, he conveyed to James Brock, accountant in Glasgow, as trustee for the purposes thereinafter mentioned, the whole of his means and estate. The purposes were—1st, to secure to the granter, as a bankrupt, the privileges conferred by the second and third Victoria, cap. 41—2d, to hold the means and estate in trust for behoof of the just and lawful creditors of the granter, with power to the trustee to sell the estate and to grant all necessary titles—3d, for the purpose of dividing among the creditors the produce of the estate when realised—4th, that the creditors acceding to the trust should not be held to surrender any securities held by them— 2D DIVISION. Ld. Ormidale. I.

property by declaratory disposition and entry with the
continued to possess down to the year 1871, before which ti
debts had been paid, and a large reversion of the estate rem
consisting of heritable property.

William Gilmour died in 1848. He had three childre
deceased him without issue. A daughter (Margaret You
died in 1869 unmarried, and the only remaining child was
Gilmour. Both John M'Ghie Gilmour and Margaret Yo
were imbecile, and James Gilmour was appointed their *cura*

In 1871 the debts of the deceased William Gilmour were pa
position dated the 17th March of that year Alexander Gilmo
factor on the trust-estate, with the consent of James Gilmour a
to the two children of William Gilmour, disponed to John M'
the several heritable subjects which had been conveyed by t

No special powers were asked, and John M'Ghie Gilmo
served to his father William Gilmour. After the dispositio
factor was exonered and discharged.

John M'Ghie Gilmour died on 30th April 1872 unma
Gilmour was his heir in heritage, being his father's immedi
brother. He claimed the properties as such. Robert Gil
father's immediate elder brother and heir of conquest. H
properties on the ground that John M'Ghie Gilmour never
to his father the right to them belonged still to the father, a
claimant as his heir of conquest. He brought this action agai
and James Gilmour to reduce the disposition to John M'Gh

The pursuer pleaded;—(1) John M'Ghie Gilmour not ha
a title to his father by service, the heritable subjects describ
clusions of the summons remained in the *hæreditas jacens*
William Gilmour, and, on the death of the said John M'
passed to the pursuer as the heir of conquest of the said Wil

The defenders pleaded;—(3) The action cannot be mai
spect that it was the right and duty of the defender Jame
curator bonis of the said John M'Ghie Gilmour, to require,
and duty of the defender Alexander Gilmour, as judicial
trust-estate of the deceased William Gilmour, to grant th
sought to be reduced. (4) The action is excluded by the
operation and discharge granted by the Court in favour of

efenders reclaimed, and argued;—The original trustee and the actor in his place were authorised to grant conveyances of the

subjects in dispute were purchased in 1845 by the pursuer's immediate brother, William Gilmour, and thereafter the latter executed a trust- n of all his estate, heritable and moveable, including the subjects in n favour of Mr Brock as trustee for behoof of his creditors. It is im-) observe that this deed is not in the form or terms of an absolute and id disposition, but expressly bears, *in grœmio*, to be in favour of Mr trustee for the granter's creditors, and for the purpose of paying his id although the deed contains a power of sale, it also expressly bears is granted with and under the burden that, after payment of his debts xpenses of executing the trust, the reversion, if any, of his estate should ted for to the truster.

Brock, the trustee, having died, the defender, Alexander Gilmour, was ry 1852 appointed judicial factor in his place on the trust-estate; and purposes having been fulfilled, and the truster himself being then dead, ts now in dispute were in March 1871 disponed by the judicial factor, the deeds now challenged, to John M'Ghie Gilmour, a lunatic son of sed truster, with the consent of the other defender, James Gilmour, as *r bonis*. John M'Ghie Gilmour had not at this time connected him- rvice or otherwise with the truster, nor had the truster's radical right to the trust-estate been vested in that individual, or taken up by or for y form whatever. John M'Ghie Gilmour has since died, and there is r descendant of his father, the truster, surviving.

in this position of matters that the present action has been brought by er as entitled to succeed to the subjects in question as heir of conquest eased brother, William Gilmour, the truster. The object of the action the interposed title, which was taken and made up in favour of John ilmour, reduced and set aside.

the subjects in question must be held to be still *in hæreditate jacente* e William Gilmour, and that the pursuer, as that individual's heir of has right to them—supposing the interposed title made up to them in John M'Ghie Gilmour to be invalid—is not disputed. And whether f John M'Ghie Gilmour is invalid or not is the question for considera-

Lord Ordinary is of opinion that the alleged title of John M'Ghie Gil- and is invalid. He holds it to be clear on the authorities that the ght to the subjects in question remained in William Gilmour, notwith- the trust-disposition granted by him in favour of Mr Brock. By the rms of the deed it was limited to certain purposes, and therefore the ical right to his estate must be held to have remained with the truster. rily follows from this that on the purposes of the trust being accom- is they have been, the full right and title of the truster revived. questions appear to have been, in varying circumstances, raised on the he Lord Ordinary must hold the principle, as he has now stated it, to nd for some time back, conclusively settled by the cases of Campbell ines' Creditors, 14th January 1801, Mor. Adjudication, Appendix No. M'Millan v. Campbell, 9 Shaw, 551, and 7 W. and S. 441. And that n held to be so settled, and doubtless since acted on by conveyancers of business, may be inferred from the statements on the subject in udal Conveyancing, p. 436, Menzies' Lectures (1st edition), p. 821, gomery Bell's Lectures, p. 751.

Lord Ordinary can find no room for distinction in principle between to which he has now referred and the present. The only distinction by the defenders was that arising out of the circumstance that here e, Mr Brock, or rather the defender, Alexander Gilmour, as having his place as judicial factor, on the purposes of the trust being fulfilled, the subjects in question to John M'Ghie Gilmour, who in point of fact on and heir of the truster, entitled to succeed to him. But it must be

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subjects. John M'Ghie Gilmour, as his father's representative, was entitled to demand and receive such a conveyance when the trust-purposes were fulfilled.

In Ker's trustees[1] there was strong authority for holding that a title might be made up through trustees. The conveyance to John M'Ghie Gilmour gave him a title. No service was required.[2]

The pursuer argued;—An infeftment under a trust-disposition for creditors does not divest the granter of the feudal title, but merely operates as a burden on his title. The heir of the granter must make up his title by service to the granter.[3] He cannot avail himself of the trust-infeftment or accept a conveyance from the trustee as a purchaser can.[4]

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borne in mind that there was no express power in the trust-deed to Mr Brock to convey the residue to John M'Ghie Gilmour, and that that individual never became vested, by service or otherwise, in the radical right and title which had all along remained in his father, William Gilmour, and which was at his death, and has ever since been *in hæreditate jacente* of him. The disposition therefore by the judicial factor in favour of John M'Ghie Gilmour must be held to have been granted by the judicial factor without any warrant or authority, and, as already said, no such warrant or authority is to be found in the trust-deed itself, for according to its terms the reversion was expressly declared to belong to the truster, and the trustee taken bound to convey it to him. Besides, from the very nature of a trust bearing *in gremio* of the deed to be granted for a limited purpose, that purpose being fulfilled, the radical right and title of the truster necessarily revived without the necessity of any reconveyance by the trustee. The radical right and title thus remaining from the beginning in William Gilmour, under burden merely of the trust right, and having, prior to the disposition by the judicial factor in favour of John M'Ghie Gilmour, been entirely freed from that burden, it seems to the Lord Ordinary to be incontrovertible that the judicial factor had no power whatever to grant such a disposition. Had John M'Ghie Gilmour taken up the succession of his father, William Gilmour, and put himself in the place of that individual *quoad* the subjects in question, by service or otherwise, the matter might have stood very differently, for on that assumption the pursuer's right and title would have been cut off, whether the disposition by the judicial factor could in itself be held to be an efficacious and habile title or not.

"The Lord Ordinary has only further to observe, that he has been unable to see that the discharge by the Court of the judicial factor can be held to affect in the least the question which has now been discussed, more especially seeing that it is expressly admitted by the defenders, in their answer to the 12th article of the pursuer's condescendence, that the defender, Alexander Gilmour, as judicial factor, did not apply for or receive any antecedent warrant or authority from the Court to grant the disposition in favour of John M'Ghie Gilmour, and also that the other defender, as *curator bonis* of that individual, did not apply to, or receive any authority from the Court to concur in that disposition, or to make up a title to the subjects in the person of John M'Ghie Gilmour, and that no such title, by service or otherwise, was ever made up."

[1] Ker's Trustees v. Ker, June 17, 1825, 1 W. and S. 381.

[2] Fogo v. Fogo, February 25, 1840, 2 D. 651, and August 18, 1843, 2 Bell's Apps. 194; Rose v. Fraser, January 26, 1709, Ross' Leading Cases (Land Rights), vol i. p. 452.

[3] Menzies on Conveyancing (2d ed.) 757; Colquhoun v. Colquhoun, July 8, 1831, 9 S. 911; Young's Trustees v. Young, July 19, 1867, *ante*, vol. v. p. 1101; Buchanan v. Angus, May 15, 1862, 4 Macq. 374; M'Laren on Trusts, vol. i. p. 93, vol. ii. p. 49.

[4] Bell's Com. (M'L.) ii. p. 392; Campbell v. Edderlines' Creditors, January 14, 1801, Mor. Adjud. App. No. 11; Macmillan v. Campbell, March 4, 1831, 9 S. 551, August 11, 1834, 7 W. and S. 441; Brock v. Johnston, November 23, 1827, 6 S. 113.

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At all events the judicial factor was not entitled to make up the title of his imbecile ward by such conveyance without the sanction of the Court. There was an option whether the imbecile should make up a title as heir or not, and that option could only be exercised by the Court.[1]

At advising,—

LORD JUSTICE-CLERK.—The question to be decided in this case arises under the following circumstances:—The late William Gilmour executed on 23d February 1848 a trust-deed for behoof of his creditors, whereby, on the narrative that he was unable to meet his engagements, and in order to prevent preferences, and with a view to the equal distribution of his estate, he conveyed to James Brock, accountant in Glasgow, as trustee for the purposes thereinafter mentioned, the whole of his means and estate. The purposes were—1st, to secure to the granter the privileges conferred by the 2d and 3d Victoria, cap. 41, as a bankrupt—2d, to hold the means and estate in trust for behoof of the just and lawful creditors of the granter, with power to the trustee to sell the estate and to grant all necessary titles—3d, for the purpose of dividing among the creditors the produce of the estate when realised—4th, that the creditors acceding to the trust should not be held to surrender any securities held by them—and, in the 5th place, the deed contains a provision that "these presents are granted with and under the burden, after realising and distributing my said estate, my said trustee or trustees shall account for and pay over to me any surplus that may remain after the payment of said debts, expenses, and others before-mentioned."

The trustee was infeft under this disposition, and realised certain portions of both the moveable and the heritable property. The truster, William Gilmour, died in 1849, and James Brock, the trustee, died in July 1851, at which time the debts had not been fully paid off. On the 10th February 1852, the defender, Alexander Gilmour, was appointed judicial factor on the trust-estate. He made up his title to the heritable property by declaratory adjudication and entry with the superior, and continued to possess down to the year 1871, before which time the whole debts had been paid, and a large reversion of the estate remained, chiefly consisting of heritable property. William Gilmour left a son and a daughter, both of whom were imbecile. James Gilmour, another brother of the truster, and the heir in heritage of the imbecile son John M'Ghie Gilmour, was appointed his *curator bonis* in 1859. The daughter died in 1869. In 1871 Alexander Gilmour, the judicial factor, executed a disposition of the trust-estate in favour of John M'Ghie Gilmour, who was then and had all along been in a state of imbecility; and on this disposition infeftment was taken in his name. Thereupon Alexander Gilmour presented a petition to the Court for exoneration and discharge, narrating the disposition which he had thus granted, and obtained decreet of exoneration, dated 19th July and 17th October 1871. John M'Ghie Gilmour, the son, never made up any other title as the heir of the truster; and he having died in 1872, the heritable property is now claimed in this action by the immediate elder brother of the truster, who has served himself heir of conquest in general to the truster and to his son. On the other hand, James Gilmour, who is the heir in heritage of the deceased John M'Ghie Gilmour, claims the heritable property in that character. The question we have to decide is whether John M'Ghie Gilmour, the son of the truster, died lawfully vest and seized in the heritable property. The Lord Ordinary has found he did not, and I am of opinion that his judgment is right.

The question turns mainly upon the effect of the trust-disposition granted by William Gilmour in 1848. Ever since the case of the Creditors of Edderline, 14th January 1801, it has been settled that an infeftment under a trust-disposition for payment of the creditors of the truster does not divest the granter of the feudal title to the subjects conveyed, but only creates a burden on that title. Such a deed, when combined with a power of sale, gives the trustee a title to grant a sufficient conveyance to a purchaser, just as an heritable bond and dis-

[1] Thoms on Factors, p 261.

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position in security gives a similar power to a creditor, although, no doubt, the powers of a trustee under such a conveyance may be free of some of the impediments which stand in the way of a sale by an heritable creditor. But, excepting in so far as creditors accede to such a trust, it is nothing; and if the estate be not sold, or, in so far as it may not be sold, the title of the trustee is nothing but a burden or security, which may be terminated and extinguished by a simple discharge, or by the payment of the debts *aliunde*. Meanwhile the title of the granter remains to all effects precisely as it was before the trust was granted, subject only to the security thereby created, and the acts of the trustee in conformity with the powers conferred upon him.

These principles have been well fixed, and are laid down in all books of conveyancing as settled law. Such a deed being a conveyance *inter vivos*, the conditions of which qualify any infeftment which can be taken upon it, is entirely different in its feudal effect from an absolute conveyance in trust *mortis causa*, or an absolute conveyance *inter vivos*, qualified by a latent or undisclosed trust. In both of the last cases the granter is divested of his feudal right. In the first case absolutely, as in the case of a *mortis causa* disposition. In the second case the granter has nothing left but a *jus crediti* to enforce the personal right to obtain a reconveyance. But in either of these cases the feudal fee is transferred. In the case of a *mortis causa* disposition the absolute fee conferred by the granter may come to be held, from failure of purposes, for the heir at law. In the case of an *inter vivos* absolute conveyance, qualified by a latent trust, the radical right to obtain a reconveyance remains with the granter. But when the infeftment proceeds on a disposition executed *inter vivos* for the payment of creditors, the fee remains undisturbed in the person of the granter, who continues to be as free to deal with it as he is after granting any other heritable security.

This was the doctrine established in the case of Edderline. Lord President Campbell has a note on his papers in this case, expressive of a doubt whether an adjudication led by a creditor against the trustee would not also have been good. But this doubt does not affect the general doctrine, and must have proceeded on the trustee's power to sell for payment of debt. The question arose more than once in election cases, whether a trust conveyance for payment of debt divested and disfranchised the granter. In one of these, Donaldson, 11th March 1786, Lord Braxfield said,—"As long as the estate is not sold it is my property. And I may, when I please, denude the trustees by paying off the debt." Lord Eskgrove observed,—"The right is in the debtor, although the creditors have power to sell."—Hailes 2, 994.

The same question arose in Campbell v. Speirs, which is the more in point because in that case the trustees had granted a renunciation of their procuratory of resignation in favour of the heir-apparent. The Court did not, however, proceed on that, but on the ground that the granter had never been divested. On this renunciation President Campbell's note bears in reference to the reconveyance by the trustee,—"I doubt if it be a feudal method of securing Sir Alexander in the superiority." But he held he had never been divested—"Infeftment (is) in security until sale actually takes place, which will of course actually denude him. But in the meantime the estate belongs to nobody but him."—1 Ross (Land Rights), 465. These two cases may be compared with that of Ferguson v. Fairlie, 5 S. 938, in which a disposition *ex facie* absolute, but in reality granted in trust to split superiority and property, was found to divest the granter.

The case of Macmillan, which occurred in 1831, recognises this distinction in the clearest possible manner. The question there was whether an heritable proprietor, who had granted a trust-disposition for payment of debt, and had taken an ineffectual reconveyance from the trustee, could execute a valid entail. Lord Moncreiff held that he could, and the Court and the House of Lords affirmed the judgment—the reason being that he had never been divested. He says in his note that "the case of Edderline settles the point that a trust-conveyance, almost identical with the trust in the present case, does not divest the granter of his feudal title, and is only to be considered as a burden on that title." Such, I

apprehend, is now well fixed as a principle of feudal conveyancing. Thus Mr Montgomery Bell says, vol. 2, p. 751, dealing with trust for payment of creditors,—"The trust merely created a burden on his right, and on fulfilment of the purposes the burden is extinguished, and the lands are at his free disposal, just as if he had granted a bond and disposition in security to a creditor, and had paid and obtained a discharge of the debt."

These principles are hardly disputed by the defenders in this case. But it was argued with very great ability that, although it is quite true that a trust of this description only burdens the right of the granter, yet that the granter, or his heir, may, if he think fit, avail himself of the trust-infeftment, and accept a conveyance from the trustee as a feudal title to the lands, just as a purchaser from the trustee might have done; and we have been referred to the case of Lady Essex Ker[1] as establishing the proposition that where there is a formal feudal title in a trustee, and a radical title remaining in the truster to the same lands, the person entitled to the radical right may select which of the two rights he chooses to be the foundation of his own feudal progress.

There appear to be two conclusive answers to the doctrine contended for in this plea. I do not doubt that a title may so stand that the proprietor having the radical right may use a trust title as the foundation of his feudal progress, although, if he had chosen to disregard it, no one had right or interest to plead on the trust title. A strong illustration of this is to be found in the case of Rose v. Fraser, in which the infeftment of a trust disponee, who held a right granted for election purposes, and apparently absolute, was yet held to entitle the widow of the granter to her terce. But the distinction to which I have already adverted lies at the foundation of this decision, viz., between a right which is *ex facie* absolute, although in reality only a trust, and a right which is *ex facie* only a burden or security.

The distinction is well illustrated by the case of Lady Essex Ker. In that case the Duke of Roxburghe had granted a trust-disposition *mortis causa* for certain purposes to be declared. These purposes were declared on deathbed, and they were reduced by the heir-at-law. Thereafter the heir-at-law granted a trust-bond, on which adjudication followed at the instance of the trustee, with a view of making up a title; and a conveyance to the decree of adjudication was granted to the heir-at-law by the trustee. But instead of proceeding to complete the adjudication title, the heir-at-law accepted a disposition from the trustee under the *mortis causa* settlement, and completed a title under that deed. The title so completed was sustained by the Court. But in that case the title of the trustee was entirely unqualified. By the failure of the purposes it resolved into a trust for the heir-at-law, which no one but the heir-at-law could make available, and which, had he thought of it, he might entirely have disregarded. But such a case is entirely different from a title which on the face of it was from first to last nothing but a burden.

The application which was made of this case in the case of Macmillan was founded on the opinion expressed by the Court that the heir-at-law might have completed his title by proceeding on the adjudication,—proving that the radical title still remained *in hereditate jacente* of the Duke of Roxburghe. This was doubted by Lord Gifford in giving judgment in the House of Lords (1 W. and S., p. 395); but, even if it did, the trust title, for want of purposes, was a trust only for the heir-at-law. But it was on the face of it an absolute title as against the rest of the world; and if the heir chose to use it as part of his feudal progress it was good in point of form, and no one could challenge it.

Although it were otherwise, the case which we have at present before us stands very differently. Even supposing that the heir-at-law had a right to accept the title of his ancestor's trustee as the regulating title of his estate, I doubt greatly if the judicial factor on the estate, at his own hand, and without the authority of the Court, was entitled to complete the title of the lunatic in that way. Supposing there had been an option, it was one which the lunatic could not declare, and which, without judicial authority, at all events the judi-

[1] June 17, 1825, 1 W. and S. 381.

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cial factor could not make. I am, therefore, of opinion that the reconveyance by the judicial factor would have operated nothing but a discharge of the burden; and, even in that view, being granted to one who did not represent the granter, was a mere nullity.

LORDS COWAN, BENHOLME, and NEAVES concurred.

THE COURT pronounced the following interlocutor:—"Refuse said note, and adhere to the interlocutor complained of, with additional expenses."

D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—RONALD & RITCHIE, W.S.—Agents.

No. 142.
July 3, 1873.
Macadam v. Macadam.

HANNAH MOORE MACADAM AND OTHERS, Pursuers.—*Sol.-Gen. Clark—Trayner.*
MARGARET MACADAM, Defender.—*Watson—Strachan.*

Jurisdiction—Executor—Arrestment jurisdictionis fundandæ causa.—A person resident in England intromitted with a Scotch executry estate. *Held* that arrestment of her private funds in Scotland was sufficient to found jurisdiction against her in a question between her and beneficiaries claiming a share of the executry estate.

2D DIVISION. Lord Mure. I.

THOMAS MACADAM senior died domiciled at Newton-Stewart in Scotland in 1848, leaving a will by which he gave to Mrs Hannah Breeze or Macadam, his wife, the liferent of everything belonging to him, appointed her his sole executrix, and directed his property at her death to be divided among his children in certain proportions.

On the death of Thomas Macadam senior Mrs Macadam went to reside in England, obtained letters of administration in the Court of Probate at Chester, and intromitted with and liferented her husband's estate.

Mrs Macadam died on 31st July 1864, and her daughter, Mrs Margaret Macadam, as one of the next of kin, obtained letters of administration from the District Court of Probate at Manchester.

The pursuers averred that under these letters of administration the defender realised and intromitted with the estate of Thomas Macadam senior, as well as of Mrs Macadam, and gave up a residue account of his estate. In a declaration appended to this residue account she declared that she was entitled to retain the sum set forth in the account for "my own use, and for the use of my bothers and sisters."

Thomas Macadam junior died in Jamaica in 1864 without receiving payment of his share of his father's estate, and his children accordingly brought this action for recovery thereof against his sister, Margaret Macadam, as administratrix to her mother, and arrestments to found jurisdiction were used in the hands of various persons who were debtors to the defender.

The defender stated that Mrs Macadam had invested £2000 belonging to the executry estate on debenture bond with the Great-Western Railway Company, who on her death refused to take the discharge of the beneficiaries, and required the appointment of an executor. This was caused entirely by the widow having lent the £2000 in her own name, instead of taking the bond to herself in liferent and the beneficiaries in fee. To obviate this difficulty and at the suggestion of Mr Martin, writer in Newton-Stewart, who had been employed by Mrs Macadam as agent in her husband's succession, the defender allowed herself to be named administratrix of her mother, and that solely for the purpose of calling up the sum lent by her mother upon the said debenture bond, and handing it over to Mr Martin. The defender never intromitted with any portion

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her father's succession, nor did she pay any legacies or anything else connection with the estate. All this was done by Mr Martin, in whose nds everything was left by the whole parties interested.

The pursuers pleaded;—(1) The defender is amenable to the jurisdic- n of the Supreme Courts of Scotland in respect of said arrestments and e funds thereby attached. (2) The defender having, as executrix esaid, realised and intromitted with the estates of the said Thomas acadam senior is liable in the sum sued for, as the proportion of said ates falling to the said Thomas Macadam junior, and now resting ing and due to the pursuers. (3) The defender being justly due and lebted to the pursuers the sum sued for, the pursuers are entitled to cree as libelled.

The following was the first plea in law for the defender;—No juris- tion, in respect that the defender is not resident in this country, d no funds belonging to the executry estate of the mother have been tached by the arrestments *ad fundandam jurisdictionem* used by the rsuers.

The Lord Ordinary pronounced this interlocutor:—"Repels the first plea law for the defender, in so far as it is pleaded as preliminary, and ex- ding the jurisdiction of this Court; and appoints the case to be put to e roll for further procedure, reserving in the meantime all questions of penses."*

The defender reclaimed, and argued;—This was an action against the fender in her fiduciary character only, as executrix of her mother. I

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* "NOTE.—This case is in some respects not free from difficulty, but in the ew the Lord Ordinary takes of it the question raised is not so much one of risdiction as of *forum competens* or *conveniens*, which is not made the matter a separate plea in defence, and which the case of Brown's Trustees, 17th De- mber 1830, mainly relied on by the defender, truly was.

"The circumstances of the case, however, are in some respects different from ose of Brown's Trustees; for the present is not strictly speaking an action in hich an executor is called to account for the execution of his office, or to enter to a general accounting relative to the affairs of the deceased party dying broad, but one in which the defender is sued for payment of a legacy bequeathed the father of the pursuers by the late Mr Macadam senior, and for which the fender is alleged to be liable as an intromitter with Mr Macadam's estate; and she is resident in England arrestments to found jurisdiction have been used this country of certain funds admittedly belonging or due to the defender, but hether in her own right, or as part of the late Mr Macadam's estate, does not stinctly appear. The case therefore is one in which the jurisdiction of this urt to entertain the action has, it is thought, been established by the arrest- nts used against the defender, and falls to be dealt with, in this respect, ac- rding to the rules applied in the cases of Campbell, 2d March 1809, Hume, p. 8, and Inverarity, 7th March 1840, 2 D. p. 816, rather than that of Brown's ustees, which, as explained in the opinions of the Judges in the case of Mac- rnie, 16th January 1845, was not a question of jurisdiction, but of *forum con- niens*; and the present case is distinguishable from that of Brown's Trustees, in s respect also, that although probate of the will of the late Mr Macadam and the defender's mother appeared to have been taken out in England the inven- y of Mr Macadam's estate was actually given up and recorded in Scotland, ere the will had been made, and the greater part of the testator's property was uated. This is shewn by the residue account, No. 22 of process, signed by the fender, and which appears from the statements in the record to have been pre- red and given up by an agent employed on her behalf, and in this respect the e is not dissimilar in one of its features to that of MacMornie already referred in which the plea to jurisdiction was repelled, leaving it open to the Court to l with the question of *forum conveniens* on the case being proceeded with."

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decree were given against her in absence it could only be put in force against the executry funds, and could not touch her personal estate.[1] So the question arose, did arrestment of private funds found jurisdiction? The theory of the matter was, that there must be an arrestable subject which might be made available on decree. But here no executry funds were arrested, and so the arrestment did not afford the Court any means of making the judgment available to the successful party. The defender was not personally liable, nor was her personal estate liable, for she was only called as executrix of her mother, and, therefore, even supposing the claim to be well founded, arrestment of her personal estate was not sufficient to found urisdiction against her.[2]

Argued for the pursuer;—Although the defender was called as executrix she was bound to answer the claim personally. Both a vitious intromitter and an executor were liable personally, but the claim against the former was universal, whereas against the latter it was limited by the inventory. So this action having been brought to establish personal liability personal funds had been arrested.

This was a Scotch succession, and all the transactions in connection with it took place in Scotland.[3]

At advising,—

Lord Justice-Clerk.—This case might certainly, and as far as I see conveniently, have been tried in England in the *forum* of the alleged debtor; but it does not follow that this Court has not jurisdiction to entertain it. The objection stated by the defender that the funds arrested are not the funds of the executry estate cannot be sustained. This objection would have been good had there been two or more executors, for then the arrestments would not have been of the funds of the debtor, but here there is only one. The obligation of the executrix is personal, limited only by the amount of the inventory, and the arrestment therefore of her funds is sufficient to found jurisdiction against her.

I doubt, however, whether an English executor should in the ordinary case be made amenable to our Courts at all, or whether it is in this case advisable to exercise the jurisdiction founded by arrestment. When an English executor comes here he is responsible in our Courts; but, as a general rule, he is responsible to the jurisdiction under which he administers. But that goes to the question whether we should exercise our jurisdiction in such a case. That we have jurisdiction I do not doubt.

Lord Cowan.—It appears to me that the only question before us is, whether the Scotch Court has jurisdiction. The objection taken in support of the plea of no jurisdiction is, that the fund arrested is of such a nature that the pursuer is not entitled to proceed against the defender upon that arrestment, but that, to found jurisdiction, funds of a different character should have been arrested. I do not think that that objection is well founded, for the liability of the executrix is personal, and therefore the arrestment of personal funds is sufficient to found jurisdiction; so when we have funds arrested in Scotland why should we not allow the case to go on here?

It may be, although it was not argued before us, that the question here is not so much a question of jurisdiction as of *forum conveniens*. I do not think, however, that the question of *forum conveniens* arises here, for nearly all the transactions and intromissions with the executry estate which gave rise to this

[1] MacMornie v. Cowie, Jan. 16, 1845, 7 D. 270; Gillon v. Dunlop and Cobbett, Feb. 27, 1864, *ante*, vol. ii. p. 776.

[2] Campbell v. Rucker, March 2, 1809, Hume, 258; Houston v. Stirling and Others, Feb. 3, 1824, 2 S. 672; Brown's Trustees v. Palmer, Dec. 17, 1830, 9 S. 224; MacMaster v. MacMaster, June 7, 1833, 11 S. 685.

[3] Clements v. Macaulay, March 16, 1866, *ante*, vol. iv. p. 583.

e took place in Scotland, and I therefore think that the Scotch Court is the per Court to try the cause. No. 142.

It is not suggested by any of the pleas in law that it is in England that this e should be considered, nor that the question at issue is the effect of the glish letters of administration, but the only question raised is as to the juris- tion of this Court. I think there is no doubt that this Court has jurisdiction, l that we must adhere to the interlocutor of the Lord Ordinary. I think, wever, that the Lord Ordinary should have simply repelled the plea, and wed the case to proceed. July 3, 1873. Macadam v. Macadam.

LORD BENHOLME concurred.

LORD NEAVES.—I think that we should adhere to the interlocutor of the Lord linary. This, however, is a case in which we should be cautious not to anti- ate points which may arise. It involves some questions of English law, and m not sure that it does not involve some questions of international law also, there is a specialty in the case. The estate to which Miss Macadam ministered executrix was not her mother's property, although it was vested in r by a Scotch executry title. The mother had only a liferent, yet the defender ok up the estate as if she had a fee, and made up a title as if it had been the other's absolute property. Now, if a party in England takes out letters of ministration for the purpose of taking possession of an estate, known by her be a Scotch executry estate, the question arises whether she does not subject rself to the laws which govern that executry estate. That specialty, however, s not been discussed.

There are several other nice points which arise in this case, but I think we n investigate them as well here as in England.

LORD JUSTICE-CLERK.—I had expressed my opinion only on the first point, t since so much has been said on the question of *forum* I must fairly say that y impression is that this Court is not the appropriate *forum* to try this case. he next step must be to decide what proof we are to have, and I think it not asonable to put the parties to the expense of an intricate proof in a Court which not the *forum* of administration. The question on the merits is a question of nglish law, and very much a question of English fact. The real truth has to disclosed, whether the lady did really only lend her name for the purpose of tting up an English debenture bond, and the legal bearing of that has to be cided. I am of opinion that the English Courts should deal with this. No ubt the original estate was Scotch, but it has long ceased to be so, so far as is question is concerned.

THE COURT adhered.

M'EWEN & CARMENT, W.S.—WATT & ANDERSON, S.S.C.—Agents.

RICHARD DUDGEON AND WILLIAM MACGEORGE, his Attorney, Complainers.—*Balfour—W. F. Hunter.*
WILLIAM THOMSON, Respondent.—*Sol.-Gen. Clark—Asher.* No. 143.

July 4, 1873. Dudgeon v. Thomson.

Patent—Provisional Specification—15 *and* 16 *Vict. cap.* 83.—The title of a tent under the Act 15 and 16 Vict. cap. 83, is explained by the provisional cification, and where it is pleaded that a patent is invalid in consequence of final specification embracing too much the final specification is to be com- red with the title and the provisional specification read together.

Patent—Specification—Misrepresentation.—A patent was objected to on ground of misrepresentation in the specification, which set forth that the nciple of the invention was expansion of boiler tubes by means of rollers which uld be worked by the hand, whereby the use of mauls or sledge hammers uld be dispensed with, while, in point of fact, the machine could not be rked without the use of hammers. It was proved that the machine could not

stated in the complete specification to be "to enable the en
tubes to be expanded in the holes in the flue-sheet. Previou
vention it has been customary to expand the ends of tube
panding tool, composed substantially of a series of swag
from a common centre, and caused to diverge by means of a t
driven into the centre of the tool by the repeated blows of a ma
The principle of the invention, which constitutes the subje
this patent, is to expand the tube by rolling the metal, by the
of one or more pressure-rollers to the interior of the tube,
metal is expanded by rolling, in contradistinction to the ol
driving it outwards by hammering, and as the roller can be
hand, the use of mauls or sledges, and all the inconveniences
their employment, are dispensed with."

After describing in detail various methods of constructin
expanding tool invented by the complainer, the specification
"Although a tapering or wedge-formed plug is preferred as th
instrument, the invention is not limited to an expanding ir
that form, as circumstances may render expedient the use of
ing instrument of different form—thus, when a tool is suffi
an arrangement of toggle-jointed levers may be inserted in it
pose of expanding the roller in place of a tapering plug." T
tion then concludes thus:—"In all the above-described mod
the roller expanding tool, at least one roller is combined wit
plug (or its equivalent, by whose action the roller is forced
the tube), and with a stock or holder by which the roller
from twisting sidewise as it is turned round in the tube. Th
strumentalities are all that are absolutely essential to the co
the roller expanding tool, but the cutter and ratchet handl
with the said instrumentalities or implements, useful combina
are supplementary to the aforesaid fundamental combinatio
claimed, therefore, as the invention to be secured by letters-p
combination in an expanding tool of the following impleme
roller, roller-stock, and expanding instrument,—these three
combination substantially as set forth. Also the combinati
panding tool of the following implements, viz., the roller, roll
panding instrument, and cutter for trimming the tube all

866, in pursuance of the proviso contained in the said letters-patent, and, particular, from making, vending, or using any apparatus for expanding iler tubes constructed or used in the manner described in the said ecification, or in manner substantially the same, and from infringing e said letters-patent in any other manner of way.

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The respondent had obtained letters-patent for a similar invention ted 18th August 1868, and sealed 16th February 1869. He stated in s defences that this invention was novel and original in various par-ulars, and that the tube expanders made and sold by him under his rn letters-patent were in principle and in all material respects different om those alleged to be protected by the complainers' letters-patent. He ecified the particulars in which they differed; and averred further;—"In e provisional specification of the complainers' letters-patent the alleged ivention was declared to be for 'improvements on apparatus used in ex-anding boiler tubes,' and the advertisements of said application so de-cribed the nature of said alleged invention. But this title was misleading, nd did not sufficiently disclose the true nature of the invention claimed, hich, in addition to being an apparatus for expanding boiler tubes, also laims to be a cutter for trimming boiler tubes, besides other combina-ions and purposes. The title of the patent and its nature were thus inconsistent with and disconform to each other. The final specification founded on by the complainers further sets forth that by means of the lleged invention 'the use of mauls and sledges, and all inconveniences hat attend their employment, are dispensed with.' In practical opera-ion, it has been found that the alleged invention cannot effect the object lleged to be accomplished by it without, either, first, the use of mauls r sledges or hammers, as a means of forcing in the expanding plug, with hich any other mode of forcing in the same would be inadequate to ccomplish these results, and no other means of forcing it in are provided; r, second, by the boiler-makers attaching a rod to the inner end of the pering plug, and pulling it inwards by the help of a screw and nut in he further end of the rod which projects out of the opposite end of the ube; but this is a mode of operation wholly different from any described n the specification founded on by the complainers. There was thus a isrepresentation and failure to make a full and true disclosure of what as necessary to render the alleged invention effectual, or to enable a orkman of ordinary skill to put the same into practice."

The complainers pleaded;—The respondent having infringed the com-lainers' said patent rights, as above condescended on, and having refused o discontinue said infringement, the complainers are entitled to have nterdict as craved.

The respondent pleaded, *inter alia*;—3. The suspension and interdict ught to be refused, as the letters-patent founded on by the complainers re invalid, in respect—(1) of the disconformity of the provisional speci-cation with the letters-patent and final specification; (2) of the mis-epresentation in the final specification above stated; and, (3) of the ilure in the said specification to make a full and true disclosure of the ivention, such as would enable a workman of ordinary skill to put the me into practice. 4. The suspension ought also to be refused, in re-ect the respondent has not infringed the letters-patent founded on by e complainers.

The Lord Ordinary allowed a proof, the import of which is given in s Lordship's note and the judgment of the Lord President.

The Lord Ordinary pronounced the following interlocutor:—"The rd Ordinary having heard the counsel for the parties, and considered e closed record, proof, and process, sustains the reasons of suspension,

tion effectual, and to enable a workman of ordinary skill to put
practice?

"1. The complainer's letters-patent, for 'improvements in ap
expanding boiler tubes,' are dated 7th March 1866. On 18th A
respondent obtained letters-patent for 'improvements in tools o
expanding and cutting tubes and metallic rings, part of which i
applicable for withdrawing ferules from the ends of boiler tubes.
apparatus of the respondent has been extensively manufactured a
since the date of his letters-patent, and the question is, whether t
tube expander is either in whole or in part a tool of the descript
the complainer's specification, or of a description substantially the

"The Lord Ordinary is of opinion that it is clearly proved that t
tool embraces in all substantial respects the combination or a
panding tubes patented by the complainer.

"Previous to the date of the complainer's letters-patent, bo
fastened in the boiler plate by means of hammering out the tube
them fit the holes in the boiler plate, or by driving a conical iro
the tubes with repeated blows of a heavy maul or sledge hamm
of placing in the tube a hollow iron cone cut into swages or segm
ing with repeated blows of a heavy maul or sledge a tapered iro
centre of the swages. For the purpose of ensuring tightness, a flat
iron, with a greater taper, was sometimes, in addition, driven i
means of a hammer, and made to distend in succession still furt
ference of that part of the tube which was in contact with the b
all these modes the expansion was obtained by percussion alo
advantage was not only that a very large percentage of the b
split in the ends and spoiled, but that the adjoining tubes, whic
in the boiler plate, were loosened. By the invention of the c
disadvantages were entirely removed. That invention consist
sion of the tube, as his specification states, 'by the application
pressure-rollers to the interior of the tube, so that the metal
rolling it, in contradistinction to the old system of driving it ou
mering.' This was a novel and very useful invention. There
stated by the respondent in the record either to the novelty or
the complainer's invention.

"The essential parts of the complainer's apparatus are the co
expanding tool of a roller stock, one or more rollers, and a t
expanding instrument. Various modes of carrying out the i
forth in the complainer's specification. But that which for gene

The respondent reclaimed, and argued;—The complainer's letters-patent were invalid, in respect of the disconformity between the title

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tool substantially as set forth in the complainer's specification. The respondent's tool is, like that of the complainer, composed of a roller stock, three rollers, and an expanding instrument. His roller stock is called in his specification a 'hollow cylindrical body.' His rollers are called in one part of his specification 'expanding cones,' and in another part 'conic rollers,' and his expanding instrument is called a 'central cone.' The sides of his roller stock, as originally constructed by him, were not extended so as to keep the rollers straight when caused to rotate, which made the tool unworkable, and he was obliged twice to extend the stock between the rollers so as to keep the rollers straight. The progress of the respondent's tool is well shewn in the three productions, Nos. 28, 29, and 30 of process. The Lord Ordinary considers that all these are mere colourable variations of the complainer's roller stock, and that the last of them only wants a cap fitted on to make it identical. The complainer's rollers work in slots in the body piece. So also do the respondent's. The only difference in the mode of fixing the rollers is that the complainer's body piece having a cap, his rollers are formed with journals at each end so to work and rotate in radial slots, while the respondent's body piece having no cap, his rollers work only at one end in slots, these slots being made dovetailed, or wider below than above, and the rollers being formed with a head like a screw nail so as to catch and rotate in the dovetailed slots. But that mode of connecting the rollers with the roller stock or body piece is, the Lord Ordinary considers, a mere mechanical equivalent for and a colourable variation of the complainer's mode.

"The respondent maintains that his rollers are conical or tapered, and that his central cone or expander has a corresponding taper the reverse way, which produces parallel expansion of the tube, and that there is nothing in the complainer's patent corresponding to it. But the complainer's specification is not limited to tapered expansion or to parallel rollers, or to any particular form of roller. And while he states that 'in the drawings the rollers are represented with profiles adapted to expand the tube in the form commonly produced by the old expanding tools,'—that is, from within outwards,—he also states that the profile of the rollers 'should be the same as that of a longitudinal section of the interior of the extremity of a tube when properly expanded.' To use other words, that is to say, the nature of the expansion being determined on, and the tapering plug or expander being conical, the rollers must be constructed with such a profile as to produce the desired shape. If conical expansion is desired, then parallel rollers operated on by a tapering plug will produce it, and if parallel expansion is desired, then the rollers must be so tapered in the opposite direction that the tapering expander and tapering rollers will be the complement of each other, and make together a parallelogram.

"The respondent also contended that while complainer's plug or expander is tapered inwards and is forced inwards, his expander or central cone tapers from within outwards, and operates by being pulled outwards. Such a distinction as this requires, it is thought, no remark.

"But the respondent further maintained as part of his invention the method of expanding or pressing his rollers against the tube by means of a nut working on a screw placed on his central cone, which nut when turned by a wrench pulls the central cone outwards, and causes it to expand the rollers. This superinduction of a screw and nut upon the tapering expander might or might not have been a good subject for a patent. As to that, the Lord Ordinary is not called upon to express any opinion. But even although this had been the case, it cannot warrant the incorporation with it and the claim, as part of the invention, of the complainer's apparatus, or the essential parts thereof. Such an incorporation, and such a claim, as is made by the respondent for the combination patented by the complainer, may invalidate, but cannot strengthen, the respondent's patent, even as regards the screwed expander and nut, supposing these to be new and original, on the ground that the introduction of any one objectionable item into a patent is fatal to the whole.

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and provisional specification, and the final specification.[1] The final specification also misrepresented the invention, and failed to give such

"2. The respondent pleads as an objection to the complainer's patent that the title 'improvements in apparatus used in expanding boiler tubes' is misleading, and does not sufficiently disclose the true nature of the invention claimed, which, in addition to claiming an apparatus for expanding boiler tubes, also claims a cutter for trimming boiler tubes, besides other combinations, so that its title and nature are inconsistent with and disconform to each other.

"The Lord Ordinary cannot adopt this objection of the respondent. What the complainer patented was improvements in expanding apparatus. One of the improvements so patented is thus described in his specification :—'In order that one tool may be used for performing the two operations of expanding the tube and of turning off its end, the expanding rollers and stock are combined with a cutter E, which is arranged to turn upon the stock of the expanding rollers, so that the compound tool thus formed may be used first to expand the tube, and then, by turning the cutter without withdrawing the tool, to trim off the end of the tube. In this case the rollers retain their positions in the groove which they have formed by rolling, and hold the tool in the tube while the cutter is operating.' That was, the Lord Ordinary conceives, such an improvement in the apparatus used in expanding as to be fully covered by the title of the patent. That is the case also as regards the other improvements claimed by the complainer, in reference to which the objection was not urged in argument. All these improvements are fully set forth both in the provisional and final specifications, and these specifications may be brought in aid to explain the title, which, in the opinion of the Lord Ordinary, they fully do.

"This is sufficient, it is thought, for the disposal of this objection. But, further, the title of the patent, and the provisional specification, both received the allowance of the law officer acting in terms of the Patent Law Amendment Act, 15 and 16 Victoria, c. 83. By that statute (sections 6, 7, and 8), which for the first time required a provisional specification to be lodged with the petition for the letters-patent, these are to be referred to the law officer acting under the statute; and it is provided that, 'in case the title of the invention, or the provisional specification, be too large, or insufficient, it shall be lawful for the law officer to whom the same is referred to allow or require the same to be amended.' The title and provisional specification received the allowance of the law officer, and the objection taken to them cannot, the Lord Ordinary thinks, now be urged. The final specification claims nothing that is not set forth in the provisional specification. The respondent's objection on this ground falls therefore to be repelled—(Penn v. Bibby, 6th December 1866, Law Reports, Ch. App. ii. 127).

"3. The complainer's patent is also said to be bad in respect of misrepresentation in the final specification, and of failure in that specification to make a full and true disclosure of what is necessary to render the alleged invention effectual, or to enable a workman of ordinary skill to put the same into practice. The grounds of these objections are set forth in the seventh statement of the respondent, and are to the effect that whereas the complainer sets forth in his specification that by means of his invention the use of mauls and sledges, and all the inconveniences that attend their employment, are dispensed with, yet in practice it has been found that the invention cannot effect the object without the use of mauls or sledges, or hammers, as a means of forcing in the expanding plug—that any other mode of forcing in the same would be inadequate—and that no other means are provided.

"By the modes in use before the complainer's invention boiler tubes were expanded by percussion alone. The most common modes were by driving with repeated blows from heavy mauls or sledges a tapered mandril into the tube, or a tapering plug into the centre of a hollow cone cut into segments and inserted in the tube. By the invention of the complainer the tube is expanded by rolling

[1] Hindmarch on Patents, 43; Croll v. Edge, 9 C. B. 479.

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description of it as would enable a workman of ordinary skill to use it.[1] he respondent had not in fact infringed the letters-patent, his apparatus eing materially different from that claimed by the complainer.

The complainer argued;—There was no material variance between the itle and provisional specification and the complete specification. The rovisional specification was intended to describe generally and fairly the ature of the invention without detail;[2] and it could not, after being llowed by the law officer of the Crown, be impeached as too general.[3] he description in the complete specification was sufficient to satisfy the equirements of the law; it was in accordance with the actual machine in

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he metal by the application of one or more pressure rollers to the interior of the ube, so that the metal is expanded by rolling in contradistinction to the old ystem of driving it outwards by hammering. These rollers are made to diverge nd rotate by a tapering plug or expander being forced inwards and turned round nd round. The complainer does not limit his mode of forcing the tapering plug r expander inwards to the hand of the operator. He only says, when describing he subject-matter of his patent, that as 'the roller can be operated by hand' he use of mauls or sledges and their attendant inconveniences are dispensed with. It is, the Lord Ordinary thinks, proved that the complainer's tapering plug or expander can both be forced in and turned upon its axis by the hand. Some of the respondent's witnesses said that this could not be done. But numerous witnesses examined by the complainer deponed that they had successfully worked it by the hand. Further, the complainer gives two descriptions of apering plugs with shallow flat screw threads, which draw themselves inwards hen turned by the hand, and also an apparatus with the axis of the rollers lightly skewed to the axis of the tube, the effect of which is, as was demonstrated before the Lord Ordinary, to cause the tapering plug when turned in one irection to draw into the tube, and to expand the tube, and when reversed, to oosen itself within the rollers. These three apparatus are worked more easily an the others, but it is proved that the others can also be worked by the and. It is not, the Lord Ordinary considers, a good objection to the patent, at the workmen, instead of using the hands alone to force the tapering plug wards, find it easier to give it a slight blow with a light hammer or wooden allet (not a heavy maul or sledge), so as to place the rollers in position, or to ite the tube before they proceed to turn the tapering plug round, in order to use the rollers to revolve within the tube, and to expand it by rolling. That a very different thing from the old practice of expanding by driving an exander into the tube with heavy mauls or sledges. The invention of the comlainer is 'the combination in an expanding tool of the following implements, iz., the roller, roller stock, and expanding instrument, these three operating in ombination substantially as set forth.' It is clearly proved that they do so perate in combination, and produce the required expansion. The mode of pplying the requisite power to force the expander inwards is no part of the atent. That may be done by a common brace, or in various other ways. But ven if the complainer had by his specification limited his mode of forcing in the xpander to the hands of the workman, it is proved that the said three impleents operating in combination can be worked by the hands alone, and that, hen so worked, they will produce the desired expansion. There is thus, the ord Ordinary is of opinion, no misrepresentation in the specification, and no ilure to make a full and true disclosure therein of what is necessary to render ie alleged invention effectual, or to enable a workman of ordinary skill to roduce the effect set forth in the specification."

[1] Rex v. Wheeler, 2 B. and Al. 345; Lord Cochrane v. Smethurst, 1 Stark, 05; Neilson v. Househill Coal and Iron Co., Jan. 27, 1842, 4 D. 470—Nov. 5, 1842, 5 D. 86.

[2] *In re* Newall, 4 C. B. N. S. 269, 288—27 L. J. C. P. 237.

[3] Penn v. Bibby, L. R. 2 Ch. Ap. 127—36 L. J. Ch. 455.

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use, and enough to enable any ordinary workman to use it.[1] The apparatus made and sold by the respondent was plainly identical in all essentials with the invention patented by the complainer, however he might attempt to disguise it by the use of different language in describing it.

At advising,—

LORD PRESIDENT.—This is an application for interdict against an alleged infringement of a patent for improvements in apparatus used in expanding boiler tubes. The respondent, besides denying the alleged infringement, has stated three objections to the validity of the patent, and it is desirable to dispose of these in the first place before proceeding to the question of infringement. He says that the letters-patent are invalid—first, in respect of the disconformity of the provisional specification with the letters-patent and final specification. Now, that plea as stated is altogether futile, nor do I think it a relevant plea in law, because, if the letters-patent and complete specification are in accordance with one another, and the two together make a valid and complete patent, then an imperfection in the provisional specification, I apprehend, would be altogether immaterial. But the objection as argued assumed a somewhat different form, and I understood the Solicitor-General to contend on the part of the respondent that there was a disconformity between the title and specification, but whether he meant to say that the disconformity was between the title, on the one hand, and the provisional and complete specification, on the other hand, or whether he meant to say that the title and the provisional specification, on the one hand, were disconform to the complete specification, on the other, I could not even in the end ascertain.

I shall consider the matter in both these lights. The title, as already mentioned, is "improvements in apparatus used in expanding boiler tubes," and the first question is whether that title is in accordance with the complete specification, the objection stated by the Solicitor-General being that the complete specification covers more than is covered by the title—that there is a certain part of the invention which is not within the title, and cannot be covered by the title, because, as he says, it is not an improvement in apparatus used in expanding boiler tubes, but an improvement in apparatus used for a different purpose than expanding boiler tubes. The complete specification describes very distinctly the nature of the invention, and gives a very clear view of its object. It says—"The object of the invention is to enable the ends of boiler tubes to be expanded in the holes in the flue-sheet. Previous to this invention it has been customary to expand the ends of tubes by an expanding tool composed substantially of a series of swages radiating from a common centre, and caused to diverge by means of a tapering plug driven into the centre of the tool by the repeated blows of a maul or sledge." And then—"The principle of the invention which constitutes the subject-matter of this patent is to expand the tube by rolling the metal by the application of one or more pressure rollers to the interior of the tube so, that the metal is expanded by rolling, in contradistinction to the old system of driving it outwards by hammering; and as the roller can be operated by hand, the use of mauls or sledges, and all the inconveniences that attend their employnent, are dispensed with." So far, I think, this specification is expressed with almost exceptional clearness. The old system of expanding tubes when they reached the flue-sheet was by driving in a tapering plug by means of repeated blows of a maul or sledge, and causing the swages which radiated from a common centre to diverge so as to expand the tube. This was an inconvenient system, for reasons which are afterwards explained, that the violent percussion which was applied was very apt to split the tubes instead of expanding them, and it also was apt to have the effect of disturbing the other

[1] Sturz v. De la Rue, 5 Russ. 322; Neilson v. Harford, 8 M. and W. 806; Webster's Patent Cases, 331; Prale v. Millar, Feb. 28, 1863, *ante*, vol. i. 450; Coryton on Patents, 133.

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tubes in the flue-sheet which had already been expanded and fixed. The detailed description which follows with reference to the figures it is not necessary to read, but the claim at the conclusion of the specification is, for the purpose of the present case, most important. He says—"These three instrumentalities,"—which he has several times mentioned—the roller, the roller stock, and the expanding instrument—"are all that is absolutely essential to the roller expanding tool; but the cutter and ratchet-handle constitute with the said instrumentalities or implements useful combinations which are supplementary to the aforesaid fundamental combination." Now, this cutter and ratchet-handle he has previously described as something which may be usefully employed in combination with his expanding tool for the purpose of finishing off the end of the pipe at the same time or by means of the same apparatus which is used to expand. And therefore he claims, first of all, in combination, the roller, roller stock, and expanding instrument, these three operating in combination substantially as set forth. In the second place, he claims the combination of the roller, roller stock, expanding instrument, and cutter for trimming the tube, all operating in combination; and the third combination merely adds to all these a ratchet-handle for turning the cutting instrument. Now, the objection which is taken is, that the cutter and the ratchet-handle for turning it are not part of an expanding apparatus, but something different and additional, and that therefore they do not fall under the title. But the title is not for an expanding apparatus. The title is "improvements in apparatus used in expanding boiler tubes," and it would rather appear to me, if it were at all necessary to decide that question, that an improvement in the apparatus used in expanding boiler tubes may be not to produce expansion but to do something else.

But, in short, it is quite needless to pursue that line of argument, which would have been a sufficiently important one before the Act of 1852 was passed, because, I apprehend, this question must be determined upon a different view altogether since the passing of that Act. There was here lodged, in terms of that Act, a provisional specification. But the provisional specification comes into existence at the very same time as the title. The first step that is taken by a patentee in order to obtain a patent is to present a petition at the office of the commissioners, and in that petition he sets forth the title, accompanied by a declaration, in which he undertakes to shew it is new and useful, and by the provisional specification which the stutute requires he describes the nature of the invention. Now, a great object of the provisional specification, introduced for the first time by the Act of 1852, was to avoid difficulties which had frequently occurred and which were embarrassing both to the patentee and to the public, or those of the public who were engaged in investigations and improvements in the same line of work or business as the patentee. The great object of the provisional specification was to secure less of a distinct statement of the patentee's claim than was to be found in the final specification, and more than was to be found in the mere title of the invention as it used to be presented, and upon which letters-patent were granted, and accordingly the provisional specification must state the nature of the invention. It does not go so far as the complete specification, which must state not only the nature of the invention, but the manner in which the same is to be performed; but in stating the nature of the invention the provisional specification necessarily goes a good deal further than the title does, and gives additional information to the public of what it is that is claimed, and at the same time it secures a certain benefit to the patentee. The petition with the provisional specification is submitted to the law officer, and it is part of his duty to see that the provisional specification and the title correspond with each other, and if the one is too large, or is insufficient, then it is his duty, under the statute, to amend it or to allow it to be amended so as to bring the two into harmony. When that has been done, then the patentee has a provisional specification, and he goes on under that provisional specification until the warrant is issued for the letters-patent, and he obtains the actual letters-patent themselves. It appears to me that in these circumstances the true question under a plea of this kind is whether the complete specification goes beyond the title and provisional specification, for these two must be taken together.

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The one is to interpret or to explain the other, and they are taken together, therefore, and are in the same position in a question of this kind now as the title would have been alone previous to the passing of the Act of 1852. Is there, then, something more claimed in the complete specification than was claimed and disclosed in the title and provisional specification? It is quite impossible to say that, because in the provisional specification there is just the same statement about the cutting implement, and the ratchet-handle by which it is turned. He says—"In order that one tool may be used for performing the two operations of expanding the tube and of trimming off its end, the expanding rollers are combined with a cutter which is arranged to turn upon the stock of the expanding rollers," and so on. In short, he stops short, as he was entitled to do in the exercise of proper caution, from going into details of the manner in which the invention was to be performed, and confines himself to a general statement of its nature, but he very distinctly brings out that its nature is that in the one tool there may be and will be combined expansion by rolling and a cutter to trim off the end of the tube. I think, therefore, that the plea here altogether fails, and that there is nothing in the complete specification which goes at all beyond the title and provisional specification, and consequently that the patent is not assailable upon this first ground.

But then, in the second place, the respondent contends that the patent is invalid in respect of misrepresentation in the complete specification, and that raises a point of a different kind. He says it is proved in evidence that the patent apparatus or expanding tool cannot be used without percussion—that while the patentee in his specification professes to dispense altogether with blows of a maul or sledge hammer to drive in the tapering plug, it is not possible in actual work, however it may be in experiment, to drive it in without the blow of some hammer. Now, it may be admitted, I think, that in practice workmen using this apparatus do use a hammer to drive the plug into the roller stock so as to enable it to bite the inside of the roller stock. At the same time, it is proved, I think, that it can be made effectually to do its work without the blow of a hammer. Probably the respondent is entitled to say that in practice it never will be, because it is much more difficult to do it without the blow of a hammer, and therefore that in any proper practical sense it is not true that the roller can be operated by the hand alone; and he says that the patentee has pledged himself to dispense with percussion altogether, and to operate by the hand only. The part of the specification to which he refers in regard to this is that which I read at the commencement of the specification; where the patentee is describing the principle of the invention he says—"The principle of the invention which constitutes the subject-matter of this patent is to expand the tube by rolling the metal by the application of one or more pressure rollers to the interior of the tube, so that the metal is expanded by rolling, in contradistinction to the old system of driving it outwards by hammering, and as the roller can be operated by hand, the use of mauls or sledges, and all the inconveniences that attend their employment, are dispensed with."

Now, that is the misrepresentation complained of. It appears to me this is a somewhat narrow point, but upon the whole I cannot think there is a misrepresentation. I think it is true that the use of mauls and sledges is dispensed with, because mauls and sledges are hammers of a very heavy kind, the use of which produces very violent percussion. We, in Scotland, are not very familiar with these words "mauls" and "sledges," but I take it, that when translated into Scotch they mean mells and fore-hammers, and everybody knows that these are the two heaviest of the class of hammers used by human hand with which we are acquainted, the one being the heaviest kind of wooden hammer, and the other the heaviest kind of metal hammer. Now, I think that the use of such heavy instruments as these is dispensed with by the patentee's mode of expanding. It may be that slighter percussion is very convenient, and is commonly used to put the tapering plug into its place, and enable it to bite the metal in the inside of the tube, so as afterwards, by means of the roller attached to it, to expand the metal of the tube all round. But all that the patentee has said upon that subject is, that the roller can be operated by the hand, and so it

can. It is capable of operating by hand, and therefore the percussion by hand is so slight that the use of mauls or sledges is altogether dispensed with, and, what is of more consequence still, the inconveniences that attend their operation are got the better of, and altogether avoided. That is in evidence before us. There is no longer such an amount of percussion as to lead to the splitting of the tube and the displacement of other tubes that have already been placed in the flue-sheet; and therefore I think that while perhaps the patentee here was a little too sanguine in believing he could do without a hammer at all, he was not guilty of any misrepresentation, in any proper sense of the term, in the words he has here used.

That disposes of the second objection to the validity of the patent; and the only remaining objection is, that the patent is invalid in respect of the failure in the said specification to make a full and true disclosure of the invention, such as would enable a workman of ordinary skill to put the same into practice. I understood that objection to be founded on the same ground as the second—that the misrepresentation in regard to the mode in which the tapering plug has to be got into its place would prevent a workman of ordinary skill from making use of the apparatus until he had found out for himself that he must resort to the hammer again. But there, again, I think the objection is not good, and the best proof is that many workmen of ordinary skill, and many who were examined as witnesses, had no difficulty whatever in using this patent apparatus, and had no difficulty whatever, when they found that the tapering plug would not go very readily into its place, in taking a small hammer handy for the purpose and giving it one or two slight blows to put it in.

The only question that remains for consideration is the question whether the respondent has infringed the patent, and here there is really no room for doubt. It is quite true that the tool which is used by the respondent differs in some respects from that which is described in the specification, but this is by no means sufficient. It may be—I do not say that it is—that the respondent's is a better tool, but that would not prevent him being an infringer if he has adopted the principle of the patent invention. Now, there is no doubt in the world that although the respondent in his specification adopts different language from that which is used in the complainer's specification, he does use in combination rollers and a roller stock and a tapering plug for the purpose of expanding tubes by rolling, and that is the subject-matter of the complainer's patent. It is quite true that in the case of the respondent's tool there is produced what he calls perfectly parallel expansion, while a tool made in terms of the complainer's specification will not give perfectly parallel expansion. That may be, for aught I know, an improvement. But, then, observe how that improvement is brought about. It is by a slight modification of that which is the subject-matter of the complainer's patent. He tapers the roller stock as well as the tapering plug, and makes the taper of the one correspond precisely with the taper of the other, so that the effect is that the tube is expanded exactly as much for the whole length of the roller. Each roller produces exactly an equal expansion throughout its whole length, and the roller of the complainer, not being tapered so as to correspond with the taper of the plug, produces not an equal or parallel expansion of the tube, but an expansion which in the tube is of a tapering nature. Now, the one may be better than the other; but the question is, whether this variation, whether for good or for evil, is not just simply a variation upon the patent of the complainer, and therefore is the use of a patent invention. If a man discovers a great improvement upon an invention already patented he is very well entitled to take a patent for it, and can obtain a patent for it, but he must come to terms with the original patentee, and pay him a duty, or in some other way satisfy his right. Then, again, it is said that the one differs from the other in this, that whereas the tapering plug is inserted from the outside and is driven in, in the case of the complainer's patent *e converso*, in the case of the respondent's tool it is introduced from the inside and drawn outwards by means of a screw and nut. That is quite true. "And the effect of that," says the respondent, "is that percussion is not only not required in my instrument, but is impossible, because the head of the tapering tool not being outside but inside the tube to

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be expanded, it is impossible to get at it for the purpose of percussion, and you are therefore driven, of necessity, to depend entirely upon the screw and nut." That is another change which may or may not be an improvement; but suppose it be an improvement, it is still an improvement upon a patent invention, and it is impossible to use the improvement without using the patent invention; and there, again, the respondent in his own very description of these differences is practically confessing that he is using a patent invention. The infringement is therefore a matter of fact, I apprehend, and attended with no difficulty whatever; and upon the whole matter I am satisfied that the Lord Ordinary's interlocutor ought to be adhered to.

LORD DEAS.—As your Lordship has stated, the answer of the respondent resolves itself into three heads. In the first place, objections to the disconformity between the title and the provisional and final specifications; in the second place, misrepresentation of the nature of the invention; and, in the third place, that the patent of the respondent is not an infringement upon that of the pursuer. I concur in the views stated by your Lordship on all these three points, and I think there is really no difficulty except upon the second point, to which alone I shall therefore advert.

The objection under this head is threefold. First, it is said, that the expansion is not produced entirely by the pressure of the roller on the interior of the tube, but is to some extent produced before that pressure begins to operate. Second, it is said that the expansion is represented as operated by the hand; and third, it is said that the use of mauls and sledges is represented as being entirely dispensed with. Now, I do not think expansion can really be said to be produced before the roller begins to operate. What takes place before that is simply the introduction of the roller to produce the expansion. The difficulty mainly is whether it is represented that the expansion is operated by hand, and without the use of mauls and sledges. The words used are certainly not very cautious. The roller can, no doubt, be operated by the hand, so that these words, taken literally, are not contrary to the fact; but then, if it is meant that the use of mauls of all kinds is, in every instance, dispensed with, that would not be a correct representation of what practically takes place. There is a nicety here, and a difficulty, but I am disposed to agree with your Lordship that the real meaning is, in the first place, that it is possible to do it altogether by the hand (which is quite true), and, in the second place (which is also true), that at all events the use of mauls and sledges—that is, the use of heavy hammers either of wood or iron—is dispensed with, meaning that sort of heavy hammers which give rise to risk of splitting and of injury. As your Lordship has said, a maul may be taken as equivalent to what in Scotland is called a mell,—that is, a large heavy wooden hammer,—and a sledge, as an appropriate enough word for what we call, more familiarly, a fore-hammer,—that is, a large and heavy iron hammer.

It is said that an ordinary workman could not follow this description. That comes under the question whether the description would or would not mislead the workman by making him think that expansion was produced entirely by rollers, and that the use of a hammer, however light, was to be uniformly dispensed with. I do not think that would be so, and upon the whole, I think that your Lordship's proposed judgment is correct.

LORD ARDMILLAN.—I have, after attentive consideration of the most able arguments on both sides, formed the same opinion as the Lord Ordinary and your Lordship. If there is no good objection to the complainer's letters-patent, then I am of opinion that infringement has been proved, and that the complainer is entitled to succeed. On the evidence before us, and on a comparison of the tool or instrument used by the respondent with the tool or instrument for which the complainer has a patent, I really entertain no doubt that the complainer's rights under his letters-patent have been infringed. I do not know whether the respondent's instrument is or is not, in some respects, an improvement on the complainer's. But in its most essential and important features it is a copy,

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obviously a borrowing of that for which the complainer holds a patent. On this question I have nothing to add.

But the more difficult part of the case is, the attack which has been made by Mr Thomson, the respondent, on the letters-patent held by the complainer.

It is not necessary to decide whether the respondent's objection, in respect of disconformity between the title and the specification, would have been conclusive before the date of the statute of 15 and 16 Victoria. I am not satisfied that the objection would even then have been conclusive. But since the date of that statute the title is legitimately explained by the provisional specification, and the title and provisional specification, read together, are to be compared with the final specification. That is really the comparison which we must make. The title, plus the provisional specification, must be carried on to be compared with the final specification. As the result of that comparison I arrive at the conclusion that there is no such disconformity as can render these letters-patent invalid. I think that the true nature of the complainer's invention, and of the mechanical instrumentality by which he practically works it, are sufficiently disclosed. The "cutter" and the "ratchet handle" are subordinate, and merely for the purpose of trimming and turning, and both are set forth in the provisional specification as well as in the final specification.

Another objection is that the specification is inaccurate and deceptive, because it sets forth that the principle of the invention is expansion by rolling, whereas, in point of fact, the "tapering plug" is first introduced into the tube by propulsion or insertion, and then, after the "bite" on the sides of the tube has been got by the insertion of the plug, the expansion by internal rolling commences. This, it is said, is not entirely expansion by rolling. I am of opinion that this objection, however ingenious, is not well founded. It must be assumed that in the process of rolling a certain amount of displacement of surface, which workmen call a "bite," must precede the rolling which produces the desired expansion. No expansion could take place if the "tapering plug" or "mandril" were so much less than the tube as to have no "bite." The first insertion of the expanding instrument must take effect in producing a "bite;" but however that mere insertion is accomplished, it is only introductory to the "expansion by rolling," which is the invention.

The third objection taken is that the complainer's instrument is falsely described, because the instrument is represented as wrought or capable of being wrought by the hand, and as dispensing with the use of "mauls or sledges," and the inconveniences that attend their employment. Now, I think that the specification is not very happily expressed. But reading and construing it fairly, I am of opinion that we should not sustain the objection. It is proved that the complainer's instrument can be wrought by the hand, and has been sometimes so wrought. But it is, I think, also proved that "mauls," by which I understand heavy wooden hammers, and "sledges," by which I understand fore-hammers, or smith's hammers, are no longer used or required, but small mallets or light hammers are found to be practically useful, and are generally used. In consequence of the inaccurate expression used in the specification a difficulty has here arisen. But, bearing in mind that the heavy hammers, mauls, and sledges, with the attendant inconvenience arising from their weight and power, are really dispensed with, and that expansion by rolling—possible by hand, and yet more effectively accomplished by the aid of light mallets—is within the intelligence and the power of a workman of ordinary skill, I think that we should not do justice to the complainer if we refused to acknowledge and to support his letters-patent.

LORD JERVISWOODE concurred.

THE COURT adhered.

MACNAUGHTON & FINLAY, W.S.—RONALD, RITCHIE, & ELLIS, W.S.—Agents.

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Earl of Kellie.

JOHN FRANCIS ERSKINE GOODEVE ERSKINE, Pursuer.—*Adam—Asher.*
The Right Honourable WALTER HENRY ERSKINE, EARL OF KELLIE, Defender.—*Sol.-Gen. Clark—Balfour.*

Entail—Destination.—A deed of entail contained a destination to A and the heirs-male to be procreate of her body, whom failing, to the heirs whatsomever descending of her body. The narrative of the deed set forth that it was granted in implement of an obligation to dispone to A and the heirs of her body. *Held* that the narrative and the destination were not inconsistent with each other, and that the whole class of heirs-male must be exhausted before heirs whatsoever could succeed.

1ST DIVISION. Lord Shand. B.

THIS was an action by John Francis Erskine Goodeve Erskine, claiming to be Earl of Mar, against the Earl of Kellie, to have his right to the estates of the earldom of Mar established under a deed of entail executed in 1739.

In 1715 John Earl of Mar was attainted, and his estates were forfeited. The friends of the family afterwards determined to acquire the forfeited estates from the Commissioners for the Sale of Forfeited Estates. Accordingly, James Erskine of Grange and David Erskine of Dun purchased the estates, and executed a disposition and deed of entail on 6th December 1739.

The following are the most important parts of the deed of entail:—"Likeas I, the said James Erskine, by my disposition and assignation, of the date the 23d day of March 1725 years, mentioning the writts before narrated, and subsuming that albeit by the foresaid disposition, indenture, contract of bargain or sale, the whole price of the foresaid purchase and interest due thereupon is said to be paid by me, the said James Erskine, and the disposition thereof taken in my name, only yet the equall half of the said purchase-money and interest thereof was truely advanced and payed by me, the said Mr David Erskine, and that it was previously concerted and agreed betwixt us that I, the said James Erskine, should dispone and convey to him the equall half of the said purchase in maner and under and with the reservations and provisions therein mentioned, Therefore I thereby sold, annailzied, and disponed from me, my heirs and successors whatsomever, to and in favours of me, the said Mr David Erskine, my heirs and assigneys whatsomever, heretablie and irredeemablie, subject alwayes proportionally to the burdens mentioned in the foresaid minute of sale and disposition above narrated, and with and under the reservations and provisions therein mentioned, the just and equall half of All and Haill the lands and estate therein and above mentioned, as the samen was brooked and enjoyed by the said John, late Earl of Marr, at the time of his attainder, and as the samen are more particularly exprest and designed in the rights and infeftments thereof, and minute or contract of sale before narrated, as the said disposition, of the date foresaid, containing ane assignation to the writts and evidents and mealls and duties of the said lands, and severall other clauses, insert and registrat in the Books of Councill and Session upon the 2d day of August 1736 years, also more fully bears: And in like manner we, by our backbond, of the date the 23d day of March 1725 years, mentioning the writts above narrated, and that we were willing that the benefite of the said purchase should be for the behoove of Thomas Lord Erskine, only lawful son to the said John, late Earl of Marr, and the other persons after named, Therefore we thereby band and obliged us, our heirs and successors, to denude ourselves of the said estate, at leist so much thereof as should remain unsold and disposed upon, for payment of the debts therein mentioned, and to dispone the same to and in favours of the said Thomas, Lord Erskine, and the heirs of his body; *whom failling, to any*

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full sister of the said Thomas, Lord Erskine, and the heirs of her body; ɔm failling, to me, the said James Erskine, and the heirs of my body; ɔm failling, to the nearest agnate of me, the said Mr James Erskine, of sirname of Erskine; whom failling, to me, the said James Erskine, heirs and assignees whatsomever, with and under the provisions and ditions therein mentioned and underwritten, as the said back-bond, taining thereintill severall other obligements and clauses, more fully rs: And we being now most willing and desirous to divest and denude selves of so much of the foresaids lands and estate as yet remain un- l in the termes of our back-bond above narrated, excepting the lands l estate after mentioned, for the reasons and causes specified and con- ıed in ane contract past betwixt the said Thomas, Lord Erskine, and of the date of thir presents, and for that effect to grant this present position in maner under written, Therefore witt ye us to have sold, ıailzied, and disponed, as we do by thir presents in implement, as said with and under the reservations, provisions, burdens, declarations, con- ions, clauses irritant and resolutive underwritten, and no otherwayes, l, annailzie, and dispone from us, our heirs and successors whatsom- r, to and in favours of the said Thomas, Lord Erskine, and the heirs- le lawfully to be procreat of his body; whom failling, to the heirs atsomever descending of the said Thomas, Lord Erskine, his body; *m failling, to Lady Frances Erskine, his sister, and the heirs-male to be reat of her body; whom failling, to the heirs whatsomever descending of body;* whom failling, to me, the said James Erskine, and the heirs- le lawfully procreat or to be procreat of my body; whom failling, to heirs whomsoever descending of the body of me, the said James kine; whom failling, to the nearest agnate of the said Thomas, Lord kine, of the sirname of Erskine; whom failling, to the said Thomas, d Erskine, his heirs and assigneys whatsomever, heretablie and irre- mablie, without any maner of reversion, redemption, or regress what- ıever, the eldest heir-female and the descendants of her body excluding ɔther heirs-portioners, and succeeding allwayes without division through whole course of succession in all time coming, with and under the ditions, provisions, declarations, burdens, faculties, restrictions, limita- ıs, clauses irritant and resolutive after-mentioned, and no otherwayes, and Haill the earldom of Mar, which sometime belonged to John, ı Earl of Mar, in so far as the same has not been disponed and alienated us, and now comprehending the lands, lordships, barronies, and others ır-mentioned, viz." . . . . "As also with this provision allwayes, as it is hereby expressly provyded and declared, that the eldest female r of tailzie above specified, and the descendants of her body, shall ex- le the younger and her descendants as heirs-portioners, and shall ceed allwayes without division; and that the whole heirs of tailzie ve mentioned, as well male as female, and the descendants of their lies who shall happen to succeed to the saids lands and estate by tue of the foresaid destination, shall be obliged in all time after their cession to assume and constantly use and bear the sirname of Erskine, l take and carry the armes which before the attainder of the said ın, late Earl of Marr, were worn by the family of Erskine and ırr, in so far as the same or any part thereof can be obtained, and ally and warrantablie born, and in case the attainder of the said John, ı Earl of Marr, shall be reversed, the title, dignity, and honours of family of Erskine of Marr, and the armes thereof, as their own per sirname and armes in all time thereafter." . . . . . eclaring allwayes that if the said Thomas, Lord Erskine, and the other rs of tailzie above-mentioned succeeding to the said lands and estate,

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shall failzie to assume, use, and bear in all time thereafter the sirname and armes above written, or that the said Thomas, Lord Erskine, or any of the saids heirs of tailzie above written, shall contraveen or failzie to fullfill the provisions and conditions of the said tailzie, or any of them, any maner of way, and specially but prejudice of the generallity, by altering or changing the order of succession, or disponing, selling, wadsetting, or burdening with infeftments of annualrent, or other servitudes or burdens, the saids lands, or any part thereof, or by granting tacks or rentales otherwayes than as above, or by contracting of debts, or doing any other facts or deeds, civill or criminall, whereby the saids lands may be burdened, evicted, forefeited, confiscate, or adjudged, or possessing of the saids lands by vertue of any other title or right than the foresaid tailzie, infeftments, and conveyances to follow thereon, or by not inserting in their severall services and retours, generall as well as speciall, conveyances and infeftments, the haill conditions and irritancies hereof, or by lying out unentred, or by not-payment of the casualities of superiority and publick burdens, whereby the saids lands may be anywayes apprized, adjudged, or evicted for the same, or by not purging the saids apprizings and adjudications in the termes above-mentioned before the expiration of the legall, or by granting liferent infeftments to their husbands and wives, or bonds of provision to their younger children, otherwayes than as is above provided, then and in either of these cases, not only all such facts, deeds, and debts committed, done, or contracted contrary hereunto, with all that may follow thereupon, shall be in themselves voyd, null, and of none availl, force, strength, nor effect, sicklike as if the same had never been committed, done, or contracted, so far as concerns the saids tailzied lands and estate above exprest, which nor no part thereof shall be anywayes affected or burdened therewith in prejudice of the saids heirs of tailzie and provision above specified appointed to succeed by vertue of thir presents, which is made and granted *sub modo*, and with and under the provisions above specified, and no otherwayes; but also such person or persons so contraveening or failling to fullfill the above written conditions and provisions, or any of them, shall for themselves only *ipso facto* amitt, loose, and forefeitt their right and intrest in the said lands and estate, and the samen shall become voyd and extinct. . . . . As also with this provision allwayes, likeas it is hereby expressly provyded and declared, that the eldest female heir of tailzie above specified, and the decendants of her body, shall exclude the younger and her decendants as heirs-portioners, and shall succeed allwayes without division, and that the whole heirs of tailzie above mentioned, as well male as female, and the decendants of their bodies who shall happen to succeed to the saids lands and estate by vertue of the foresaid destination, shall be obliged in all time after their succession to assume and constantly use and bear the sirname of Erskine, and take and carry the armes which before the attainder of the said John, late Earl of Marr, were worn by the family of Erskine and Marr, in so far as the same or any part thereof can be obtained and legally and warrantablie born; and in case the attainder of the said John, late Earl of Marr, shall be reversed, the title, dignity, and honours of the family of Erskine of Marr, and the armes thereof, as their own proper sirname and armes in all time thereafter."

The institute, Thomas, Lord Erskine, died in 1766 without issue, and the estate devolved on his sister, Lady Frances Erskine.

Lady Frances died in 1776, and was succeeded by her only son, John Francis Erskine, who became Earl of Mar, the attainder having been removed by Act of Parliament in 1824.

John Francis Erskine, Earl of Mar, died in 1825, leaving three sons, of

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hom the eldest, John Thomas, succeeded him in the titles and estates. ohn Thomas died in 1828, leaving a son, John Francis Miller, who suceeded to the titles and estates, and died in 1866 without issue, and two aughters.

One of these daughters, Lady Frances Jemima, married, and her eldest on, John Francis Erskine Goodeve Erskine, was the pursuer of the preent action, and claimed the title of Earl of Mar.

The defender, the Earl of Kellie, who was the son of Walter Coningsby rskine, who was the son of Henry David, the son of John Francis, the estored Earl, also claimed the earldom of Mar. The pursuer was thus he heir whatsoever of Lady Frances Erskine, and the defender was heirale. The question of the right to the earldom was in dependence before he House of Lords.

The pursuer pleaded;—(2) Upon the death of the said John Francis filler Erskine, Earl of Mar, without issue, the succession to the earldom f Mar and others under the said disposition and deed of entail opened to he eldest of his heirs-portioners, being his heirs whatsoever, and the purner being one and the elder of the two such heirs, is now entitled to the aid earldom and others, and to make up titles thereto as heir of taillie nd provision under the said entail. (3) The pursuer being in lawful ossession of the honours, dignities, titles, and arms of the Earls of Mar, c., is, on the true construction of the said disposition and deed of entail, ntitled to the lands and estates thereby conveyed. (4) The pursuer is ntitled to have the right of the defender to the said entailed estates eclared void and extinct, in respect that the defender is not entitled to ear the title, surname, and arms of the family of Erskine of Mar, and hat the pursuer has the only lawful title to bear, and does bear, the said itle, surname, and arms, as required by the entail.

The defender pleaded;—(1) The pursuer has no title to sue, in respect hat he has no right to the title, dignity, or honours of Earl of Mar, or at ll events he cannot insist in the action while the competition for said itle, dignity, and honours between him and the defender is *sub judice* in he House of Peers. (2) *Separatim*, the pursuer has no title to sue, in espect that he is not heir-male of the body of Lady Frances Erskine. (4) The defender ought to be assoilzied, in respect that he is the heirmale of the body of Lady Frances Erskine, and as such has right to the estates in question by virtue of the destination contained in the deed of entail libelled.

The Lord Ordinary pronounced this interlocutor:—"Finds that the defender, as the nearest heir-male of the body of Lady Frances Erskine, has right to the estates in question by virtue of the destination contained in the deed of entail libelled: Finds that the pursuer, as an heir-female or heir whomsoever of the body of the said Lady Frances Erskine under the said entail, has no right or title in a question with the defender to the said estates: Sustains the defender's second, third, and fourth pleas in law: Finds that the pursuer has no right or title to insist in the conclusions of the present action, and accordingly dismisses the same, and decerns: Finds the pursuer liable in expenses, allows an account thereof o be given in," &c.*

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* "NOTE.—In the year 1866, on the death of John Francis Miller, Earl of Mar and Kellie, without issue, the defender's father, Walter Coningsby Erskine, Earl of Kellie, was served nearest and lawful heir-male of taillie and provision n general to him to the earldom or estates, which form the subject of the present ction.

"This service was expede under and by virtue of the disposition and deed of

of tailzie and provision to him under the deed of entail above m
that he had then, and still has, the right to make up all proper
lands as such heir of tailzie and provision, and to enter upon a
estates as proprietor thereof. By the reductive conclusions of t
pursuer seeks to reduce—(1) The various services and other writs
late Walter Coningsby Erskine, Earl of Kellie, the defender's fat
his title to the estates in 1866; and (2) the decree of general ser
and recorded in Chancery 20th May 1872, pronounced by the Sher
in favour of the defender, Walter Henry Erskine, Earl of Kellie,
lawful heir of tailzie and provision of his father, the said Walter C
of Kellie, under the deed of entail above mentioned.

"The action is maintained on the footing and averment that t
heir of line, succeeded to the title and dignity of Earl of Mar upo
the late John Francis Miller Erskine above mentioned, his uncle
suer founds on a decree of general service in his favour, dated 14th
recorded in Chancery 4th March 1867, granted by the Sheriff of C
favour, by which he was served as one and the elder of the two
portioners of his uncle, the late John Francis Miller Erskine, Earl
named.

"The defender, the Earl of Kellie, maintains that he is Earl of
the claim of the pursuer to that title and dignity is unfounded.
claim to the title is based on the allegation that the peerage des
general, while the defender maintains his right to the peerage as tl
male of the last Earl; and the question whether the pursuer has ri
in preference to the defender is at present *sub judice* of the House
it is said may be decided in the course of the present year.

"As the pursuer's claim to the estate in question is rested e
ground of his being the person having right to the title and dig
Mar, and as the question whether he has such right cannot be dete
Court, and may be decided by the House of Peers within a short t
Lord Ordinary was at first disposed to sist the present action unti
should be decided, for if it should be decided against the pursuer
his claim under the present action would be swept away. The
ever, objected to this course, and pressed the Lord Ordinary to
dispose of his second, third, and fourth pleas in law. Under th
maintained that, even on the assumption that the pursuer has ri
and dignity of Earl of Mar, and that this should be declared by
Peers, he has nevertheless no right to the estates in question, ina

the destination, and the words "whom failing" let in the other class. If the words used in the destination are *per se* susceptible of different meanings, as he has a legitimate interest to require that the action shall be now disposed of in place of being sisted, if there are grounds which enable the Court to do so.

"In this view the question now for determination is whether, assuming the pursuer to be the Earl of Mar, as he alleges, he has right to the estates in question under the entail; and the Lord Ordinary is of the opinion, to which he has given effect in the preceding interlocutor, that the pursuer has not such right, but that the defender is lawfully in possession of the estates as heir of entail under the subsisting destination.

"The question thus raised is one entirely as to the meaning and effect of the destination contained in the entail. The pursuer maintains that the destination must be read as carrying the estates always to the person who holds the title and dignity of Earl of Mar, while the defender maintains that this is not its true meaning, and that although it may be inferred from one clause in the entail that the granters of the deed had contemplated that the title and dignity of Earl of Mar should accompany the estates, this has not been provided by the destination, which gives him right to the estates independently altogether of whether he has or has not right to the title and dignity.

"The entail, which, as already stated, was executed in 1739, was made by James Erskine of Grange, and Mr David Erskine, one of the Senators of the College of Justice, after they had purchased the estates from the Commissioners and Trustees for the Sale of Forfeited Estates in Scotland. And the destination in the entail was, in the first place, in favour of Thomas, Lord Erskine, only lawful son of John, then late Earl of Mar, and eleventh Lord Erskine (who was attainted in 1715, and whose estates had been in consequence forfeited), and the heirs-male lawfully to be procreate of his body, whom failing, to the heirs whatsomever descending of the said Thomas Erskine his body. Thomas, Lord Erskine, died without issue in 1766, and the branch of the destination which then took effect, and is now subsisting, is in the following terms:—'Whom failing, to Lady Frances Erskine, his sister, and the hers-male to be procreate of her body, whom failing, to the heirs whatsomever descending of her body.'

"The defender is the nearest heir-male of the body of Lady Frances Erskine. This is instructed by the services produced, and the relationship on which these services proceed is not disputed by the pursuer, nor is it disputed that the defender is the nearest heir-male of Lady Frances Erskine and of the late John Francis Miller, Earl of Mar, whose right to possession of the estates during his life is admitted by both parties. The pursuer, on the other hand, is somewhat nearer in degree of relationship to John Francis Miller, Earl of Mar, but he is an heir-female, and not an heir-male of the body of Lady Frances Erskine, nor an heir-male of the late John Francis Miller, Earl of Mar. As in the case of the defender so in that of the pursuer, his alleged relationship or propinquity is not disputed.

"Further, if the destination were alone to be looked at it seems to be quite clear that the pursuer has no right or title to the estates in a question with the defender. The destination itself is expressed in clear, distinct, and ordinary language, and carries the estates, in the first place, to the heirs-male of the body of Lady Frances Erskine, in preference to the heirs-female or heirs whatsoever of her body. The defender is called to the succession as an heir-male under this destination, and until such heirs-male are exhausted the pursuer, as an heir-female, has no place in the destination. The two branches of the destination are separated by the ordinary term 'whom failing,' denoting that the heirs-male, of whom the defender is one, must be exhausted before an heir-female can claim right to the estates.

"Accordingly it was pleaded for the pursuer that the destination is controlled by other clauses in the entail, and that in respect of these clauses its language ought to receive a different meaning from that ordinarily given to it in similar deeds, and that the effect of these other clauses is to call under the destination an heir-female of the body of Lady Frances Erskine possessing the title and

in the first place, the narrative of the deed quoted in article 14 scendence, and in the next the provisions narrated in condescen 16 and 18, to the effect that the heirs of tailzie who should hap to the estates by virtue of the above destination should be oblig after their succession to assume and constantly use and bear th Erskine, and in case the attainder of the said John, late Earl of M reversed, the title, dignity, and honours of the family of Erskine the arms thereof, as their own proper surname and arms in all ti and the relative provision that if the heirs of entail succeeding 'shall fail to assume, use, and bear in all time thereafter the surn above written'—(here follow a reference to the contraventions of t hibitions in the entail, and a relative clause of irritancy)—'but al or persons so contravening or failing to fulfil the above written c provisions, or any of them, shall, for themselves only, *ipso facto* and forfeit their right and interest in the said lands and estate, a shall become void and extinct, and it shall be lawful for the next who would succeed if the contravener were naturally dead, albei the contravener's own body, to obtain and pursue declarators up vention or failing to fulfil any of the saids provisions and condit adjudications of the foresaids lands and estate, or to obtain them retoured, entered, infeft, and seased therein as heirs to the person vest and seased in the samen before the contravener had right, i the right of the contravener is hereby declared to become void a said is, and the right of succession to the foresaids lands and es provided to devolve and pertain to the next heir of tailzie for t the said declarator, adjudication, or service, and retour, or legal blishing the right of the said tailzied lands and estates in their p used and obtained.'

"The Lord Ordinary is of opinion that these clauses do not affe tion of the estate, as is maintained by the pursuer, the narrative having reference to the obligation which the entailers, as pur estates, had undertaken to entail. The residue which remained of certain debts specifies the destination to be one 'in favour of Erskine, and the heirs of his body; whom failing, to any lawfu said Thomas, Lord Erskine, and the heirs of her body,' and s different branches of the destination, without indicating that th each stirps were to be exhausted before the heirs-female of that st called to the succession. This, however, is in no respect inconsist

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The defender argued;—There is no conflict between the various parts of the deed. A destination "to heirs-male of the body, whom failing," John, Earl of Mar, is introduced, not as affecting or controlling the clause of destination, or the meaning of the particular terms there used, descriptive of different classes of heirs, but for a different purpose, and it cannot, in the opinion of the Lord Ordinary, have that effect. If it had been the purpose of the entailers that the estates should only descend to the person in right of the title, in the event of the attainder being reversed, it is only reasonable to believe that this would have been expressly provided by some words or clause directly qualifying the destination itself, and this all the more that the language of the destination, without such qualification, is perfectly clear in calling the different heirs in a definite order, heirs-male taking before and to the exclusion of heirs-female. The Lord Ordinary is of opinion that the clause in question does not affect the meaning of the destination or the order of heirs thereby called, and that its true meaning and effect is to impose upon the heirs of entail the obligation of using the arms and title, dignity and honours, of the family of Erskine of Mar, in so far as they can lawfully and warrantably do so. The present action is not designed, or, as the Lord Ordinary thinks, suited, to try the question whether an heir in possession like the defender, under the destination, would contravene the entail and be liable to an action of forfeiture in respect of his failure to use the arms and title and dignity of the family of Mar, provided he was not in fact entitled to use these arms and title and dignity. That question can only be properly tried in an action of contravention and forfeiture, and the Lord Ordinary will merely observe upon it here, in the first place, that the clause of forfeiture is very limited, and does not in its terms refer to the title and dignity of Earl of Mar at all; and further, that the argument of the pursuer has failed to satisfy him that an heir of entail in possession of the estates could be held to have contravened the entail by failure to use the arms and dignity of the Earl of Mar, if he were in a position to shew that he had a lawful excuse for not using these, in respect that he was not entitled to do so, and that the title and dignity belonged to another person. Reference was made for the pursuer to a number of cases, and in particular to the following, viz., Sutherland, 1801, Mor., *voce* Tailzie, Appendix No. 8; Leslie, 1774, 6 Paton, 792; Lockhart, 1842, 1 Bell's Appeals, 202; Braid v. Ralston and Waddell, 22 D., 433; and Forbes v. Clinton, 1868, 6 Macph., 900. It appears to the Lord Ordinary, however, that none of these cases affect the decision of the present. In the first of them it is true that the destination in the dispositive clause was interpreted and affected by another clause in the entail, viz., the procuratory of resignation; but the destination itself was there repeated in terms which shewed the meaning which the entailer applied to the dispositive clause. In the various other cases referred to the meaning of the terms used in the destination was gathered mainly, if not exclusively, from the terms and structure of the clause of destination itself; and in none of the cases was plain and ordinary language, such as is used in the present entail for the purpose of calling heirs-male in preference to heirs-female, held to be controlled or affected in such a way as to reverse the order in which the heirs are called, which would really be the result of the pursuer's argument.

"On the whole matter, therefore, the Lord Ordinary has come to the conclusion that, whether the pursuer shall succeed in establishing his right to the title and dignity of Earl of Mar or not, he has no title to the estates held under the entail in a question with the defender, who is an heir called before him under the destination.

"In dismissing the action on preliminary defences lodged against satisfying the production, in place of having a record on the merits made up, the Lord Ordinary has followed the course of procedure which was adopted by this Court and by the House of Lords in the case of The Earl of Perth v. Lady Willoughby d'Eresby's Trustees, 11th March 1869, 7 M., 666. If the pursuer has no title to the estates, it is evidently the best course for him that that should be now determined on the record as it stands, without further expense being incurred."

purchase by Mr David Erskine, and a back-bond containing a trust, and upon that narrative proceeds to settle the estate. The in these words :—"To and in favours of the said Thomas Lord E the son of the forfeited Earl) and the heirs-male lawfully procrea whom failing, to the heirs whatsomever of the said Thomas Lor body ; whom failing, to Lady Frances Erskine, his sister, and th be procreat of her body ; whom failing, to the heirs whatsomever her body ; whom failing, to me, the said James Erskine, and lawfully procreat or to be procreat of my body," and so on.

Now, the institute, Thomas Lord Erskine, died in 1766 with consequently the estate devolved on his sister, Lady Frances Ersl in 1776. She had a family, and her son, John Francis Erskine her and died in 1825. In his person the title of Earl of Mar wa the estate and title became again united. He left two sons, of wh John Thomas, succeeded him in the estates and titles, and Henry the grandfather of the defender, the Earl of Kellie. John Tho son of John Francis, died in 1828, and was succeeded by John who died without issue in 1866. The succession was thus contin uninterrupted through males down to 1866. That branch of th to an end with the Earl, John Francis Miller. He was survive Lady Frances Jemima, who is mother of the pursuer. The pursu whatsoever of the body of Lady Frances Erskine, but not heir-mal

On the other hand, the second son of the restored Earl, Henry I died in 1848, leaving a son, Walter Coningsby, who succeeded t of Kellie, and the defender is his son. So the defender is neare the body of Lady Frances Erskine, while the pursuer is nearest he If, therefore, the descent is to heirs whatsoever of the body, o whatsoever of the heir-male of her body, the pursuer will be entit But if it was a male descent which was provided in the first ins fender will be entitled to succeed. The words here are scarcely construction, because they are "to Lady Frances Erskine, his s heirs-male to be procreat of her body ; whom failing, to the he descending of her body." These are the only words, and their m is that heirs-male must be exhausted before the succession can whatsoever.

But it is said that these words may be controlled by reference words of the deed. It is a settled rule of construction that such so construed if they are susceptible of more meanings than one.

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the dispositive clause, and that the two must be so read as to be consistent. It appears to me that the recital and the dispositive clause are quite reconcileable. In the recital it is not necessary to specify very particularly the order in which the succession is to go. There is only there a general statement that the estate was to be settled on Lord Erskine and his descendants, whom failing, on Lady Frances Erskine and her descendants. But this is more particularly set out in the dispositive clause, which gives the succession first to the male line, and then to the heirs succeeding through females.

Further, it is said that the other parts of the deed make it appear that the intention was that the title and estates should not be separated. The heirs of entail are taken bound to carry and bear certain arms, and to use and bear the sirname of Erskine. But heirs of entail can only be bound so far as they can lawfully carry such arms. Now, if the estate comes into the hands of a person who is not Earl of Mar, he may be entitled to hold it, unless it has been so settled that the title and the estate are to go together. The question is, whether this is so. The pursuer says that he is entitled to the earldom of Mar, and that he is prosecuting his claim to that title in the House of Lords, and if he succeeds in that it will be because the earldom descends to the eldest heir whatsoever, in preference to a remoter heir-male. Is it not the case that in the dispositive clause a remoter heir-male of the body of Lady Frances Erskine is preferable to a nearer heir whatsoever or heir-female? If that be so, then the earldom and the estate are necessarily severed, because the destination in the entail is not the same as the destination of the title of Mar. But it is further contended that we must read the dispositive clause as if it meant that the first heir-male of the body of Lady Frances Erskine should take in the first place; and that her eldest son, having taken, the "heirs whatsoever descending of her body," who were immediately afterwards substituted, must mean or be construed to mean the heirs whatsoever of the body of that first heir-male. Reference has been made to two cases, in particular, as favouring that construction—the case of Largie, and the case of Fettercairn; but there is a very material distinction between the words of the destination here and the words of either of those cases. Here the words are "to Lady Frances Erskine and the heirs-male to be procreat of her body; whom failing, to the heirs whatsomever descending of her body." The two clauses are separated by the words "whom failing." The class first named must be exhausted before the second can succeed. In the Largie case the destination was "to the said Elizabeth Macdonald and the heirs-male of her body of this present marriage, and the heirs-male whatsomever of the body of the said heirs-male." This was read in such a manner that each heir-male should take first, and then that his heir whatsoever should take. It was a case of great difficulty, but has no application to the present case, where there are no such words, nor words susceptible of a similar construction.

In the case of Fettercairn, the destination was "to Sir William Forbes, Baronet, of Pitsligo, and the heirs-male procreated of the marriage between him and the deceased Dame Williamina Stuart or Forbes, my daughter, his spouse, and the heirs-male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively." There was a considerable similarity between that case and the present, but there are also material differences. The destination is to a class of heirs already ascertained,—the existing sons of Sir William Forbes. There could be no more in this class, as Lady Forbes was dead. This was just the same as if they had been called *nominatim*. Then follow the words "and the heirs-male of their bodies respectively." The eldest heir-male having taken, the difficulty arose whether the words "whom failing" applied to the whole class. But the language of the destination in that case is so entirely different from the present that it does not aid the pursuer. The words used have so fixed and plain a meaning that I can find nothing in the deed to warrant the construction attempted to be put on them by the pursuer.

I therefore think that the Lord Ordinary is right, and that the class of heirs-male must be exhausted before heirs whatsoever come in.

LORD DEAS concurred.

and the title. The clause of destination is in the following ter
Thomas Lord Erskine died without issue. His only sister,]
Erskine, succeeded. Her son, John Francis, succeeded to her, a
1824 restored to the earldom of Mar, which had been forfeited in
person of his grandfather, John Earl of Mar. The pursuer of this
heir whatsoever of the Lady Frances Erskine. The defender, the I
is the heir-male of the body of Lady Frances Erskine. The ques
is entitled to succeed to these estates under the destination which l

The right to the peerage of Mar—a title of great antiquity—
or immediately involved in this case. Nor has this Court the powe
of that question of peerage succession. It must be decided by
Peers. We have only to deal with the pursuer's claim to the est
same time, it is not to be overlooked that, on the supposition tha
succeeds, as we must assume that possibly he may, to the title, t
judgment against him in this action would be to separate the est
title. It is naturally and forcibly urged that such a separation c
been intended, and that the deed of entail on which this questio
be so construed as to prevent that separation, and to maintain t
between the peerage and the estates. I appreciate the force of t
If there were any ambiguity in the words of destination, the argu
on the presumption against an intention to separate the estates
would be appropriate. But if the words are not ambiguous, such
is inappropriate and must be excluded. Presumed intention can
effect when contrary to expressed intention. The entail itself, and
clause of destination in the entail, must be read and construed an
there is room for reasonable doubt as to the meaning of the words
of the intention expressed, then the supposed or conjectured int
the title and estates together may perhaps be founded on in suppo
struction of the doubtful expression which seems in accordance v
sumed intention. But if the words are clear and plain, so that
doubt rests on the expressed destination, then there is no room an
place for conjectural aid to construction. I adopt the words of I
in the Largie case, June 24, 1840,—"The general rule unquestion
deed must be construed according to the true force of the expressi
in it. The meaning of one clause, if ambiguous in itself, may b
the context."

being the grandchild of a son, and in short is not limited to the first heirs-male of the body, viz., the sons. There are many instances in which the words have been so construed. But the expression never can comprehend either an heir-female of the body, or a male descending from or through an heir-female. On the other hand, the words "heirs whatsomever descending of the body" must mean in this destination all heirs soever descending of the body, except the heirs-male of the body who are previously called. The clause then proceeds, "whom failing" (as Thomas Lord Erskine and his heirs did fail) then to Lady Frances Erskine and the heirs-male to be procreate of her body." The defender is undoubtedly heir-male of the body of this Lady Frances Erskine, he being the great-grandson, through males only, of John Frances Erskine, the restored Earl, who was the only son of that Lady Frances Erskine. The destination proceeds, "whom failing"—that is, failing Lady Frances and the heirs-male of her body—then to the heirs whatsomever descending of her body,—that is, to heirs-female descending of the body of Lady Frances Erskine. Now, the pursuer is the heir whatsoever, the heir-female descending of the body of the same Lady Frances Erskine being the son of a younger Lady Frances Erskine, who was granddaughter of the restored Earl, and the defender is the heir-male of the body of Lady Frances Erskine. To me it appears very clear that until the heirs-male of the body of Lady Frances Erskine have failed the heir-female of the body of Lady Frances Erskine cannot succeed under this destination.

After the exposition already given by your Lordship it is unnecessary for me to explain the grounds on which I arrive at this conclusion. Unless a doubt can be set up, founded on the two decisions which have been urged on us by the counsel for the pursuer, viz., the case of Lockhart v. Macdonald, and the case of Forbes v. Baroness Clinton, both of which were decided in the House of Lords, there is, in my opinion, no authority opposed to the contention of the defender, that as heirs-male of the body of Lady Frances Erskine he is entitled to succeed under this destination.

These two decisions are, however, of very high authority, and we must be careful in dealing with this case so to read the destination as to give effect to the principles of construction laid down by the House of Lords, affirming in both cases the decisions of our own Court.

I am, however, of opinion that in construing as we now do the words of this destination we do not run counter to the decision either of the Largie case or of the case of Lady Clinton.

In the Largie case the destination was to "the heirs-male of the body of Elizabeth Macdonald and the heirs whatsoever of the bodies of the said heirs-male." The word "and," instead of "whom failing," is a peculiarity in the clause in the Largie case which does not occur here, and which some of the Judges thought important; but still more important are the words "heirs whatsoever of the bodies of the said heirs-male," not heirs whatsoever of the body of Elizabeth Macdonald. It was held, as I think, that the words "the said heirs-male" could not be construed collectively as denoting a class, but must be construed distributively as denoting each individual in succession holding the character of heir-male. This appears to have been considered by Lord Mackenzie and Lord Fullerton as an important peculiarity of the clause, and if I do not misapprehend the remarks of Lord Cottenham he is of the same opinion. Not only did Lord Cottenham propose the affirmance of the judgment, but I think he expressly agreed with the view taken by Lord Mackenzie and Lord Fullerton.

Each heir-male is called *seriatim*, and each heir-male so called is a stirps in the case of Largie. He is, as the Solicitor-General well expressed it, a "compo-ite stirps," comprehending the heirs whatsoever of his own body as within the destination, and I think that these heirs did under the Largie entail partake of the precedence of the stirps as heirs of whom they were called in succession.

In the case of Lady Clinton, again, the expression in the clause of destination is, if possible, even more clear. The destination is to the entailer and the heirs-male of his body, whom failing, to Sir William Forbes and the heirs-male procreated of his marriage with the entailer's daughter, "whom failing, to the heirs

manifest. Therefore I come to the conclusion that the words of d the present case are clear, and that we are not entitled to call in th jectural or presumed intention. The case of the defender rests on destination. Accordingly I agree with your Lordship in the chair adhering to the Lord Ordinary's interlocutor.

LORD JERVISWOODE concurred.

THE COURT adhered to the interlocutor of the Lord Ord

W. & J. COOK, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—A

No. 145.

July 4, 1873.
Traills v.
Small & Boase.

ANDREW TRAILL and ROBERT TRAILL, Pursuers.—*Kirkp*
SMALL AND BOASE, Defenders.—*Fraser—J. Guthrie Sm*

Reparation—Culpa—Machinery—Factory Acts, 7 and 8 Vict. c 19 and 20 Vict. c. 38, sec. 4.—The Act 7 and 8 Vict. c. 15, requir the mill gearing in a factory to be securely fenced.

The Act 19 and 20 Vict. c. 38, limits the obligation to fencing t the mill gearing "with which children and young persons and wome come in contact, either in passing or in their ordinary occupations in

Held that there is still an obligation to fence such mill gearing a to women and children, and not merely such as they are liable to tact with in the regular course of their employment.

Question as to the age at which a person can be guilty of negligence.

2D DIVISION.
Lord Shand.
I.

IN this action Andrew Traill, Leven, and Robert Traill as l trator-in-law, sued Messrs Small and Boase, hemp spinners damages for personal injury.

The condescendence set forth that the pursuer, Andrew T under fourteen years of age, had been employed at a carding the defenders' works, and that he had been injured in conseq machinery not having been properly fenced, as required by t tion of the Act 7 and 8 Vict. c. 15.*

* Section 21, enacts "that every fly-wheel directly connected wi engine, or water-wheel, or other mechanical power, whether in the

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The pursuers pleaded;—(2) The pursuer, Andrew Traill, having sustained severe and permanent bodily injury through the neglect of the defenders, or those for whom they are responsible, in not causing the lesser gearing of the machine at which the pursuer was engaged, and from which he sustained the injury, to be securely fenced in terms of the 21st section of the Act 7 and 8 Vict. c. 15, he is entitled to decree against them as concluded for.

The defenders pleaded;—(3) The accident in question not having been occasioned by any fault on the part of the defenders, and *separatim*, having been caused by the pursuer's own fault, the defenders should be assoilzied.

A proof was led, which shewed the structure of the machine and the mode in which the accident had occurred. These are given in the opinion of the Lord Justice-Clerk.

The Lord Ordinary (Shand) pronounced this interlocutor:—"Finds that the pursuers have failed to prove that the injuries sustained by the minor pursuer, Andrew Traill, on or about 9th October 1871, at the defenders' works in Leven, were caused by fault or negligence on the part of the defenders: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses."*

The pursuers reclaimed, and argued;—Mill-owners were under an obligation to fence their machinery where there was reasonable risk of the young persons employed about their works being in danger. It was not necessary that there should be risk while following their usual duties about the mill. The damage done to the pursuer was occasioned by no fault of his. He was following out his duty in the employment of the defenders, and it arose from the fault of the defenders in having the machinery unfenced.[1]

The defenders argued;—They were only bound to fence machinery where children or young persons would be exposed to danger while performing their work about the mills. If they pleased to run into danger the defenders were not liable. The pursuer had no right to be where he was. There was contributory negligence on his part.

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mill gearing, shall apply only to those parts thereof with which children and young persons and women are liable to come in contact, either in passing or in their ordinary occupation in the factory."

* "NOTE.—The Lord Ordinary stated his views of the evidence in detail to the parties in giving judgment. He thinks it sufficient here to state (1) That he is of opinion on the evidence that, having regard to the place in the defenders' works at which the machine by which the pursuer was injured was situated, there was no obligation by statute or otherwise on the defenders to fence the machine as alleged by the pursuer; (2) that the pursuer has failed to prove as maintained by his counsel at the debate at the close of the evidence (although not pleaded on record) that there was neglect on the defenders' part, or on the part of those for whom they are responsible, to give the pursuer proper and necessary instructions for the performance of a duty said to be attended with danger; and (3) that even if the working of the machine had been attended with danger and there had been a failure to give the pursuer proper or necessary instructions, the fault lay with the manager or foreman of the works who were with the pursuer in the service of the defenders, and these persons having been men of experience and well fitted for their duties the defenders would not in law be liable for their fault in omitting to perform the duty of warning the pursuer."

[1] Grizzle v. Frost, 1863, 3 Foster and Finlason, 622; Wilson v. Merry and Cunningham, May 29, 1868, 1 S. Apps. 326; Gemmills v. Gourock Ropework Co., Feb. 1, 1861, 23 D. 425; Pollock v. Cassidy, Feb. 26, 1870, *ante*, vol. iii. p. 615.

the machine looking from the feeding-table, and consequently or
of the boy, who worked opposite it, where the tow was discharged
machinery was worked by a belt passing over two revolving cyl
removal of which by the hand the machine, when choked, cou
without stopping the general motive power. This machine wa
building with the right portion of it, on which the revolving
situated, within thirteen or fourteen inches of the wall; the b
worked in this space. Some three months before the pursuer, w
under fourteen, was engaged at this machine, its mechanism had b
covered in and fenced, but owing to some alterations on it the fen
removed, and when the pursuer commenced the working there w
prevent him going between the machine and the right-hand wall.
when the machine got clogged, to remove the belt in question fron
on which it worked, and thereby suspend for the time the revolu
the machine until it cleared itself. It appears from the evidence
that he was in the habit of performing this operation by squ
between the machine and the wall, where the wheels in question
and so making his way to the cylinder on which the belt worke
site end of the machine, and after taking off the belt when th
choked to return in the same way between the wheels, which stil
revolve, and the wall. He had only been engaged two days a
when, according to his account, on returning from lifting the b
caught in one of the revolving wheels, and his right arm was so
that it had to be amputated below the elbow. The present a
brought against the mill-owners to recover damages for his injury.

The first question is, whether the defenders were in fault for n
machine fenced. Under the statute 7 and 8 Vict. cap. 15, sec. 51
inter alia, that all parts of the mill gearing in a factory shall be s
and had that statute regulated the present question I entertain
the machine was not properly fenced. It is quite true that th
placed against the wall, but not so placed as to prevent a boy pass
the pursuer describes. But it is said that this statute was altered
1856, by which the operation of this clause was limited to such
women and young persons are liable to come in contact with, and
that the true reading of that statute is that no fencing is required
a situation as children or young persons, in the ordinary and re
their employment, are in danger of coming in contact with,
argued that if the pursuer was working the machine according t

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having been seven feet from the ground. But Lord Campbell, Chief Justice, said, "the sooner such an interpretation of the statute is corrected the better; the Legislature has not said that when there shall be danger machinery shall be fenced, but has declared in the most absolute manner that in all the cases mentioned the machinery shall be fenced."

As this judgment, which was contrary to the opinion of Mr Justice Cresswell, posed on the mill-owners a very serious obligation in regard to those parts of e machinery that were truly not accessible to children and young persons gaged in mills, the limiting statute of 1856 was passed; but it was by no ans intended to restrict the operation of the 7th and 8th Vict., along with hich its provisions were directed to be read, further than to render it unnecesry to fence machinery in regard to which there was no reasonable risk that ildren and young persons should be exposed to it. In the present case this achine had been previously fenced. The evidence shews that it was subsequently fenced; and Paterson, who was in the employment of the defenders at the time, says that he thinks the fencing should have been replaced, and that the machine was not safe without it.

It certainly does not necessarily follow that because the machine was not properly fenced every accident thereby occasioned to those employed in working it can found a claim of damages against the mill-owner. In the case I have referred to as decided by Lord Campbell it was found that although the machine was not properly fenced yet that the injury having been caused by the improper act of the man injured he was not entitled to recover. But that, in the first place, was the case of an adult under the former law. It is obvious that the continuation of the former law as regards children and young persons necessarily implies that they are more likely to come in contact with the dangerous parts of the machinery than adults, and the object of the statute was to have the machinery so fenced that in the course of their ordinary employment they could not come in contact with it. Without saying that a boy under fourteen cannot be guilty of contributory negligence where the statutory provision has been violated I do not think that such is the case here. The evidence leaves it very much in doubt what the instructions were which the pursuer received. The defender says that he told him always to go round by the feeding end of the machine. The pursuer himself says that he received no such instructions; and the man Wallace, who fed the machine and was there all the time until the accident happened, says that he cannot tell whether the pursuer went round by the back,—that is, by the feeding end,—and at last says that he sometimes went the one way and sometimes the other. The result of the evidence, to my mind, is that the boy was in the habit of squeezing between the wall and the machine, as the shortest way, when he required to take the belt off, and that he never was checked for doing so by the man Wallace, who stood at the other end of the machine. It is remarkable that although this man was present when the accident occurred he is wholly unable to tell where the boy was when it happened. Mr Nicol thinks that the boy could not have gone between the machine and the wall from the place where he worked, but this, I think, is not supported by the evidence.

On these two points, therefore, I am of opinion that this machine ought to ave been fenced, and that the pursuer, being under fourteen and engaged at he time in his ordinary occupation, has not liberated the defenders from their esponsibility by taking that method of discharging his duty. It ought not to ave been left open to him to do so. This being so, I am also of opinion that he responsibility of fencing the machine lay with the employer and not with ny subordinate.

The machine has been since fenced, and without giving undue weight to that ircumstance I think it shews that it was possible to fence it. I have no doubt hat the employers thought that the machine was safe enough, and that they id not anticipate the mode of working which the pursuer adopted. But they ught to have performed their statutory duty, and must be liable for the consequences of not having done so.

LORD BENHOLME.—This case mainly depends upon the words
and these words are so explicit that they do not allow us to take
tion carelessness on the boy's part. Here the boy was, in the pro
work, near the unprotected machinery, and the result was that h
In these circumstances I think the statute requires us to give dam

LORD NEAVES concurred.

THE following interlocutor was pronounced:—"Find th
established by the proof that the pursuer, Andrew T
the course of his ordinary occupation in the works of
was injured by coming in contact with a wheel, bein
machine libelled, while the same was in motion: F
said machine and the machinery and gearing ther
securely fenced or protected: Find that the machine
and used in the works of the defenders as that the m
being under fourteen years of age, was liable to com
with the parts or gearing thereof in the course of
occupation: Find that it is not proved that the m
came into contact with the gearing in question thr
dience of orders: Find that the gearing of the machin
had been securely fenced until a few months prior
rence libelled, and that it has been since fenced:
terms of the statute 7 and 8 Vict. c. 15, sec. 21, a
Vict. c. 38, sec. 5, the defenders were bound to h
fenced the said machine and gearing, and that they fa
and are responsible for the injury thereby occasione
recall the interlocutor complained of: Find the defen
the pursuer in the sum of £150 of damages, an
expenses of medical attendance consequent on the sa
decern for payment thereof by the defenders to the
find the defenders liable in expenses of process,
and remit."

ROBERT A. VEITCH, S.S.C.—JOHN GALLETLY, S.S.C.—Agent

No. 146.

July 9, 1873.
Irvine v. Irvine.

2D DIVISION. I.

nieces, and that the grandchildren of a nephew were entitled to succeed *per stirpes* to the share which their predeceasing parents would have had.

Opinion (*per* Lord Cowan) that the condition *si sine liberis*, when applicable, embraces all the descendants of the parties called to the succession towards whom the testator stands *in loco parentis*.

ALEXANDER IRVINE, merchant in Aberdeen, died on 19th December 1849, leaving, *inter alia*, a testamentary writing, dated 8th October 1842, in which he made the following provision as to the residue of his estate:—"Lastly, the whole free residue of my property I wish to be divided among my nephews and nieces, in proportion of one and a-half share to my nephew Thomas, and one share to any other nephews and nieces. The shares of my nephew, Thomas, and of my nieces, Margaret and Ann, to be invested by you in your names (if thought proper not to give the principal, but, if for their advantage, you can give them it as you please); but if not given, it will be for behoof of them, and their husbands in life-rent, and children in fee, and to be declared alimentary, and not attachable for their debts or deeds in any way; and failing children, the shares of those deceasing to go to the survivors of my nephews and nieces, or the families of such as may have predeceased."

By testamentary writing, dated 10th December 1844, Mr Irvine provided that in consequence of the death of one of his nephews "the share of my means which would have fallen to my nephew, had he survived me, shall now belong equally to his family."

One of the testator's nieces, Mrs Margaret Irvine or Smith, died on 16th April 1872, a widow, without issue and intestate, and a question arose as to the division of her share of the residue in the following circumstances.

The whole of the testator's nephews and nieces had predeceased Mrs Smith except one, the Rev. Alexander Irvine.

James Irvine, one of the testator's nephews, had left five children. Of these, a son, John Irvine, alone survived Mrs Smith; of the remaining four children, two died unmarried, and two, Louisa and Alexander, left issue. The question was whether John Irvine was entitled to the whole share of residue payable to his father's family at Mrs Smith's death, or whether the children of Louisa and Alexander were entitled to the proportions of that share which would have been payable to Louisa and Alexander respectively, if they had survived Mrs Smith.

A special case was therefore presentd for the opinion and judgment of the Court by the Rev. Alexander Irvine, the only surviving executor of Alexander Irvine, the testator, and the said John Irvine.

The following questions in law were submitted to the Court:—"(1) Whether the second party is entitled, as the sole survivor of James Irvine's family at the date of Mrs Smith's death, to receive the whole share payable to that family on Mrs Smith's death? or (2) Whether the first party hereto is bound to reserve out of the said share, for behoof of the children of the said deceased Louisa Irvine or Garrow, and of the child of the said deceased Alexander Irvine, the proportions thereof which would have been payable to the said Louisa Irvine or Garrow and Alexander Irvine respectively, if they had survived Mrs Smith?"

Argued for the first party;—The word "families" in the testamentary writing is more flexible than children of predeceasers.[1] But if the terms of the writing are not themselves sufficient to let these children take their parent's share the *conditio si sine liberis* applies, the testator having stood *in loco parentis*.[2]

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[1] M'Laren (Wills and Suc.), 726; Fyffe v. Fyffe, Jan. 13, 1841, 3 D. 1205.
[2] Wallace v. Wallaces, Jan. 28, 1807, 12 F.C. 596; Mor. No. 6, App. Clause.

No. 146.

July 9, 1873. Irvine v. Irvine.

Argued for the second party;—(1) The ordinary and natural meaning of the word "family" is children.[1] And the connection in which the word is used in other parts of his testamentary writings makes it clear that that was his meaning, for he provides that in consequence of one of his nephews having died his share is to go "equally to his family." Now, if grandchildren are included by the same word that is used to denote children they ought to claim *per capita*, which they are not doing. (2) The *conditio si sine liberis* does not apply, because the testator has himself contemplated the event of the institute dying before the period of division leaving issue, and has provided for it, and wherever that is the case the law does not add its implied substitution to the express substitution of the settlement.[2] Here the testator has done precisely what the law would have done for him, and it is not bound to do anything more. Although a man may be technically *in loco parentis* to the remotest generations, the *conjectura pietatis* grows weaker as you descend in the scale of relationship.[3]

At advising,—

LORD COWAN.—This special case relates to the share of the deceased's estate effeiring to his niece, Margaret Irvine or Smith, appointed by his will to be invested by his executors for behoof of herself and husband in liferent, and of her children (if she had any) in fee; and failing children, the share is directed "to go to the survivors of my nephews and nieces, or the families of such as may have predeceased." It is admitted by the parties that the share did not vest in Margaret, and that, as she died a widow without children, the succession to it falls to be regulated by this clause. Only one of the nephews and nieces of the testator, the Rev. Alexander Irvine, survives, but there are families of predeceasing nephews and nieces; and as regards the immediate descendants of these parties it is not disputed that they are entitled to participate in Margaret's share along with the surviving nephew of the testator. But as regards the share payable to the family of the deceased James Irvine, one of the predeceasing nephews, it is to be decided whether his immediate descendants alone are to be preferred, or those more remote to be conjoined with them in the succession. These parties are (1) John Irvine, the second party hereto, the son of James, who alone survived Mrs Smith; and (2) the children of Louisa and Alexander, son and daughter of the said James Irvine, who predeceased Mrs Smith, the former leaving a family of four daughters, and the latter one child. It is to regulate the respective interests of these parties that the questions of law are presented for the opinion of the Court.

The construction of the words of the deed, fixing the destination of the testator's residuary estate, seems to me to be attended with little or no difficulty. Margaret Irvine's share, as appointed by the deed, falls to be taken by surviving nephews and nieces, and (for the disjunctive "or" must plainly be read as conjunctive) by the families of predeceasing nephews or nieces *per stirpes*; and, as regards the family of James, the testator's nephew, who predeceased Mrs Smith, and whose share is in question, they take as his descendants that equal share which he would have taken had he survived. There is no room for holding that they take on any other footing than as in right of James. It is *per stirpes* not *per capita* that the succession is to be regulated. The family are to take the share, and I think it must necessarily be held that when immediate descendants fail, leaving issue, that issue takes their parent's place. The word "family" is of large significancy in a question of this kind, and includes all descendants, so that all may participate in the succession according to the order of law, children repre-

[1] Fyffe v. Fyffe, Jan. 13, 1841, 3 D. 1205.

[2] Rhind's Trustees v. Leith and Others, Dec. 5, 1866, *ante*, vol. v. 104 (Lord Neaves' opinion, p. 111).

[3] Sturrock v. Binny, Nov. 29, 1843, 6 D. 117.

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ng their parents in their several generations. Assuming, however, that the should be regulated by the application, or not, of the *conditio si sine liberis*, ntended for in the argument, I have no hesitation in holding that, on prin- as well as on authority, that condition does apply to a case of succession the present. The testator was admittedly *in loco parentis*. Had the nation been merely to "nephews and nieces" that would have led to the ndants of predeceasers being included, so as to take their parent's share, her they were of the first or second generation of descendants. This was lisputed in the argument for the second party. But it was ingeniously con- ed that, because the families of predeceasing nephews and nieces are ex- ly named, this indicated an intention on the part of the testator that the generation of descendants only was to be included,—a construction of the s which, though there might be living descendants of a remote degree, d, in a certain state of the family at the time of distribution, have led to tacy, as, *e.g.*, had all the nephews and nieces and their immediate issue pre- ased, and only great-grandnephews and great-grandnieces being alive. But view is to mistake the effect of the condition *si sine liberis*, which, when icable, embraces all the descendants of the parties called to the succession rds whom the testator stands *in loco parentis;* and it is also to narrow the effect and meaning of the very words of this deed in calling the families of eceasers to the succession.

or these reasons I am of opinion that the first question should be answered ie negative, and the second in the affirmative.

ORD BENHOLME concurred.

ORD JUSTICE-CLERK.—I concur in the judgment. I am not altogether able rame any very uniform rule out of the decisions on the subject. The im- ant elements in this case are, first, the testator was *in loco parentis* to the ficiaries; secondly, it was a share of residue that was bequeathed, and not ecific legacy; thirdly, the term "family" is more comprehensive than that children," and *prima facie* excludes *delectus personæ*, and includes descen- ts.

ord Neaves authorises me to state that he concurs in the judgment.

ORD NEAVES was present when the case was heard, but absent when it was ised.

THIS interlocutor was pronounned:—"The Lords having heard counsel on the special case are of opinion, and find (1) that the second party is not entitled, as the sole survivor of James Irvine's family at the date of Mrs Smith's death, to receive the whole share payable to that family on Mrs Smith's death; and (2) that the first party hereto is bound to receive out of the said share for behoof of the children of the deceased Louisa Irvine or Garrow and the child of the deceased Alexander Irvine, the proportions thereof which would have been payable to the said Louisa Irvine or Garrow, and Alexander Irvine respectively if they had survived Mrs Smith, and decern: Find the party of the second part liable in expenses to the party of the first part, and remit," &c.

ANDREW & WILSON, W.S.—MORTON, NEILSON, & SMART, W.S.—Agents.

No. 147. THE LORD ADVOCATE, on behalf of Her Majesty and the Commissioners of Woods and Forests, Objector.—*Sol.-Gen. Clark—Kinnear.*
THE EARL OF GALLOWAY, AND JOHN FLETCHER HATHORN, Esq., Respondents.—*D.-F. Gordon—Marshall.*

July 11, 1873. Lord Advocate v. Earl of Galloway, and Hathorn.

Teinds—Locality.—Teinds had belonged to a priory before the Reformation, had never been erected into a temporal lordship, but after the Reformation were held *in commendam* by laymen until 1612, when they were regularly united to a bishopric. They were inalienable in the hands of the bishop before the submissions to King Charles I. in 1627 and 1628, and fell to the Crown on the abolition of Episcopacy in 1689. *Held*, in a locality, that these were bishops' teinds in the hands of the Crown and entitled to be postponed to teinds held on heritable right.

1ST DIVISION. Lord Gifford Teind Clerk.

THIS question arose upon objections by the Lord Advocate, on behalf of the Crown, to the interim schemes of locality in the conjoined processes of locality of the stipend of the parish of Whithorn. The following narrative is taken from the opinion of the Lord President:—

"The Lord Advocate, on behalf of the Crown, objects to the locality, as it has hitherto been adjusted, on the ground that the stipend has been localled on the teinds in the hands of the Crown to the effect of relieving the teinds of the Earl of Galloway, and of Mr Fletcher Hathorn of Castlewigg, which are held on heritable right.

"The ground of the objection is that the crown teinds are bishops' teinds. Of course that objection lays the burden upon the Crown to prove that they are so in point of fact, and I am of opinion that this onus has been discharged, and the fact established.

"The history of these teinds can be very shortly stated. The church of Whithorn before the Reformation was certainly a patrimonial church of the priory of Whithorn, and after the Reformation that priory was given *in commendam* first to one layman and afterwards to another for a considerable time. It was shortly after the Reformation that the heritable rights now claimed respectively by Lord Galloway and Mr Hathorn came into existence. In 1569 the then commendator granted a feu of the ten merk land of old extent, called Mains of Whithorn, and another feu of the five merk land of old extent of Preistrie, these being part of the patrimony of the priory, along with the teinds, the conveyance in each case being *cum decimis inclusis*. This conveyance led to a mistake, it being considered that it was *cum decimis inclusis nunquam antea separatis*, which it certainly was not. Now, this conveyance was undoubtedly illegal altogether, and if it had been challenged *tempestivè* it could not have stood. It has however so stood for 300 years, and it is impossible for the Crown, especially after recognising it by charter of confirmation, to challenge it now. It must therefore be assumed that Lord Galloway and Mr Hathorn, who are now in right of these feus, have good heritable rights to their teinds. This explanation is necessary, because otherwise the fact of these conveyances having been granted would be wholly inconsistent with the contention for the Crown that the teinds of Whithorn in their hands are bishops' teinds. From the above narrative it will be seen that the heritable rights to these teinds came into existence before the teinds were bishops, teinds, and when they were the property of the priory and of a lay commendator.

"The grants *in commendam* continued for some time, and the last was about 1580 in favour of Patrick Earl of Orkney. In 1605 James VI. carried out his favourite scheme of restoring the order of bishops, though it was not actually put in force till 1606. His Majesty was, however, in difficulties how to supply maintenance for his new bishops. While cast-

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ng about for a source of revenue for the bishops of Galloway, he found ortunately that Patrick, Earl of Orkney, had turned traitor, and his states were forfeited, and among them the emoluments of the priory of Vhithorn. Accordingly in that year, 1605, he granted the patrimony of hat priory to Gavin Hamilton, the first restored bishop of Galloway, for is maintenance, but for his life only. Thereafter, on 31st July 1612, he ranted the same to William Coupar, Hamilton's successor, for his life also. hese grants in liferent would never have made the teinds of Whithorn, ishops' teinds—they were only grants *in commendam* of priory teinds. ut in 1612 an Act of Parliament was passed, which changed the character of these teinds altogether. This Act annexed the priory of Whitorn to the bishopric of Galloway, to the effect that the whole revenue f the priory was given to the Bishop of Galloway for his maintenance. he Act is not in existence, but its tenor and effect are clearly stablished by contemporary writings. I think, therefore, that the teinds in question became in 1612 proper bishops' teinds, and continued in the hands of the bishops of Galloway as such until the troublous times in 1639. They were again held by the bishop after the Restoration, and finally came into the hands of the Crown at the Revolution in 1689 as bishops' teinds."

The Lord Advocate pleaded;—1. The whole teinds of the parish, except those held on heritable right, being bishops' teinds in the hands of the Crown, the augmentations ought to be laid *primo loco* on teinds held on heritable right.

The respondents pleaded;—2. The objector has no right or title to maintain that the augmentations should have been allocated *primo loco* on the teinds held on heritable rights, in respect that it has not been shewn that the teinds upon which the augmentations have been localled are bishops' teinds in the hands of the Crown, and the objections ought therefore to be repelled. 3. The objections are excluded—(1) By *mora* and acquiescence; and (2) by prescription. 4. The objections ought to be repelled—(1) In respect that they are ill founded in point of fact; and (2) That they re untenable in law, and the respondents should be found entitled to xpenses.

A proof having been led, which consisted entirely of documentary evilence, the Lord Ordinary (June 22, 1871) pronounced an interlocutor inding "that the teinds of the parish of Whithorn in the hands of the rown are bishops' teinds, or at all events are church teinds entitled to ll the privileges in allocation of bishops' teinds in the hands of the rown: Finds that in allocating the stipend in the present conjoined rocesses of locality the augmentations ought to be laid *primo loco* upon inds held on heritable right, or at all events the same same should e laid on teinds held on heritable right before any part thereof is laid pon the teinds in the hands of the Crown, and to this extent sustins the objections for the Lord Advocate, and remits to the teind clerk rectify the locality accordingly: Finds the Lord Advocate, as repreng the Crown and the Commissioners of Woods and Forests, entitled to xpenses," &c.*

* "NOTE.—The questions raised in the present record are—(1) Whether the inds of the parish of Whithorn are bishops' teinds; (2) Whether, at all events, ey are priors' teinds, entitled in questions of allocation to the same privileges bishops' teinds; and (3) Whether, in the present conjoined processes of locality, e said teinds in the hands of the Crown ought to be postponed in allocation to e teinds held on heritable rights. In substance, the Lord Ordinary has nswered these questions in the affirmative, and the result is that he has sustained he objection stated by the Crown, and appointed the locality to be rectified.

No. 147. The respondents reclaimed. The Court appointed the parties to lodge cases.

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"A proof was allowed, but it consisted entirely of an extensive recovery of old title-deeds, rentals, and other documents, no oral proof being necessary or even possible. The documents raise several important questions both of fact and of law. The Lord Ordinary will shortly notice the questions which he has virtually disposed of by the present judgment.

"(1) The Lord Ordinary thinks it is proved that the whole teinds of the parish of Whithorn—at least the whole teinds thereof now in the hands of the Crown—were originally priors' teinds. They belonged to the priory of Quhithorne. This seems established not only by the rentals of the great church benefices given up in 1561, but by the various grants, presentations, and tacks in the sixteenth and seventeenth centuries, many of which are in process, and specimens of which are printed in the joint print for the parties.

"Whithorn was never, strictly speaking, either a bishopric or a part of the patrimony of a bishopric, and although, as will be immediatcly noticed, the teinds of Whithorn were made over to the bishop of Galloway, it becomes a serious question whether this grant had the effect of converting what were originally priors' teinds into bishops' teinds. This question of law directly arises in the present case, but in point of fact it can scarcely be disputed that the teinds of Whithorn were originally not bishops' teinds but priors' teinds belonging to the priory of Whithorn.

"(2) It seems to be proved that these teinds—that is, the teinds of the priory of Whithorn—were given *in commendam* to various laic commendators prior to 1605. This is established, for example, by the tack by Robert, commendator of the priory of Whithorn, of 3d October 1572, and by the tacks by Patrick Earl of Orkney, as commendator of said priory, granted in 1591 and 1596. It is true these commendators only held the teinds *in commendam* and not heritably, and only at most for their lives; but it may not be immaterial that before they were granted to any bishop they were given to laic commendators.

"(3) The said teinds were first given to the bishop of Galloway in 1605, and then only for the life of the existing prelate, Mr Gavin Hamilton. This is proved by the crown grant of 29th November 1605, which bears *in gremio* that the teinds had come back to the Crown by the rebellion and denunciation of Patrick Earl of Orkney, the last commendator. It is material to notice that the grant expressly bears to be made because the emoluments and patrimony of the bishopric were dilapidated and exhausted, so that Bishop Gavin Hamilton could not therefrom maintain suitable state and dignity. The grant, however, was only for Bishop Gavin Hamilton's life.

"(4) A similar liferent grant was made by the Crown in favour of the next Bishop of Galloway, Bishop William Coupar, dated 31st July 1612.

"(5) These temporary grants of the priory, including the teinds of Whithorn, were followed, in or about 1612, by a permanent union of the priory and teinds of Whithorn to the bishopric of Galloway.

"This union is said to have been effected by an Act of Parliament passed in October 1612; but this Act is now lost, at least no copy of it can be found. It is referred to, however, not only in various deeds dated very shortly after its passing, but in other Acts, and it is expressly renewed and confirmed by the Act of Parliament of 28th June 1633. Reference may be made to the charter of confirmation by the Bishop of Galloway in favour of Lord Garlies, dated 3d March 1615, in which it is expressly said that the priory of Whithorn and the abbacy and monastery of Glenluce and Tongueland, both temporality and spirituality, were united, annexed, amd incorporated with the bishopric of Galloway by the Act of October 1612, to remain so in all future time.—(See also Thomson's Acts, vol. iv. p. 522.)

"The same thing is repeated in the charter of novodamus of May 1615, in the crown charter of confirmation of July 1615, and elsewhere.

"The Act of Parliament of 28th June 1633 (v. Thomson's Acts, p. 73) confirms certain grants to the bishopric of Galloway, *inter alia*, the grants of the

The respondents argued;—In order to succeed the Crown must establish three propositions—(1) That the teinds in question truly are

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priory of Whithorn and the teinds thereof, and ratifies the same, 'togider with the former Actes of Parliament quhairby the saids Pryorie of Quhithorne and Abbacies of Tungland and Glenluce wer annexit unit and incorporat into and with the said bishopric of Galloway in all and sundry pointes articles and clauss' therin contenit.' The Act then proceeds of new to annex, unite, and incorporate, *inter alia*, the priory and teinds of Whithorn with the bishopric of Galloway, to remain in all time coming 'ane proper pairt of the patrimonie thereof.'

"The Lord Ordinary holds that the evidence of this statute, and of the other deeds, sufficiently instructs that in 1612 the teinds of Whithorn were made a proper part of the benefice of the bishopric of Galloway. They were certainly so in 1633; but in one view of the law the earlier date, 1612, may be of importance.

"(6) Holding the above facts to be proved, the Lord Ordinary is of opinion that the teinds of Whithorn became in 1612 proper bishops' teinds. That they were originally priors' teinds seems to be of no importance. Bishops got their teinds under various ecclesiastical arrangements, and got their emoluments from various sources. Lands were mortified to the bishoprics by private donors. Abbacies, priories, or even proper parsonages, might be suppressed in order to enlarge the bishop's revenue; but the Lord Ordinary thinks that all teinds which ultimately came to be the bishop's exclusive property and at his absolute disposal, so that he might devote the same, if he pleased, to maintain 'his state and dignity,' were bishops' teinds, whatever their prior history may have been. Kirks made mensal kirks—that is, to support the bishops' table—were bishops' kirks, and the teinds thereof were bishops' teinds, and this though originally they may have been proper parsonages. From and after 1612, therefore, it is thought that the teinds of Whithorn were bishops' teinds.

"(7) If this be so, the Lord Ordinary thinks that, in point of law, these teinds, which on the abolition of Episcopacy fell into the hands of the Crown, are, while they continue in the Crown's hands, entitled to postponement in allocation.

"The respondents no doubt maintained that to give the teinds this privilege they must be bishop's teinds at the date of the Reformation—that is, at or about 1560. The Lord Ordinary cannot find authority for this. The passage founded on in Connell (pp. 507-8) is obscure and ambiguous, and none of the cases seem to make any limit of the date of acquisition by the bishops as an essential of the privilege.

"There is nothing in principle which should limit the date, and give teinds acquired by a bishop in 1560 a greater privilege than those acquired in 1612, or should give teinds mortified to a Popish bishop a greater privilege than those originally mortified to a Protestant one. Indeed the privilege, such as it is, only rests upon practice, which could not commence till after 1633, and the practice seems not to have to any extent depended on the date of the acquisition of the teinds by the bishop. The first case is that of Arngask, 15th July 1715, 1 Connell, 504. The privilege was recognised in many subsequent cases. See, among others, Officers of State v. Lochnell, 7th March 1770, Mor. 14,796; Officers of State v. Christie, 16th July 1788, Mor. 14,818; Deans of Chapel Royal v. Hay, 11th December 1799, Mor. App. and Teinds, No. 6. Whatever be its origin, the existence of the privilege must be held to be established.

"(8) The respondents founded strongly upon the case of the Lord Advocate v. Gordon's Trustees, 17th January 1868, affirmed in the House of Lords 9th June 1871, where it was held that a usage of allocation for a hundred years was inconsistent with the Crown's claim of postponement for bishops' teinds. But in that case the true question was, whether the teinds were in point of fact bishops' teinds or not. They could not be distinguished from other teinds which were not bishops' teinds, and the judgment really went on a failure to prove the fact. In the present case, according to the Lord Ordinary's view, there is no doubt about the fact that the teinds became bishops' teinds in 1612.

"(9) Even if the teinds in question were to be held priors' teinds in the

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bishops' teinds in the hands of the Crown; (2) That such teinds are entitled to exemption; and (3) That they are entitled to such exemption in a question with the respondents, whose heritable rights to the teinds have flowed from the Crown, and from former ecclesiastical holders of these teinds. The *onus* should be laid upon a party claiming such an extraordinary privilege, because the general rule is that teinds held by heritors upon heritable right are liable to be localled upon only *ultimo loco*.[1] But not only has the objector failed to establish these propositions, but the respondents have established the negative of all these propositions. They have established,—

I. That the teinds of the parish of Whithorn, belonging to the bishops of Galloway at the Revolution, and thereafter and now to the Crown, never were "bishops' teinds," because (1) The whole teinds of Whithorn were priory teinds before the Reformation; (2) for nearly half a century after the Reformation these teinds were in the hands either of the Crown or of a lay commendator, by whom a large portion of the teinds was feued out for onerous considerations to vassals now represented by the respondents; (3) although the teinds not so feued out were afterwards annexed to the bishopric of Galloway, they were annexed only as priory teinds to the benefice of the bishopric; (4) neither the bishop nor the bishopric ever at any time possessed or had right to the whole teinds of the parish; (5) the kirks of the priory, including Whithorn, were truly common kirks of the bishopric, which have no right of postponement such as is contended for.[2]

II. That the teinds so belonging to the bishop, even if changed by the annexation from priory into "bishops' teinds," are not entitled to any privilege in localities as against teinds held by heritors on heritable right,

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hands of the Crown, the Lord Ordinary would be disposed to give them the same privilege in allocation, though certainly this point is very open to dispute. The reason for the privilege is the same. The privilege of postponement has been extended to teinds for pious uses, and even to college teinds.—See Heritors of Portmoak v. Douglas, 9th December 1795, Mor. 14,823. The analogy is very important, and shews that the privilege is not peculiar to the Crown.

"(10) Lastly, the respondents founded very strongly upon the usage of allocation as barring the present objections.

"The Lord Ordinary doubts whether mere usage or neglect on the part of the Crown would ever bar the Crown from claiming the right, if it really existed; but he thinks the usage in the present case is sufficiently explained by two circumstances:—

"1. Until recently the Crown teinds were always under tack, and the Crown, which always drew its full tack-duty, however the stipend was allocated, had really no interest in the allocations; but,

"2. And chiefly, the reason of the former allocations seems to have been that the teinds claimed on heritable right, which were postponed or rather exempted altogether in the allocation, were claimed on a *decimæ inclusæ* right, that is, as being teind free altogether, and this right was without any inquiry conceded. It was only in the present process of locality that it was decided that these *decimæ inclusæ* rights were bad as such, as they were not held with the clause *nunquam antea separatis*. The alleged *decimæ inclusæ* right has now therefore been found to be a simple heritable right, and it is now for the first time that these teinds are to be allocated upon as held on heritable right. Their former exemption cannot be pleaded upon as affecting the new order of allocation, because it is only now that a question of the order of allocation with them arises for the first time."

[1] Bankt. ii. 8, 169; Connell on Teinds, vol. i. p. 483.

[2] Solr. of Tithes v. E. of Moray, May 23, 1797, M. 15,704; Solr. of Tithes v. Belches, Dec. 3, 1800, M. App. Teinds, 10.

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ecause (1) There is no foundation for the alleged privilege either in principle r in statute, or in judicial decision, the Arngask[1] case having been a decision n specialties, and having been imperfectly known to or understood by the udges who decided the cases of Lochnell[2] and Elmslie.[3] (2) The teinds of ıensal kirks are not entitled to any such exemption, in respect that during Episcopacy the bishop was bound, out of these teinds, to provide ministers ith competent stipends, and they cannot now be more highly privileged han when in the hands of the bishop. (3) Even assuming teinds of ıensal kirks to be privileged, the privilege is confined to kirks which ere mensal kirks of bishops before the Reformation, and does not extend to hose which were acquired from religious houses after the Reformation;[4] ut Whithorn was never a mensal kirk of the Bishop of Galloway; it was priory kirk, and was not acquired by the bishop till 1612, and even then he bishop did not acquire right to the whole teinds of the parish.[5] (4) The nveterate usage for 250 years, both during Episcopacy and since its abolition, as been to allocate the stipend *primo loco* upon the teinds in question, and to xempt altogether, or at least to postpone in the allocation, the teinds held n heritable right, and the bishops, or the Crown as successors of the ishop, have always been parties to the processes in which the teinds in uestion have been so dealt with.

III. That even if the crown teinds are bishops' teinds, and entitled to exnption from allocation as in a question with teinds held on heritable rights, ıey are not entitled to such exemption as against the respondents' teinds, ecause (1) The Crown having, while the priory was held by a commendar, sanctioned an onerous grant of the teinds of the respondents' lands, it was ot entitled, after resuming possession of the priory, to make any grant of ıat benefice, except under burden of the feu-rights of the said teinds. (2) he grant in favour of the bishop was accordingly made subject to these ;u-rights, which were, for onerous considerations, renewed from time to me by the bishops, and by the Crown after the abolition of Episcopacy. 3) Neither the bishops nor the Crown were or are entitled to plead an lleged privilege of postponement in allocation as against their own nerous grants in favour of the respondents or their authors, but, on the ontrary, the free teind remaining in their hands as superiors and titulars ıust, according to the law as settled in numerous cases, be exhausted efore the respondents can be called upon to contribute to the stipend.

It was argued for the Lord Advocate;—It was true that in previous ocalities the teinds of the respondents were not localled upon, but that as because their lands were erroneously supposed to be held *cum decimis clusis*. The question as to the mode of allocation therefore arose now or the first time. The objector (the Crown) must prove that the Crown

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[1] Minister of Arngask, 1715, cited in Officers of State and E. of Breadalbane . Campbell of Lochnell, March 7, 1770, M. 14,796; see also Connell on Tithes, 405; Sess. Papers, Arniston Coll. in Adv. Lib. vol. xi. No. 23; Forbes Coll. ol. iii. p. 328, *seq.*, vol. vi. p. 675, *seq.*

[2] 1770, M. 14,796.

[3] Skene and Elmslie v. Officers of State, June 3, 1795, M. 14,822; Balfour . Officers of State, June 16, 1742, Elch. Teinds, 16, and Connell, i. 506, enthorn case, 1734, Connell, i. 507, and Elch. l.c.; Officers of State v. Christie, uly 16, 1788, M. 14,818; Littledean case, Sess. Papers, Arniston Coll. vol. i. No. 23; Locality of Prestonkirk, Nov. 14, 1846, 9 D. 61.

[4] Ld.-Adv. v. Gordon's Trs. Jan. 17, 1868, *ante*, vol. vi. 250,—aff. *ante*, vol. ix. L.L. 73.

[5] Stair, ii. 8, 35; Hope's Minor Pract. ii. 1 and 2, 13; Forbes on Tithes, pp. 5, 73; Bankton, ii. 8, 9, 12; Connell on Teinds, vol. ii. App. p. 291; Keith's at. of Scottish Bishops, p. 161.

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was titular, that before the abolition of Episcopacy the teinds were bishops' teinds, and that on that event they passed to the Crown. There was no doubt as to the crown right of titularity. The history of the parish from the Reformation downwards shewed that the teinds in question were bishops' teinds before 1689. The priory of Whithorn had never been erected, but held *in commendam*, and therefore continued to be a church benefice after the Reformation. The church of Whithorn was one of the proper churches of the priory, and, along with the others, and the teinds that had belonged to the priory, was given to the Bishop of Galloway for his maintenance, and permanently united to the bishopric in 1612 by an Act of Parliament which, though lost, is sufficiently proved by various contemporary deeds.[1] But the respondents denied the privilege of postponement claimed for bishops' teinds, and objected that there was no sound or intelligible principle on which it could be maintained. The privilege was not one of exemption, but of position in a locality. It was idle therefore to look for the source of the privilege to any period before the Reformation, for then the parson's right was to levy the teinds for his own use, and even where he was a stipendiary the teinds belonged to a bishop or religious house, who levied them all, and there was no such thing as a lay heritor entitled to the teinds of his own lands. In a variety of leading cases, subsequent to the Reformation and to the abolition of Episcopacy, the privilege had been recognised, and rested on very intelligible grounds. The judgment in the Arngask case was a determination of the general question, and it had been followed as a leading case in the Lochnell case, and in Officers of State v. Skene and Elmslie.[2] In short, the point has been regarded as fixed law, and hundreds of localities have been made out, acquiesced in, and approved by the Court on that footing.[3] Where the point has been adverted to at all, it has been only to confirm the general rule. The objector referred to the interlocutors of Lord Moncreiff and Lord Barcaple,[4] printed at the end of this report.

The contention that only those bishops' teinds, if any, were entitled to the privilege, which were bishops' teinds before the Reformation, was chiefly supported by a dictum of Sir John Connell's,[5] which was somewhat ambiguous, but could not bear the meaning attached to it by the respondents. The ground of decision in the cases of Littledean and others referred to by him was not that the teinds were acquired at any particular date, but that they had been feudalised in the person of a layman, and acquired from him by a temporal title.

The objection that this was not a mensal church proceeded on a misapprehension of the nature of the bishops' right in the teinds of mensal churches,[6] and the objection that the annexation appropriated the church and teinds to the bishop and chapter in common was hardly more intelligible.[7] The statutes referred to shew that if, after the Restoration, a bishop is found in possession of the teinds of a parish which his prede-

[1] See deeds printed in app. to record, and Thomson's Acts, v. p. 72.

[2] See also 1693, c. 23; Heritors of Portmoak v. Douglas, Dec. 9, 1795, M. 14,823; Deans of Chapel Royal v. Hay, M. Teinds, App. 6.

[3] Connell on Tithes, i. 506; Bain v. Officers of State, June 1, 1858, 20 D. 1006.

[4] This was also before the Court in reference to another question, in Lord-Adv. v. L. Arbuthnott, &c. July 8, 1868, *ante*, vol. vi. p. 999.

[5] Connell, i. 507.

[6] Connell, i. 59, 66; Hope's Minor Pract. tit. ii. p. 83; Stair, ii. 8, 27; Ersk. ii. 10, 11; Da Gauge, *voce Mensa;* Craig i. 15, 7, 8.

[7] Freeman on the Cathedral of Wells, 45; Innes's Sketches of early Scottish History, p. 81; 1606, c. 2; 1617, c. 2; 1594, c. 199; 1662, c. 1.

cessors had also enjoyed before 1639, it must have been a part of the proper patrimony of the bishop himself, and could not by possibility have been a common kirk. The same result is shewn by the different treatment at the Revolution of teinds which had belonged to bishops and those which had belonged to chapters.[1] And it was no answer to the present claim that the bishop was liable to support the minister of Whithorn, for all bishops' teinds during the subsistence of Episcopacy were subject to the same burden.[2]

At advising,—

LORD PRESIDENT.—(After the narrative above quoted)—That being the state of the facts, the question is, is there any reason in point of law that these teinds should not enjoy the privilege of being postponed to all the other teinds in the parish? That is, are they to be localled on before or after the teinds to which the proprietors of the land have acquired heritable right as above described?

It was contended on the part of the respondents that this alleged privilege of bishops' teinds has no reasonable or sound foundation in law. I am afraid it is too late to maintain that proposition, because it has been settled by a series of decisions that teinds which were bishops' teinds when they came into the hands of the Crown are entitled to the privilege here claimed. No doubt, if the teinds had once been erected into a temporal lordship and had come into the hands of the Crown, even though they again returned into the hands of a bishop, and on the abolition of Episcopacy fell to the Crown, they would not be bishops' teinds; they would have been feudalised by having been in the hands of a layman, and would not be entitled to the privilege of bishops' teinds. These teinds, however, never were erected into a temporal lordship. When they were in the hands of laymen they were held only *in commendam*, which is quite a different thing. The cases therefore where it was decided that the bishops' teinds, which had been erected into a temporal lordship, were not entitled to the privilege here sought have no application.

It was also contended that the nature of this privilege could not easily be explained or defined. There is no difficulty in that. It is quite settled that the test of this privilege is whether the teinds are or are not inalienable,—not inalienable in the hands of the Crown, but in the hands of the original possessor. If the teinds were inalienable in the hands of the bishop then they are entitled to the privilege, and so with college teinds, hospital teinds, and teinds devoted to pious uses, which are exempt in virtue of statute 1693, cap. 39, where it is declared "that the said commission shall not be extended to the buying or selling of teynds which formerly pertained to the bishops and now belong to their Majesties by the abolition of Prelacy, so long as the said teynds shall remain in their Majesties' hands undisponed, nor to teynds belonging to colledges and hospitalls or mortifyed or destinate for pious uses."

In the case of the Deans of the Chapel Royal v. Hay, 11th December 1799, M. App., *voce* Teinds, No. 6, it was laid down that that was the true rule for ascertaining whether teinds are entitled to this privilege.

It was further maintained by the respondents that the grant by the statute 1612 to the Bishop of Galloway was truly not to the bishop but to the chapter, or at all events to the bishop and chapter. It appears to me that the answer to that by the Lord Advocate is both conclusive and historically correct. It is said for him that at the time of the Act of 1612 there was actually no chapter in existence in Galloway. The statute of 1594, cap. 99, had the effect of destroying all chapters and their right to their patrimonial kirks. After that Act there was truly never such a thing as a kirk belonging to a chapter. That

[1] 1690, c. 23; 1693, c. 23; 1693, c. 25.

[2] 1581, c. 100; Connell, i. 100; Knox's Hist. of the Reformation, b. iv. vol. ii. p. 298, ed. 1848; Keith's History of the Affairs of the Church of Scotland, App. to b. iii. vol. iii. p. 346; Hope's Minor Pract. 102, 103; Connell, i. 90; i. 504, 505.

Episcopacy at the Revolution. They could not then have been i
the chapter, because chapters were not restored after the Rest
were therefore restored to the bishop as proper bishops' teinds. I
quite plain that these teinds came to the Crown at the Revol
bishops' teinds.

But it is contended further for the respondents that no bish
entitled to this privilege which were not bishops' teinds before th
I cannot see any good ground for this contention. The only t
any weight to it is the fact that Lord Colonsay, in the case of the
v. Gordon's Trustees, decided recently in the House of Lords, is re
used some expressions in his opinion which have been quoted t
view. I confess I am unable to understand how the passage qu
way into the report. It is quite unnecessary to the decision o
Crown there having failed to make out that the teinds were bisho
it is in direct opposition to many opinions expressed by that no
Lord when he presided in this Court. I cannot help thinking th
misreported or misunderstood. I cannot find any ground for holdi
teinds are not entitled to this privilege unless they were bishops' te
Reformation. I can quite understand its being said that they
claim to the privilege unless they had existed as bishops' teinds
mission to Charles I. Unless the teinds we are dealing with
teind, and inalienable before the submission to the King, and bef
arbitral was embodied in the statute of 1633, they could not
this privilege, because then they would have belonged to that
which might be bought by the heritors at nine years' purchas
already said, the proper test is whether the teind was inalienable
holder, and I have shewn that it was so in this case. No teind
this exemption unless it was bishops' teind before the statute of
submission in 1627 and 1628. It is impossible, however, to find
holding that the date at which teind must be bishops' teind in
titled to the privilege is antecedent to the Reformation.

The reason why this privilege is given to inalienable teind is o
alienable teind was liable to be localled on the same way as ordi
all other teind being alienable, the heritors would buy up their tei
heritable rights to it, and so the whole burden of stipend would b
the inalienable teind, because it never can be bought up. The wh
being made inalienable would thus be defeated. That is the reaso
vilege was granted, in order that the teind might remain for the coll

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s." Now, if they are not bishops' teinds they are not entitled to the pri- e claimed. If they are church teinds, belonging to other churchmen than ps, they have no privilege. That has been decided in two cases,—the itor of Tithes v. the Earl of Moray, 23d May 1797, M. 15,704; and the itor of Tithes v. Belches, 3d December 1800, M. App., *voce* Teinds, No. 10. Lord Ordinary says in his note, with regard to this,—"Even if the teinds uestion were to be held priors' teinds in the hands of the Crown, the Lord nary would be disposed to give them the same privilege in allocation, though inly this point is very open to dispute. The reason for the privilege is the . The privilege of postponement has been extended to teinds for pious and even to college teinds.—See Heritors of Portmoak v. Douglas, 9th mber 1795, M. 14,823. The analogy is very important, and shews that privilege is not peculiar to the Crown." The analogy seems to me most ading and false, because college teinds and teinds devoted to pious uses are red by statute equal with bishops' teinds and to have the same privileges, eas other church teinds belonging to chapters or priors never had this pri- e, and are not inalienable in the hands of the Crown. With that exception ee with the Lord Ordinary, and hold that the Crown has proved that these ls are entitled to the privilege.

he other Judges concurred.

THE following interlocutor was pronounced:—"Recall the interlocutor of the Lord Ordinary in so far as it finds that the teinds of the parish of Whithorn are bishops' teinds, or at all events are church teinds entitled to all the privileges in allocation of bishops' teinds in the hands of the Crown, and in place thereof find that the teinds in the parish of Whithorn in the hands of the Crown are bishops' teinds: *Quoad ultra* adhere to the interlocutor of the Lord Ordinary, and find the Lord Advocate entitled to additional expenses; appoint an account thereof to be lodged, and remit," &c.

V. H. SANDS, W.S.—RUSSELL & NICOLSON, C.S.—JOHN GIBSON Jun., W.S.—Agents.

INTERLOCUTOR and NOTE by Lord Moncreiff in Locality of Kinneff and Caterline, referred to in argument for pursuer.

18th December 1830.—The Lord Ordinary having considered the revised ctions for the Reverend Patrick Stewart, and the revised answers for Lord th's trustees, and having heard parties' procurators, Finds it sufficiently blished that the teinds of the parish of Caterline, which is now united to the ish of Kinneff, are all bishops' teinds, entitled to the privilege generally nging to such teinds, in so far as the circumstances of the case admit of the inary rules of allocation being applied; but finds that, as the parish of neff now consists of two united parishes which were originally distinct, the stion whether the stipend ought to be allocated on the two parishes indisminately as one parish, or separately and proportionally on each parish, must end on the question of fact whether there exist any special interest to exclude principle of joint allocation: Finds that though in this case it appears pro- le that the general titularity of the two parishes are in the same party, it is r that certain of the heritors, and particularly the respondents, hold heritable its to the teinds of their own lands, whereby they have the same interest to ct to a joint allocation which would be competent to a separate titular who right to draw the teinds of the parish of Kinneff: Therefore finds that the nary rules of allocation in united parishes, where there is but one titularity, not justly be applied to the present case: Finds that the stipend must be ated separately on the two parishes according to the proportions hitherto rved: Repels the objections, approves of the locality on this point, and finds respondents entitled to expenses; allows an account," &c.

NOTE.—It was justly observed that it is scarcely conceivable that the parishes ld ever have been united on the principle that the whole stipend should be

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July 11, 1873. Lord Advocate v. Earl of Galloway, and Hathorn.

laid on one parish, which would be the result of the objector's argument. But the Lord Ordinary further remarks that as the objector has no heritable right to his teinds, and consequently bound to pay them to somebody, he has scarcely a legitimate interest to maintain his foresaid plea."

INTERLOCUTOR and NOTE by Lord Barcaple in Locality of Traquair.

"10th March 1865.—The Lord Ordinary having heard counsel for the parties, and considered the closed record on the question between the Crown and the Duke of Buccleuch, Finds that bishops' teinds now in the hands of the Crown in the old parish of Traquair, although they may have been under tack in the year 1629, cannot be localled upon until the teinds in said parish, held by the Duke of Buccleuch on heritable right, should have been exhausted: Finds the Duke of Buccleuch liable in the expenses of this discussion; allows an account," &c.

"NOTE.—It is contended for the respondent that the privilege of being postponed in the allocation of stipend attaches only to such bishops' teinds now in the hands of the Crown as were not under tack at the date of the king's decree-arbitral in 1629. No authority is referred to as establishing this proposition. The argument in support of it is rested upon the terms of the submission by the bishops, and of the decree-arbitral, and upon the Acts 1662, c. 9, and 1663, c. 28, prohibiting valuations of teinds of which the bishops were in possession, by leading and drawing the teinds or by rental bolls. It is attempted to trace the privilege attaching to bishops' teinds as to being localled upon to the stipulation in the submission as to valuation, and to the effect given to that stipulation in the decree-arbitral and subsequent statutes, and it is maintained that this privilege remained after the exemption from valuation was abolished.

"The Lord Ordinary thinks that this is a novel and unauthorised view of the source of the privilege. No allusion is to be found to it in the opinions of the Judges in the case of Prestonkirk, 14th November 1846, 9 D. 61, where that matter was much considered. The Lord Ordinary has never understood that the recognised privilege of bishops' teinds is subject to any such exception, and he does not perceive any principle on which it can be established. He did not understand it to be disputed that in the case of Arngask, referred to in 1 Connell, 505, the teinds had been under tack. The judgment expressly refers to teinds formerly belonging to bishops and their tacksmen."

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July 16, 1873. Walker v. Langdales Chemical Co.

JOHN WALKER, Pursuer.—*Millar—Keir.*
LANGDALES CHEMICAL MANURE CO., Defenders.—*Sol.-Gen. Clark—Asher—Innes.*

Sale—Delivery—Risk.—A person sold a number of carcases of whales in Shetland at a price per ton, to be delivered at the buyers' wharf at Newcastle. The carcases became unfit for use on the voyage. *Held* that the risk was with the seller, as (1) neither the quantity sold nor the price could be ascertained till delivery; and (2) as the seller had undertaken to deliver at the buyers' wharf.

1ST DIVISION. Lord Mure. B.

THIS was an action at the instance of John Walker, farmer, Shetland, against the Langdales Chemical Manure Company, Newcastle, concluding for £362, 10s., which he alleged to be the agreed-on price of 145 tons of carcases of whales, at the rate of 50s. per ton, with certain other charges for demurrage and expenses.

In December 1871 the pursuer sold to the defenders 212 carcases of whales. This contract was entered into by certain letters and telegrams, from which it appeared that the pursuer was to deliver the carcases at the defenders' wharf at Newcastle. The ship the "Mars" in which the carcases were shipped was detained, and never came to the defenders' wharf. The carcases had become putrid, and were ordered to be destroyed by the Board of Health of Newcastle.

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The pursuer pleaded;—(1) The defenders having purchased the carcases from the pursuer, and delivery having been tendered, the defenders are liable for the price thereof, and they are also bound to relieve the pursuer of the claim made by the owner of the "Mars." (2) The defenders, in the circumstances, are justly due and addebted to the pursuer in the price of the whales' carcases, and are bound to relieve the pursuer of the claim made against him for the expense of destroying the cargo, and for demurrage.

The defenders pleaded;—(1) The pursuer having failed timeously to deliver or tender delivery to the defenders, in terms of the contract, of the goods contracted for, in such condition as by the contract they ought to have been, he cannot maintain the present action. (2) Having regard to the time when and the condition in which the goods arrived in Newcastle, the defenders were not bound to accept delivery thereof under the contract.

After a proof had been taken the Lord Ordinary pronounced the following interlocutor:—"Finds, as matter of fact, 1st, That in the end of December 1871 a contract was entered into between the pursuer and the defenders, by which the pursuer undertook to deliver at the defenders' wharf at Newcastle 212 or thereby carcases of whales, then lying at Uyea Sound, in Shetland, with heads, at the rate of 50s. per ton, to be paid on delivery; 2d, That upon the carcases arriving at Newcastle, which they did on the 7th of March 1872, they were in a putrid state, and unfit for being used in the manufacture of chemical manure; 3d, That when the condition of the cargo was made known to the Local Board of Health at Newcastle proceedings were taken by them to prevent the cargo from being landed, and it was thereafter condemned and destroyed, at their instance, as a nuisance and injurious to health; 4th, That when the whale heads arrived at Newcastle in the end of March they were also in a putrid condition, and unfit for the purpose of manufacture: Finds, in these circumstances, in point of law—(1st), That as the pursuer, by the contract founded on, undertook to deliver the carcases in question at Newcastle, the property, until delivered, was at the risk of the pursuer; (2d), That the defenders were entitled to refuse to take delivery of the carcases in the condition in which they were when tendered to them for delivery; and (3d), That the pursuer failed to deliver the goods contracted for to the defenders in terms of the contract; Therefore assoilzies the defenders from the whole conclusions of the action, and decerns: Finds them entitled to expenses," &c.*

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* "NOTE.—(1) It is very clearly established by the evidence in this case that the contract in question was one to deliver at Newcastle, and also that this obligation was deliberately undertaken by the pursuer. Because, in the earlier communications which passed between him and the defenders relative to the contract, the carcases were offered at 30s. per ton, 'free on board at Uyea;' but upon being informed by the defenders that they could not arrange for a vessel to take delivery in Shetland, and requested to offer the carcases for delivery at Newcastle, the pursuer did so at 50s. instead of 30s. per ton, thereby stipulating for 20s. per ton more, with a view, it is presumed, to meet the expense of transit and some of the consequent risks.

"(2) Such being the nature of the contract, it appears to the Lord Ordinary that the carcases, until delivery, were in law at the risk of the pursuer. It is so laid down by Erskine, iii. 3, 7, and Prin. iii. 3, 3; in Bell's Coms., vol. i. p. 444; and it was so decided in the cases of Spence, 25th January 1687, M. p. 3153, and Milne, 1st February 1809, F. C.

"(3) In these circumstances it is not necessary, in the view the Lord Ordinary takes of the case, as between the pursuer and the defenders, to inquire whether

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The pursuer reclaimed. He argued that the sale was of a specific quantity of carcases, and the price being ascertained at so much per ton

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the condition of the cargo when the vessel arrived at Newcastle was occasioned by improper delays and mismanagement of the cargo during the voyage. These are questions which must, it is thought, be disposed of between the pursuer and the owners of the vessel in which the carcases were shipped, because the pursuer by his contract was bound to deliver at Newcastle; and if the carcases, when there tendered for delivery, were in such a condition as entitled the defenders to reject them, it is, in the opinion of the Lord Ordinary, of no moment whether that was caused by unnecessary delays and mismanagement on the part of the master of the vessel during the voyage, or arose from delays occasioned by stress of weather or unavoidable causes. In the case of Milne, above referred to, the condition of the wheat which led to and was held to warrant its rejection appears to have arisen, not from any fault on the part of the seller or those employed by him, but simply from the wheat having become heated in the course of the voyage, and being in that state when tendered for delivery.

"(4) As regards the condition of the carcases in question at the time of their arrival at Newcastle, it is, in the opinion of the Lord Ordinary, plain upon the evidence that they were then in an advanced state of decomposition,—putrid, and unfit for disembarkation by any ordinary process. This is proved by the scientific witnesses examined who saw the cargo, two of whom, viz., Dr Newton and Dr Hardcastle, inspected it on the 13th of March upon the employment of the defenders, and the other, Mr Pattinson, on the 14th, upon the employment of the pursuer, and whose evidence is fully more decided than that of the witnesses who inspected it for the defenders. The opinion of these witnesses is confirmed by that of the defenders' foreman, who inspected it on Monday the 11th, of the inspector of nuisances, who superintended its removal, and of the parties engaged under him in carrying out his directions. And this body of evidence from parties who saw the cargo is, in the opinion of the Lord Ordinary, more to be relied on upon a practical question of this description than the opinion of a scientific man even of the high position of Dr Stevenson Macadam, who had not an opportunity of examining the cargo.

"(5) This evidence, moreover, appears to the Lord Ordinary to be sufficient to shew, not only that the carcases were not in a fit state to be landed, but also that they were not in a fit state to be manufactured into chemical manure, which was the purpose for which they had been bought. The defenders' foreman is very distinct upon this point, and, while there is no contrary evidence, his opinion in that respect is corroborated by that of the managing director of the defenders, and by two other chemical manure manufacturers at Newcastle, who say that carcases in such a putrid condition were not a merchantable commodity, could not be worked up without endangering the lives of the workmen, and would not therefore be received into any of their works. And that this opinion is acted upon is borne out by the fact that another cargo of whales purchased by the defenders, which arrived some time before the one in question, and which, when landed at a distance from Newcastle, was found to be in a decomposed state, was buried there, and has not yet been used, and that it is in evidence that the defenders do not intend to use it for several years to come, or until the flesh and obnoxious matter have been absorbed, and nothing is left but the bones.

"(6) It is strongly contended on the part of the pursuer, that even if in ordinary circumstances the risk under a contract of this description lay with the seller till delivery, it had here been transferred because of the defenders' refusal to allow the pursuer to use the necessary quantity of carbolic acid for the preservation of the flesh. But the Lord Ordinary is unable to read the communications which passed between the parties in this light, for he does not think that there was any refusal on the part of the defenders to allow carbolic acid to be used. They no doubt seem to have hesitated at first, as they do not appear to have been aware of the precise effect it might have upon the whales as an article of manure. But when informed by the pursuer that the chemists he consulted said it would

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risk passed to the purchaser. The pursuer had shipped the cargo in ordance with his contract, and from that time he was not responsible it.[1]

The defenders argued;—The contract was not for a specific subject, but a quantity of a specific subject. The contract might have been implemented by sending the carcases of any whales. The price could not be ertained till delivery took place, as it would vary according to the antity delivered. Therefore the risk remained with the seller.[2]

At advising,—

LORD PRESIDENT.—The question raised in this case is of some importance, but annot say that it is attended with any difficulty. A contract of sale was en- ed into between the pursuer, who was resident in Shetland, and the defenders, o are chemical manure manufacturers in Newcastle. It was concluded by ans of various telegrams and letters, but it is needless to go into their terms, ause the result of them is quite clear. The pursuer sold to the defenders ut 150 tons of whale flesh, meaning thereby flesh as distinguished from bones l blubber, and to this, by a subsequent arrangement, a certain quantity of bones s added. Now, these materials were sold at a certain rate per ton, and it ears in the first place that the sale was *venditio generis* and not *venditio rei cificæ*, and, in the second place, that the price must have remained unascer- ned until delivery, because the quantity to be delivered was not ascertained. is is plain, for when the cargo was put on board the "Mars" for Newcastle find the shipmaster and the seller differing about the quantity, one of them imating it at 170, the other at 140 tons, and even that was not the entire ount to be sent, for another vessel was engaged to carry a further quantity. s see, therefore, that the quantity was quite unascertained, and the price in sequence is in the same position. But further, the seller undertook to give ivery at the defenders' wharf at Newcastle, so that the time of delivery there s the first time that the price to be paid could be ascertained, and that was first place at which delivery could be made. Whose, then, was the risk ore the delivery at the defenders' wharf at Newcastle? For the arrival of the sel at Newcastle is not the point of time, even if delivery had been actually dered, but her arrival at the defender's wharf. On both the grounds on ich the case has been argued I think the risk was the seller's, and the whale sh having admittedly become unfit for use from the length of the voyage, he st be the party to suffer loss. The circumstance that the subject of sale was liverable at Newcastle is of itself sufficient to settle the case against the pur- er, for both Erskine and Bell distinctly lay down that if a place be fixed for livery the goods are held to be still the seller's till brought thither for deli- ry, the intermediate risk being his, and the two cases of Spence and Miller are ect authorities to this effect. But further, the uncertainty of the amount of e subject and of the price is a circumstance which settles the law against the

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no harm, they seem at once to have consented to the pursuer using as much he might see it prudent to do.

"Upon the whole matter, therefore, the Lord Ordinary has come to the con- sion that, as the pursuer was under a contract to deliver at Newcastle, and e cargo when it arrived there was not only unfit for use but even for being ded with safety, the pursuer has failed to deliver in terms of the contract, and at he is not therefore entitled to recover against the defenders, in terms of the nclusions of the summons.

[1] Hardy v. Austin, May 25, 1870, *ante*, vol. viii. p. 798; Mercantile Law n. Act, 19 and 20 Vict. c. 60, sec. 5; Jaffé v. Ritchie, Dec. 21, 1860, 24 D. 2; Hutchison v. Henry and Corrie, Nov. 20, 1867, *ante*, vol. vi. 57.

[2] Hansen v. Craig, Feb. 4, 1859, 24 D. 432; Bull v. Robison, July 7, 1854, Exch. 342; Gardiner v. Gray, March 6, 1815 (English case) 4 Campton, 4; Bell's Pr. 117; Abbot on Shipping, 453; Ersk. iii. 3, 84; Spence, Jan. 25, 87, M. 3153; Milne v. Miller, Feb. 1, 1809, F. C.

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pursuer, because while these are uncertain the risk is not transferred. The general rule is *res perit domino*, and the transference of the risk to the buyer is an exception to that rule, and only comes into existence when the subject and the price are both so fixed that the buyer can insist on the delivery of a specific article and the seller on the payment of a fixed sum. The impossibility of enforcing a contract in such circumstances as the present is illustrated by the way in which the action is laid. The summons concludes for payment of £362, but how is that amount ascertained? Simply by assuming that the quantity on board the "Mars" was 145 tons, for there are no means of ascertaining this. It was only by weighing the cargo at the place of delivery that the amount could have been ascertained. That has now become impossible, and so the summons is founded on mere conjecture. I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS concurred.

LORD ARDMILLAN.—I have very little to add to what has been said. It is unfortunate that here we have two innocent parties complaining of a loss for which neither of them is to blame. The question is on whom the loss is to fall. The seller says the loss should fall on the purchaser, the purchaser says that it should fall on the seller. Now, I have come to the same conclusion as your Lordships, that the risk remains with the seller till delivery.

There was here a *venditio generis*, not the sale of a specific ascertained article. It was not possible that either the exact amount sold or the exact price could be ascertained until the vessel arrived. That is the first step in the case. The next step is that delivery to the pursuer was part of the contract, and capability of delivery was a quality of the article sold. Capability of delivery was thus a condition of the contract. The vessel was the seller's vessel *pro hac vice*, and when the vessel arrived delivery had become legally impossible.

There was a very important change made in the contract. Originally it was contemplated that the seller should give delivery in Shetland, and that the purchaser should procure a vessel and take the carcases to Newcastle. That was altered, and in consequence of the alteration a higher rate per ton was fixed as the price. It is obvious that the increase exceeded the mere cost of carriage, and the increase of price was added for the risk of delay. I do not think that the Mercantile Law Amendment Act applies. I think that it is important that we should adhere to the well-established rule of the law of Scotland that when a contract is made for delivery of a specific quantity at a particular port if the article perishes before it is delivered at the port it perishes to the seller.

LORD JERVISWOODE concurred.

THE COURT adhered, with additional expenses.

ANDREW & WILSON, W.S.—BOYD, MACDONALD, & LOWSON, S.S.C.—Agents.

No. 149.

July 16, 1873. Robertson v. Ross.

ELIZABETH WILSON OR ROBERTSON AND HUSBAND, Pursuers.
ELIZABETH BAIN OR ROSS AND HUSBAND, Defenders.—*Guthrie.*
THOMAS H. DOUGLAS, Defender.—*Thoms.*
J. M. MACQUEEN, Compearer.—*Scott.*

Agent and Client—Personal Liability of Agent.—An agent for a private pursuer of an action of declarator of contravention of lawburrows used the name of the Lord Advocate as joint pursuer without his authority. *Held* that the agent was personally liable in expenses to the defenders.

1ST DIVISION. Ld. Mackenzie. B.

THIS was an action of declarator of contravention of lawburrows at the instance of Elizabeth Wilson or Robertson and her husband, "and the Right Honourable George Young, our advocate for our interest," against Elizabeth Bain or Ross, and Charles Ross, her husband, and Thomas Douglas.

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The Lord Ordinary pronounced the following interlocutors:—

"11th March 1873.—In respect that it is admitted by the counsel for the pursuers, Mr and Mrs Robinson, that the authority of the Lord Advocate was not obtained by them or their agent before inserting the name of the Lord Advocate as pursuer in the action, appoints intimation to be made by the defenders to the Lord Advocate of the dependence of this action by service of a copy of the summons and record upon his Lordship, and upon the Crown Agent, and continues the cause in the procedure roll until Tuesday next the 18th instant."

Appearance was made for the Lord Advocate, and it was stated for his Lordship that he had granted no authority to use his name in the instance.

"18th March 1873.—The Lord Ordinary, having heard counsel for the parties, makes avizandum with the debate and the process."

"22d March 1873.—The Lord Ordinary having heard counsel, and considered the closed record, in respect that the Lord Advocate has not granted his concurrence to the summons, dismisses the action, and decerns: Refuses the motion of the defenders that the pursuers' agent should be found liable to them in the expenses of process: Finds the pursuers, Elizabeth Wilson or Robinson and John Ivinson Robinson, liable in expenses to the defenders, of which allows accounts to be given in, and remits."

The pursuers reclaimed, and when the reclaiming note was called in the short-roll, no appearance being made for the reclaimers, the Court pronounced an interlocutor ordering the reclaimers' agent to be personally present. When the case was called again the agent was present, and it was stated that he had withdrawn from the agency. There was no appearance made for the pursuers.

The defenders moved the Court to find the pursuers' agent liable to them in the expenses of process. They argued that the action being of a penal nature could not have gone on without the concurrence of the Lord Advocate. It was competent when a person's name has been made use of without his consent to find the agent so using it liable in expenses.[1]

At advising,—

LORD PRESIDENT.—This is an action of declarator of contravention of lawburrows, raised at the instance of Elizabeth Wilson or Robertson and her husband for his interest, "and the Right Honourable George Young, our advocate for our interest," and the petitory conclusion of the summons is that "the defenders ought and should be decerned and ordained, by decree foresaid, conjunctly and severally, to make payment of the sum of 400 merks Scots, or £22, 10s. sterling . . . . one-half thereof to us, and the other half to the pursuers, the said Elizabeth Wilson or Robertson, now Robinson, and John Ivinson Robinson." Now, it is needless to say that the action could have been raised in no other form in order to be an effectual declarator of contravention of lawburrows. One-half of the penalty goes to the Crown, and the other half to the informer, but the whole sum must be sued for. It now appears that the Lord Advocate gave no authority to institute this summons in his name. This is not a case in which his mere concurrence would be of any avail. He must be a joint pursuer, and he gave no authority to raise this action in his name. After the summons had been executed it was called in Court as at the instance of Mrs Robertson and others, and in order to justify the use of the word "others," the Lord Advocate must be a pursuer as well as Mrs Robertson and her husband. The summons was therefore called as at the instance of all the pursuers. Now, I need hardly say that this was altogether wrong, and that the agent who libelled this summons, and procured it to be executed and called without being duly authorised, was acting improperly. It would have been a

[1] Cowan v. Farnie, March 4, 1836, 14 S. 634; M'Call v. Sharp, Jan. 31, 1862, 24 D. 393.

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more serious matter had the pursuers maintained that they had authority from the Lord Advocate, when in truth they had not. But I am happy to think that they did not do so; for it appears from the first interlocutor pronounced by the Lord Ordinary after closing the record that the pursuers' counsel admitted that the authority of the Lord Advocate had not been obtained. The Lord Advocate having declined to adopt the action or to appear as a pursuer the Lord Ordinary has dismissed the action, and found the private pursuers liable in expenses to the defender. That is undoubtedly right, as far as it goes; and there is now no appearance by the pursuers in support of their reclaiming note. But the defenders, on 22d March, moved the Lord Ordinary to find the pursuers' agent also liable to them in expenses, and they now ask an alteration on the interlocutor to that effect. I am of opinion that their motion ought to be granted. I think that the pursuers' agent, by his misconduct (for I cannot call it anything less than misconduct), has been the cause of the defenders incurring expense, and that being so, there can be no doubt, both on principle and authority, that he must be liable to them in costs.

I have spoken of the agent's misconduct, for I think it amounted to that; but I am of opinion that he acted more from rashness or heedlessness than from intention, and I am therefore not prepared to suggest to your Lordships that any censure should follow on our judgment. But I have no doubt as to the agent's liability for the expenses of process.

LORDS DEAS, ARDMILLAN, and JERVISWOODE concurred.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor of the Lord Ordinary in so far as it refuses the motion of the defenders, that the pursuers' agent should be found liable to the defenders in the expenses of process: Find the pursuers' agent, Mr J. M. Macqueen, S.S.C., liable to the defenders in the expenses of process moved for before the Lord Ordinary, and also in the additional expenses since the date of the Lord Ordinary's interlocutor; *quoad ultra*, in respect of no appearance for the pursuers, adhere to the interlocutor, and refuse the reclaiming note, and find the pursuers, Elizabeth Wilson or Robertson and her husband John Ivinson Robinson, liable in additional expenses: And remit to the Auditor to tax the account or accounts of expenses now found due, and to report."

J. M. MACQUEEN, S.S.C.—DAVID FORSYTH, S.S.C.—LINDSAY MACKERSEY, W.S.—Agents.

No. 150.

July 16, 1873. Breadalbane's Trustees v. Jamieson, &c.

THE TRUSTEES OF THE FIRST MARQUIS OF BREADALBANE, Pursuers and Real Raisers.—*Kinnear.*

GEORGE AULDJO JAMIESON (Judicial Factor on the estate of the second Marquis of Breadalbane), Claimant and Defender.—*Sol.-Gen. Clark—Balfour—Campion.*

THE EARL OF BREADALBANE, Claimant and Defender.—*Watson—Adam—Macdonald.*

Trust-Settlement—Codicil—Construction.—A truster conveyed his unentailed lands and property, heritable and moveable, to trustees, and directed them, in the third place, for the period of twenty years after his death, to invest and accumulate the whole free rents and proceeds of the trust-estate, and to employ the funds so invested in the purchase of lands. In the fifth place, the truster directed the trustees, at the termination of the twenty years, to settle the estates conveyed by the trust-deed, and the lands purchased by them, in strict entail upon the truster's son, and his heirs-male, whom failing, upon the heirs entitled to succeed to the truster's entailed estate. In a codicil the truster directed that the trustees, "instead of investing the free rents of my unentailed estate in manner before mentioned, shall annually pay over the whole free proceeds of the same to my two daughters, equally between them, while both shall be in

e, and to the survivor, and shall continue to do the same as long as both or her of them shall be alive." *Held* that provisions in the codicil in favour of e truster's daughters were not limited to the period of twenty years after the ster's death. No. 150. July 16, 1873. Breadalbane's Trustees v. Jamieson, &c.

Annuity—Revenue.—*Held* that annuities granted by the proprietor of heritle and moveable estate were after his death payable out of the rents of the ritage.

SEQUEL of case reported 3 D. 357, 2 D. 731, and 14 S. and D. 309. 2D DIVISION. R.

This action of multiplepoinding was raised in 1834 by the trustees der the settlement of the first Marquis of Breadalbane.

The first Marquis died on 29th March 1834 leaving a widow, a son he second Marquis), and two daughters, one of whom became Duchess Buckingham, and the other Lady Elizabeth Pringle. The Marquis ft a large succession. Besides the entailed estates of Breadalbane he ft large unentailed property and a large sum of money.

By his trust-settlement he conveyed his fee-simple lands and his oveable estate to trustees for, *inter alia*, the following purposes:— In the first place, for payment of all my just and lawful debts, and eathbed and funeral charges, and any legacies, annuities, or donations I ay give or bequeath to any person or persons by a writing under my nd, with the necessary charges and expenses of executing this trust; hich expenses shall be held to be sufficiently liquidated and ascertained r the signed accounts of the said acting trustees or trustee, without any her proof or document." By the third purpose the truster directed his ustees to accumulate the rents, &c. for twenty years after his death, and rchase land. The fifth purpose of the trust was thus expressed,—"It hereby expressly provided and declared that at the termination of the id twenty years, or as soon after as may be, the said trustees or trustee ting for the time shall be bound and obliged to settle and secure the hole lands, teinds, and other heritages conveyed by me to them, and also ose purchased by them as aforesaid, in strict entail, and to vest the same r disposition, procuratory of resignation, or other legal deed as shall be adsed, to and in favour of the said John Viscount Glenorchy, my son," &c.

A codicil, of date 26th August 1829, bore,—"In virtue of the power reinbefore reserved to alter and innovate these presents I hereby direct at my said trustees, instead of investing the free rents of my unentailed nds and estates in manner before mentioned, shall annually pay over e whole free proceeds of the same to my two daughters, Lady Elizabeth mpbell and Mary Marchioness of Chandos (afterwards Duchess of Buckgham), equally between them, while both shall be in life, and to the rvivor, and shall continue to do the same as long as both or either of em shall be alive; but that always without prejudice to the obligations d provisions granted by me in favour of Mary Countess of Breadalbane, to the obligations contained in the contract of marriage between John scount Glenorchy and Eliza Baillie, his spouse."

By *inter vivos* deeds he granted annuities in favour of various persons. e Duchess of Buckingham, having claimed and taken legitim, was found have forfeited the provisions in her favour contained in the settlement her father, and her claim to the rents of the unentailed lands, in terms the codicils to his settlement, was repelled by interlocutor of 5th March 40. That forfeiture was found, by interlocutor of 15th January 1841, operate, during the life of the Duchess of Buckingham, in favour of the ustees of the first Marquis.

During the whole period from the commencement of the trust in 1834 the death of the Duchess of Buckingham in 1862, the trustees of the st Marquis paid one-half of the free rents of the unentailed lands to

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Lady Elizabeth Pringle, and since the Duchess's death they paid the whole of the said free rents to Lady Elizabeth Pringle. To meet the deficiency created by the Duchess having successfully claimed legitim, the trustees during her lifetime drew the rents forfeited by her, and applied them as part of the general fund of the trust-estate, to increase the residue destined for the purchase of land to be entailed. From time to time they made purchases of land, in fulfilment of the purposes of the trust.

In 1873 the judicial factor on the trust-estate of the second Marquis, who died 8th November 1862, claimed,—(1) That the trustees of the first Marquis should make up and exhibit proper accounts of the income of the trust-estate from 15th May 1854 (being the date of expiry of the period of accumulation directed by the trust-settlement) down to 8th November 1862, and that he should be ranked and preferred to the revenue of the trust-estate for the period between these dates, including the half of the rents of the unentailed lands from Whitsunday 1854 to the date of the Duchess of Buckingham's death in 1862. (2) That, in ascertaining the amount of the income to which he is entitled, the annuities bequeathed and granted by the first Marquis should, for the period subsequent to Whitsunday 1854, be debited, not to the revenue, but to the capital of the trust-estate. (3) That in ascertaining the said income there should be credited thereto the whole percentages paid by the life-renters of the unentailed lands in respect of permanent improvements, or other outlays made by the trustees thereupon as aforesaid.

The trustees, in answer, pleaded;—(3) The annuities in question, forming a proper charge against the income of the trust-estate, the judicial factor's claim to have them paid out of capital ought to be repelled. (4) The judicial factor is not entitled to have the whole percentages paid in respect of outlays on permanent improvements charged to income, in respect that a portion thereof represents repayments of capital advanced.

The Lord Ordinary pronounced the following interlocutor:—"Finds that Mr George Auldjo Jamieson, as judicial factor on the estate of the second Marquis of Breadalbane, is not entitled to the one-half of the rents of the unentailed lands left by the truster, the first Marquis of Breadalbane, for the period from Whitsunday 1854 to 8th November 1862; and to that extent repels the claim of the said judicial factor: Finds that the trustees of the first Marquis of Breadalbane are bound to retain the whole of the said rents for the period between Whitsunday 1854 and 28th June 1862, the date of the Duchess of Buckingham's death, as a surrogatum for the sums taken from the capital of the trust-estate, and paid as legitim to the Duchess of Buckingham, and to apply the same accordingly; and to that extent sustains the claim for the Earl of Breadalbane: Repels the second and third claims of the said judicial factor, and decerns: Appoints the cause to be put to the roll with a view to farther procedure, and reserves all questions of expenses." *

* "NOTE.—The Duchess of Buckingham, having claimed and taken legitim, was found to have forfeited the provisions in her favour contained in the settlement of her father, the first Marquis of Breadalbane, and her claim to the rents of her father's unentailed lands, in terms of the codicils to his settlement, was repelled by interlocutor dated 5th March 1840. That forfeiture was found, by interlocutor, dated 15th January 1841, to operate during the life of the Duchess of Buckingham in favour of the trustees under the settlement of the first Marquis. By the two codicils of 30th June 1829 and 26th August 1829 the trustees are directed to pay to the Marquis's two daughters, Lady Elizabeth Pringle and the Duchess of Buckingham, equally between them, and to the survivor, the free rents of his unentailed lands. According to the true construction of these codicils, and of the trust-disposition and settlement, it is, in the

The judicial factor reclaimed. At advising,— No. 150.

LORD BENHOLME.—This is an action of multiplepoinding, which was brought in the year that the first Marquis died, for the purpose of regulating his succession. The action has been the means of deciding various important questions in our law, and the interlocutor that we are now to review presents three questions for determination, and these are of some little importance. July 16, 1873. Breadalbane's Trustees v. Jamieson, &c.

The first Marquis died in 1834. He left a widow, a son (the second Marquis), and two daughters, one of whom became Duchess of Buckingham, and the other Lady Elizabeth Pringle. The Marquis left a large succession. Besides the entailed estates of Breadalbane he left large unentailed property and a large sum of lying money. But various events took place that interfered very much with the original scheme of the Marquis's settlement. I must mention to your Lordships two of the clauses of the settlement upon which the first of the points now before us turns. The fifth purpose of the trust was thus expressed—"It is hereby expressly provided and declared that at the termination of the said twenty years, or as soon after as may be, the said trustees or trustee acting for the time shall be bound and obliged to settle and secure the whole lands, teinds, and other heritages conveyed by me to them, and also those purchased by them as aforesaid, in strict entail, and to vest the same by disposition, procuratory of

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opinion of the Lord Ordinary, only upon the death of the survivor, Lady Elizabeth Pringle, that the rents of these unentailed lands will become payable to the heirs of entail of the Breadalbane estates called by that trust-deed. The second Marquis of Breadalbane, the first called of these heirs, who died on 8th November 1862, had no right to any part of these rents. One-half of them was payable to Lady Elizabeth Pringle, during the life of her sister, the Duchess of Buckingham, and, on the Duchess's death, Lady Elizabeth Pringle acquired right for her life to the whole of these rents. During the Duchess's life the half of these rents provided to her fell to be retained by the trustees as surrogate for the sums taken from the capital of the trust-estate, and paid to her as legitim, and the proceeds of that half must be invested and applied by the trustees in terms of the first Marquis's trust-settlement.

"The Lord Ordinary has on these grounds repelled the claim of the judicial factor on the estate of the second Marquis to the rents of the unentailed lands. But the judicial factor also claims to be ranked and preferred to the other revenue of the trust-estate from Whitsunday 1854 to 8th November 1862. If there had been any such free revenue his claim would not be disputed, but the trustees aver that there was no such free revenue, and that there was, on the contrary, a deficiency. In support of this statement they have lodged their accounts, with reports thereon by the late Mr Mansfield, C.A. Should the judicial factor, notwithstanding these reports, which distinctly state the annual deficiency from 1854 to 1864, insist in his objections in regard to this matter, a remit to an accountant will be necessary.

"2. The Lord Ordinary has been unable to find any provisions in the trust-settlement, in virtue of which he can hold that the annuities granted or bequeathed by the first Marquis must, contrary to the ordinary rule, be debited, not to the revenue, but to the capital of the trust-estate.

"3. The sums expended on permanent improvements on the lands in the hands of the trustees were paid out of the trust-funds, under an arrangement with Lady Elizabeth Pringle, who had right to the rents, that she should pay 7½ per cent per annum for eighteen and a quarter years on the sums so expended, 4 per cent of which was to be accumulated for the purpose of replacing the capital advanced, and the remaining 3½ per cent of which was to be dealt with as interest. This was an act of beneficial management, and within the powers conferred upon the trustees by the trust-settlement. Further, the Lord Ordinary is of opinion that the claim of the judicial factor that the whole 7½ per cent per annum paid by the liferentrix, under the above mentioned arrangement, should be credited to income, is altogether untenable, and that the judicial factor is not entitled to have a larger sum credited than that stated in the trust-accounts."

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resignation, or other legal deed as shall be advised, to and in favour of the said John Viscount Glenorchy, my son," &c. That settlement was not allowed to take effect, because at a later period the Marquis executed a codicil of date 26th August 1829, and that codicil is thus expressed—"In virtue of the power hereinbefore reserved to alter and innovate these presents I hereby direct that my said trustees, instead of investing the free rents of my unentailed lands and estates in manner before mentioned, shall annually pay over the whole free proceeds of the same to my two daughters, Lady Elizabeth Campbell and Mary Marchioness of Chandos, equally between them, while both shall be in life, and to the survivor, and shall continue to do the same as long as both or either of them shall be alive; but that always without prejudice to the obligations and provisions granted by me in favour of Mary Countess of Breadalbane, or to the obligations contained in the contract of marriage between John Viscount Glenorchy, and Eliza Baillie, his spouse. Now, so far as relates to the unentailed property of the Marquis, this operated a complete alteration of the fifth purpose of the trust; for that fifth purpose directed that after the lapse of twenty years those unentailed lands, together with the produce of the accumulation, should be vested in the heir of entail. But by this codicil that was entirely defeated during the lives of the one or other of his two daughters. They were to enjoy the liferent of these lands during their lives and during the life of the survivor, who was to take the whole upon the death of the predeceaser. Now, these two clauses have given rise to several litigations, both in this Court and in the House of Lords, for the Duchess of Buckingham, who had not in her marriage-settlement given up her right to legitim, chose to demand her legitim, and as her sister, Lady Elizabeth, had discharged her right to legitim by her marriage-contract, the result was that the Duchess of Buckingham got the whole legitim, viz., one-third of the free proceeds of the moveable estate; and in this way she defeated the general intentions of her father, and consequently has been held to have forfeited her right to a liferent of the half of the unentailed property. With regard to that half which she had forfeited it has been finally determined that that forfeiture operated not in favour either of the sister or of any other party except the trustees of the Marquis, who had been deprived of a very large sum of money by the demand of legitim by the Duchess, contrary to the intentions of her father; and she having thus deranged the settlement intended by her father it was held that this half of the liferent of the unentailed lands went as a surrogatum to the trustees of the Marquis, and came in place of the large sum of money which the Duchess chose to take instead of the provisions made to her by her father. Now, the first point decided by the Lord Ordinary is, "that the trustees of the first Marquis of Breadalbane are bound to retain the whole of the said rents for the period between Whitsunday 1854 and 28th June 1862, the date of the Duchess of Buckingham's death, as a surrogatum for the sums taken from the capital of the trust-estate, and paid as legitim to the Duchess of Buckingham, and to apply the same accordingly." It was contended by the judicial factor, who supports the interests of the second Marquis, that these rents belong to him; but the Lord Ordinary finds that the judicial factor "is not entitled to the one-half of the rents of the unentailed lands left by the truster, the first Marquis of Breadalbane, for the period from Whitsunday 1854 to 8th November 1862; and to that extent repels the claim of the said judicial factor." Now, the result of repelling that claim was just to affirm, as the Lord Ordinary goes on to do in the subsequent clause, that instead of this forfeiture operating in favour of the estate of the second Marquis, and in that way in favour of the judicial factor, these forfeited rents were to go as a surrogatum for the large sum of money of which the estate of the first Marquis had been deprived by the choice of the Duchess of Buckingham. That is the first question in this case, and I confess that upon that question, important as it is, I have never been able to see that there is any reasonable doubt, because the codicil, which is later in date than the trust-deed with its fifth purpose, must prevail against that fifth purpose, as indicating a totally different destination of the unentailed lands from that which he had originally intended. And the result is that during the lives of both or of either of those two daughters, the

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ents of the whole of the unentailed lands which belonged to the Marquis, including an estate which he had purchased but had not taken possession of, must, during the lives of either of these ladies, be paid away from the destination that was originally intended, and the Duchess of Buckingham having died in 1862, from that date her sister became entitled to the whole rents. Now, that is the first question in this case, and I have no doubt that the Lord Ordinary has decided that question rightly. It is just this, that the subsequent codicil must, so far as it goes, alter the destination which the Marquis had intended as to the unentailed rents, one-half of which is left to go to Lady Elizabeth during the life of her sister, and the whole after her sister's death, and the other half during the Duchess's lifetime whilst the forfeiture operated; these rents are to go as a surrogatum, and be applied to the general purposes of the trust, which were liable to be defeated by the claim of the Duchess to her legitim.

The second question which the Lord Ordinary has decided is set forth in the second claim for the judicial factor:—"The claimant claims that in ascertaining the amount of the said income to which he is entitled the annuities bequeathed and granted by the first Marquis shall, for the period subsequent to Whitsunday 1854, be debited not to the revenue, but to the capital of the trust-estate." That seems to raise a pretty general question, viz., whether heritable debts of the nature of annuities are liable to be paid out of the heritable or moveable succession of a testator. The general rule of law, as to the application of which to this case I cannot see any difficulty, is that annuities, being heritable, should be paid out of the rents of the heritable estate. I am not aware that there is any good exception to this rule, but it has been suggested that there are cases, and especially one, to which I shall refer, that seem to throw some doubt upon this general rule. The case is that of Mackintosh v. Mackintosh and Others, in which the House of Lords reversed the judgment of the First Division of the Court here (May 19, 1873, *ante*, H. of L. 28). The question arose in this way: Mackintosh had executed a contract of marriage which imposed upon his entailed estate an annuity in favour of his widow. He had previously bound himself and his heirs and successors to relieve his entailed estate of La Mancha of all debts and obligations in these terms:—"I oblige myself and my heirs, executors, and representatives whomsoever, to free and relieve my lands of La Mancha of all my debts and obligations." Subsequent to the execution of this entail obligation he had created the burden upon the entailed estate in favour of his wife, who became his widow; and after his death the heir of entail got into controversy with the general representative of Mr Mackintosh, the general representative being of opinion that this burden must remain on the entailed estate, and consequently must burden the rents of the entailed estate as in the hands of the heir of entail, whilst the heir of entail contended that under the obligation that I have read, the general representative was bound to relieve him of that burden. The contention did not go upon the general rule as to the payment of heritable debt in the shape of annuity. I think it went upon the special obligation which the testator here undertook, by which he bound and obliged his heirs, executors, and representatives "to free and relieve my lands of La Mancha of all my debts and obligations." This argument was rendered the more conclusive because the testator had provided the means of clearing off the entailed estate of this burden, for he had rendered it lawful for himself and his heirs of entail to clear it off by purchasing an annuity of an insurance office, in the following words:—"Declaring that it shall be in the option and power of the said James Mackintosh, and his heirs, executors, and successors, to secure the said annuity of £150 and yearly sum of £70 to the said Mary Ann Burn, by purchasing at his and their own expense, from any respectable insurance company to be selected and approved of by her, an annuity payable to the said Mary Ann Burn in the terms before mentioned, and upon the purchase being effected and completed to her satisfaction, and the writs securing the same being delivered to her, she binds herself and the trustees after named, but at the expense of the said James Mackintosh and his foresaids, to discharge and disburden the several subjects before mentioned and described of the provisions secured to her." Here was a very special provision by which the testator had

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given the means of clearing off the burden, and indicated his intention that whether during his own lifetime the thing was done, for he had obliged himself as well as his heirs, that could be done by just purchasing an annuity, and the widow was to be bound to clear the burden off the entailed estate in consequence of obtaining as a surrogatum this obligation from the insurance company. In these circumstances I cannot help thinking that this was a tolerably clear point when it was duly considered; that the general representatives, as coming in place of the testator himself, were liable to clear off this obligation, and they had the means of doing so provided by the testator himself, viz., by purchasing an annuity from an insurance company to come in place of it. This was a very special case, and from the judgment of Lord Colonsay it is quite clear that the House of Lords considered it to be a specialty based upon the positive obligation to clear off this burden upon the entailed estate. I need not say that there is no such obligation here. There is a general obligation by the trustees to pay the debts and obligations, but there is no such special injunction upon them to clear off any burden upon an entailed estate such as gives a character to that case. In these circumstances, I cannot help thinking that the Lord Ordinary's view of this question is perfectly correct. He says,—"The Lord Ordinary has been unable to find any provisions in the trust-settlement, in virtue of which he can hold that the annuities granted or bequeathed by the first Marquis must, contrary to the ordinary rule, be debited, not to the revenue, but to the capital of the trust-estate."

The third point arises in this way, that the trustees advanced to Lady Elizabeth Pringle a considerable sum of money, to be laid out in improving the unentailed lands, and the way in which that money was to be obtained was that her Ladyship should pay 7½ per cent for eighteen and a quarter years. It was calculated, and I believe upon perfectly just grounds, that allowing that 3½ per cent was to answer for the interest of that money, the remaining 4 per cent for eighteen and a quarter years would just be sufficient to clear off and repay the capital, because so many payments of 4 per cent, together with the interest which would be accumulating by the successive payments from year to year, would at the end of that period amount to the capital. That is a very reasonable arrangement, and it brings out in the clearest way that the payment of 4 per cent was in respect of the capital alone, and that the whole interest to which the heir of entail was entitled was the 3½ per cent, which was the true interest of the money. The Lord Ordinary has, I think, decided this point also correctly. The judicial factor claims that the whole 7½ per cent should go to the estate of the second Marquis, that is to say, he claims that the second Marquis's estate should not only draw the interest of the money, but also the whole capital of that advance, for by demanding the whole 7½ per cent he not only gets the interest during that time, but he has at the end of the period obtained payment of the capital too. Now, on this point it is quite plain that the demand of the judicial factor is quite inconsistent with his position, and consequently I agree with the Lord Ordinary's observations.

Lord Cowan.—I concur in the opinion of Lord Benholme on all the three questions which the Court have to decide. The first question is the more material, and as to it I would only add, that in my view the codicil made provision as regards the rents of the unentailed lands in favour of the two ladies and the survivor which must be held to come in place of the provision as to the application of these rents for twenty years declared by the third purpose of the deed. The deed is to be read and construed on the footing of its having contained the codicil provision, and not that for which it is substituted.

Lord Justice-Clerk.—I entirely concur in all that has fallen from Lord Benholme. There are three questions which were mainly argued, the first of them being whether the right to the interests bequeathed by the codicil of 1829 terminated at the end of the twenty years. I am quite clear that it did not, but that it could only terminate at the death of Lady Elizabeth. In regard to the second question, whether the annuities should be capitalised and charged against

capital, or charged against income, I am of opinion that it must follow the nature of the right itself, which is a right essentially chargeable upon revenue, and I see no element in this case to lead to an opposite conclusion. No. 150. July 16, 1873 Breadalbane's Trustees v. Jamieson, &c

In regard to the question about the 7½ per cent, the argument seems to me to proceed on an entire fallacy. It was put in a double way. It was said, in the first place, that it is interest, and therefore must be considered as income, or there must be an allowance given. Now, it is not interest at all. It is a payment by instalments of interest and capital, and the demand to have that allowance made, as if it were the income of the estate, is out of the question. The other argument was that the trustees had no power to make advances at 3½ per cent. But it was an advantageous arrangement for the estate, and I think the trustees had ample power. Therefore, without any further observation, I can only express my concurrence in what Lord Benholme has stated. We adhere to the Lord Ordinary's interlocutor.

LORD NEAVES absent.

THE COURT adhered.

DAVIDSON & SYME, W.S.—J. J. & A. FORMAN, W.S.—ADAM, KIRK, & ROBERTSON, W.S. —Agents.

SIR JAMES COLQUHOUN, Bart., Condescender.—*Watson—Hall.*
REV. JOHN LAWRIE FOGO, Objector.—*Millar—Kinnear.*

No. 151. July 18, 1873 Colquhoun v. Fogo.

Teinds—Valuation and Approbation—Prescription—Derelinquishment—Surrender.—1. For more than forty years payments of stipend in excess of subvaluations of teinds had been made under final decrees of locality. *Held* that the minister had acquired a prescriptive right to have these payments continued, which was not affected by a subsequent decree of approbation.

2. For more than forty years payments of stipend in excess of the value of teinds fixed by previous subvaluation and decree of approbation had been made under a decree of locality. *Held* that the minister had not acquired right to have these payments continued.

3. Payments of stipend in excess of a subvaluation of teinds had been made for more than forty years under a final decree of locality, and the subvaluation had been abandoned, and a decree of valuation of the High Court obtained. *Held* (*dub.* Lord Deas) that the decree of the High Court fixed the amount of the teind, and that the minister had no right to have overpayments continued out of stock.

4. Where a minister had acquired a right to overpayments of teind in excess of the value of teinds fixed by decrees of approbation, *held* that the heritor could not surrender his teinds.

Observations on the case of Maderty, 9th July 1817, F. C.

Ante, vol. vi. 105.

1ST DIVISION Lord Gifford. Ld. Mackenzie Teind Clerk.

In 1815 the minister of the parish of Row obtained an augmentation of stipend, which was modified at 15 chalders, and £10 for communion elements.

In the locality Sir James Colquhoun of Luss, one of the heritors, lodged a condescendence and surrender of the teinds of his lands as valued at various times. The minister, the Rev. John Lawrie Fogo, objected to the surrender, in so far as regarded the lands of Faslane, Durling, Gairlochhead, Stucknaduff, Auchinvennelwilling, East Kilbride, and West Kilbride, on the ground that he had acquired a prescriptive right to certain overpayments of stipend in excess of the valuations. The teinds of the whole of these lands (which at that time belonged to the parish of Cardross) were valued by subcommissioners in 1629 and 1630, but certain lands stood in a different position in regard to the overpayments.

1. As regarded the lands of (1) Faslane, (2) Stucknaduff, (3) Auchinvennelwilling, and (4) West Kilbride,—

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There were subvaluations of the teinds of these lands in 1630, but in a final locality in 1748 these subvaluations were disregarded, and the teinds were localled on for stipend in excess of the valued teind. For forty years thereafter stipend was paid in conformity with this decree.

Thereafter approbations were obtained of the subvaluations (dated respectively in 1794, 1813, 1800, and 1813).

The minister maintained, in regard to these lands, that his prescriptive right under the decree of locality was not affected by the subsequent approbation.

2. As regarded the lands of (5) East Kilbride, (6) Durling,—

There were subvaluations of these lands in 1630. As in the former case, overpayments were made under the decree of locality of 1748, and in so far they were in the same position as the lands above mentioned; but other overpayments had been made for forty years under a final decree of locality in 1803, which was subsequent to the decrees of approbation (dated respectively 1793 and 1794).

The minister maintained that he had a prescriptive right to these overpayments also.

3. As regarded (7) the lands of Gairlochhead,—

There was a subvaluation of Gairlochhead in 1630, but it was never acted on, and under the decree of locality in 1748 payments of stipend greatly in excess of the subvaluation were made, and were continued down to a recent period. The proprietor of Gairlochhead had raised a summons, concluding alternatively for approbation of the subvaluation of 1630 or for a valuation by the High Court, and in 1794 he obtained a decree of valuation by the High Court.

The minister maintained that he had a prescriptive right to payments of stipend from these lands in excess of the valuation by the High Court.

A further question arose as to the payments out of East and West Kilbride. The minister maintained that, as the stipend had been allocated on these two lands and paid out of them under the localities of 1748 and 1803, the teinds of these lands were still liable for the full amount then paid, and that the lands of Middle Kilbride (the surrender of which he was prepared to accept) were not liable for any part thereof. The teind of East and West Kilbride, as valued in the subvaluation, was paid to the minister of Cardross, but payments in excess had been made to the minister of Row under the localities of 1748 and 1803. It appeared, however, from the documents produced that the lands of Kilbrides, East, West, and Middle, were a 9 merk land, and had all been valued in a subvaluation in 1630 at 9 bolls meal and 1 merk for each merk land. The proprietors of East and West Kilbride in 1793 and 1813 had carried through approbations of the subvaluation, and in doing so had divided the 9 bolls meal and 9 merks between these two lands, ignoring Middle Kilbride. A subsequent approbation of the subvaluation of all the Kilbrides was carried through in 1839, when they were all then valued at 9 bolls meal and 10s. money sterling, but this approbation was afterwards reduced at the instance of the minister. Sir James Colquhoun in 1870 had also obtained a separate High Court valuation of Middle Kilbride or Balemenoch. It was, however, clear, from the rentals and titles produced that all these lands had been valued, and had paid the stipend in equal proportions.

The Lord Ordinary (Gifford) pronounced the following interlocutors:—

"Edinburgh, 4th July 1871.—The Lord Ordinary having heard parties' procurators, and having considered the condescendence and surrender for Sir James Colquhoun of Luss, Bart., and the answers thereto for the Reverend John Lawrie Fogo, minister of Row, Nos. 65 and 66 of process, with the old localities and proceedings, Finds that, for a period greatly

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ceeding forty years, the condescender, the said Sir James Colquhoun, d his predecessors and authors, have, under final decrees of locality, id to the successive ministers of the parish of Row amounts of stipend nsiderably exceeding the amount of the value of the teinds contained the decrees of valuation held by the said Sir James Colquhoun and his edecessors and authors, and now proposed to be surrendered: Finds in int of law that the minister of Row for himself, and his successors in ice, has by such prescriptive overpayments acquired a right to insist at said payments shall be continued, notwithstanding the decrees of luation: Finds that the said Sir James Colquhoun is not entitled, by rrendering his teinds, to free himself from the obligation to continue to ake the overpayments in the same way as has been done during the pre-iptive period, and decerns: And before further answer appoints the cause be enrolled, with the view of ascertaining the precise amount of the pre-iptive overpayments, reserving meantime all questions of expenses." *

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* "NOTE.—It was quite fairly and candidly admitted by the counsel for Sir mes Colquhoun that his object in insisting in a surrender, in terms of his con-scendence and surrender, No. 65 of process, was to free himself in future from overpayments of stipend, and that notwithstanding that such overpayments had en made under final decrees of locality for a period greatly exceeding forty years.

"It was not disputed that such overpayments had been made for more than ty years, although their precise amount was disputed, and thus the question law was fairly raised whether Sir James Colquhoun, by now surrendering the act amount of his valuations, can now get rid of such overpayments in all ne coming.

"There was a subordinate question, whether, even supposing that the over-yments are still to continue, Sir James Colquhoun may still notwithstanding rrender his valued teind, subject to the continuance of the overpayments. is question, however, is of little importance, being rather a question of form an of substance, and at most only affecting Sir James' liability for a share of e expenses of future localities.

"The Lord Ordinary is of opinion that, by reason of the prescriptive over-yments under final decrees of locality, the minister has acquired a right thereto, d that the heritor is not entitled to shake himself free of his liability by sur-ndering the mere amount of his valued teind. The Lord Ordinary has thought better to decide this important point of law by substantive findings rather an by sustaining the surrender under a declaration or qualification. This urse is the more expedient, as the exact amount of the prescriptive overpay-nts is in dispute.

"It is now finally fixed that a decree of valuation of the High Court cannot derelinquished even by prescriptive overpayment, but the precise effect of ch overpayments has perhaps not been fully determined by the decided cases. ne leading cases are:—Locality of Fearn (Munro), Nov. 21, 1810, F. C. 38; axwell v. Blair (Eastwood Locality), July 3, 1816, F. C. 182; Locality of aderty (Moray), July 9, 1817, F. C. 371. Reference may also be made, as aring upon the question of surrender, to Connell, i. 521, and *sub*, and cases oted; Buchanan on Teinds, p. 216 and *sub;* Locality of Lamington, May 24, 98, F. C.; Tawse v. Earl of Glasgow (Paisley Locality), June 20, 1821, Shaw, Cases, 8; Cuthbert v. Waldie (Ednam Parish), Nov. 24, 1824, Shaw, T. C. ; Baird v. Minister of Polmont, July 3, 1832, 10 Shaw, 752; Richmond v. mmon Agent in Orwell, March 8, 1866, 4 M. 554.

"It appears to the Lord Ordinary to be finally decided by the case of Maderty, ove cited, that a minister may acquire a right to overpayments by prescription, twithstanding a High Court decree of valuation. This case was very fully gued, and decided upon informations to the Court, and it seems to determine e substantial question raised in the present case. The Lord Ordinary feels nself bound by this decision, which he does not think is inconsistent with the evious cases of Fearn and Maxwell, and which he cannot hold to be overruled

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"Edinburgh, 24th July 1872.—The Lord Ordinary having heard parties' procurators on the condescendence and surrender by Sir James Colquhoun, and answers thereto for the minister, with special reference to the teinds of the lands of Kilbrides, finds that the subvaluation of the teinds of the lands of Kilbrides, dated 7th January 1629, approved of by final decrees of approbation dated 20th February 1793 and 10th March 1813,

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by the case of Baird v. Minister of Polmont. No doubt in this last case Lord Moncreiff remarks upon the case of Maderty as a special case, and the ground of the decision in Polmont case was that the decree of locality on which the alleged overpayments proceeded had been *tempestive* reduced, so that the overpayments were really without a title.

"In the present case the old decrees of locality, in virtue of which the prescriptive payments have been made, have never been reduced, and it is impossible to reduce them, because they are long ago protected by prescription. It is vain to say, as was ingeniously urged by the counsel for Sir James Colquhoun, that every new augmentation operates *eo ipso* as a decree of reduction of all the old localities, however long they may have stood, or although they have been pronounced in litigated causes. This is not so. The old localities and *res judicatæ* therein are all final, either as *res judicatæ*, or as decrees unchallengeable after the prescriptive period, and all that can be settled in such locality is how the augmentation is to be localled, otherwise there would be no finality at all in teind causes. It is quite fixed that judgments in one locality are final in all subsequent ones, and there is no different rule for decrees protected by prescription.

"The minister's right to prescriptive overpayment seems also to rest on sound reason. His title to the benefice, and his decree in the locality, constitute a good title on which to found prescription, and where the heritor under such a title pays the amount decerned for forty years without challenge, there seems no ground for allowing him after that to open it up. He is barred, both by the positive prescription in respect of possession by the minister, and by the negative prescription which cuts off the heritor's right, to challenge the old decree. The decree of valuation will protect the heritor from all future augmentations, for it has not been derelinquished; but it will not protect him from the law of prescription, which prevents him from challenging a decree which he has implemented without objection for more than forty years.

"As to the subordinate question, or question of form, the Lord Ordinary is inclined to think that, notwithstanding the prescriptive overpayment, the heritor may still surrender, provided it is made clear that, besides the surrendered teind, the heritor is still to pay the fixed and prescriptive overpayment. In this way the Lord Ordinary reconciles the cases of Fearn and Maxwell with that of Maderty, but the overpayments must be fixed, and with this view the Lord Ordinary has appointed the case to be enrolled.

"The Lord Ordinary was referred to an unreported decision of Lord Barcaple in the case of Auchterlony, 22d December 1866, which was acquiesced in, and in which Lord Barcaple refused to sustain a surrender where there had been overpayments. In that case, however, it was only a portion of the valued teind which was proposed to be surrendered, and there had been no apportionment fixing its amount. This by itself would support Lord Barcaple's judgment, and his note shews that it was rather the form of the surrender than its substance which was considered objectionable.

"Surrenders were introduced by the Court in the case of Lamington,—see Connell, i., 521. Their primary object was to save heritors from overpayments in a new locality by reason of increased value of victual, when the valuation of the teinds was in money. Their practical effect was to save the heritors, whose payment was fixed and unalterable, from taking part in localities, and from the expenses of a process in which he had no interest. If, in the present case, Sir James' constant payment is fixed and unalterable, there seems nothing in principle to prevent him from giving up that payment so as to save him from the trouble and expense of taking part in future processes of locality."

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must be held to apply only to the teinds of the lands of Easter Kilbride, and to the teinds of the lands of Wester Kilbride, and not to the teinds of the lands of Middle Kilbride: Finds that the teinds of the lands of Middle Kilbride have been separately valued by decree of valuation dated 3d June 1870: Finds that the amount of the valued teinds of Easter Kilbride and of Wester Kilbride, as contained in the said subvaluation and decrees of approbation, has always been paid by the proprietors of these lands to the minister of Cardross, under the original arrangement, when the present parish of Row was disjoined therefrom: Finds that, in considering and fixing the overpayments to which the minister of Row is entitled by reason of prescriptive possession thereof, the payments of the valued teind to the minister of Cardross must be held to have been solely in respect of the lands of Easter Kilbride and Wester Kilbride, to the teinds of which lands alone the final decrees of approbation apply; and finds that all sums paid to the minister of Row for the full prescriptive period, in respect of the lands of Easter Kilbride, Wester Kilbride, or Middle Kilbride, must be held to be overpayments over and above the valued teinds of Easter Kilbride and Wester Kilbride; and finds that the said payments made to the minister of Row for the full prescriptive period must continue to be paid without deducting therefrom any part of the valued teind paid during the same period to the minister of Cardross; and, with these findings, appoints the case to be enrolled, that the amount of the prescriptive overpayments may be fixed and adjusted, reserving all questions of expenses." *

* "NOTE.—The condescendence and surrender by Sir James Colquhoun of Luss, Bart., and the answers thereto for the minister of Row, raise a great many questions of much difficulty, both in point of principle and in matters of detail.

"The Lord Ordinary, by his interlocutor of 4th July 1871, disposed of the chief question of principle as to which the parties were at issue. He found that an heritor who, notwithstanding old decrees of valuation, has for forty years and upwards, under final localities, paid more than the amount of the valued teind, is bound to continue such overpayments, although the decrees of valuation are not thereby derelinquished, and that such heritor cannot get quit of such overpayments merely by surrendering his valued teind. This judgment has in the meanwhile been acquiesced in, and parties were further heard upon the questions of details as to what the amounts of the prescriptive overpayments really were.

"There are a great many lands, and the facts as to some of them are rather intricate, but ultimately both parties explained to the Lord Ordinary that they thought they could adjust all mere questions of amount, excepting as to the lands of Kilbrides, of which there are three parcels, Easter Kilbride, Wester Kilbride, and Middle Kilbride. The ascertainment of the amount of overpayments for these lands depends upon questions of principle, which were argued before the Lord Ordinary, and he has now endeavoured to dispose thereof.

"The question chiefly turns upon the effect of the old subvaluation of 1629, as explained or affected by the two decrees of approbation thereof of 1793 and 1813. It may be quite true that the subvaluation of 1629 was originally intended to apply to the whole three Kilbrides, and not merely to two of them. The Lord Ordinary is of opinion, however, that it is too late now to maintain this, but that it is finally fixed by the two decrees of approbation of 1793 and 1813, both of which are now unchallengeable, that the old subvaluation only applies to Easter and Wester Kilbride, and thus leaves the teinds of Middle Kilbride unvalued. This conclusion is confirmed, if confirmation were necessary, by the fact that in 1870 Sir James Colquhoun led before the High Court a new and independent valuation of the teinds of Middle Kilbride.

"The incidence and application of the different valuations being thus fixed, the next question is, from the teinds of what lands was stipend paid to the minister of Cardross? Now, the stipend paid to the minister of Cardross for

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On 19th March 1873 the Lord Ordinary (Mackenzie) pronounced the following interlocutor:—"Sustains the surrender in so far as concerns the teinds, parsonage and vicarage, of the following lands, viz. Faslane, Deorling, East Kilbride, Wester Kilbride, Auchenvennelvoulin, and Middle Kilbride or Ballemeanoch, amounting in whole to 115 bolls 2 firlots 1 peck 2 lippies and 13-15ths of a lippy of meal, at 9 stones per boll, 25 bolls 2 firlots 3 pecks 2 lippies and 1-5th of a lippy bear, and £89, 18s. 2⅙d. sterling, under deduction of the teind or stipend of the said lands of Faslane, Deorling, Auchenvennelvoulin, and Easter and Wester Kilbrides, payable to the minister of Cardross, amounting in whole to 72 bolls 2 pecks and 2 lippies of meal, and 3 bolls 1 firlot of bear, and £3, 7s. 2$\frac{8}{12}$d. sterling, leaving as the amount of the surrendered teinds 43 bolls 1 firlot 3 pecks and 13-15ths of a lippy of meal, 22 bolls 1 firlot 3 pecks 2 lippies and 1-5th of a lippy of bear, and £86, 10s. 11½d. sterling of money: Also sustains the surrender of the teinds of the said lands of Gairlochhead and Stucknaduff, but without prejudice in any respect to, and under reservation of, the prescriptive right of the minister of Row to a stipend of 6 bolls of meal and 5s. 1$\frac{6}{12}$d. sterling of money out of Gairlochhead, and 5 bolls of meal and 7s. 5d. sterling out of Stucknaduff, which stipend is hereby reserved entire to him: Further, finds and declares that the surrender of the said teinds of Faslane, Deorling, East Kilbride, Wester Kilbride, Auchenvennelvoulin, and Ballecknock is not to prejudice or in any way affect the prescriptive right of the minister of Row to a stipend in excess of what is paid to the minister of Cardross, of 8s. 4d. sterling out of Faslane, 1 firlot of meal and 7s. 9$\frac{6}{12}$d. out of Deorling, 3 firlots 3 pecks and 1 lippy and 4-5ths of a lippy of meal and 4s. 2d. sterling out of East Kilbride, 2 bolls 1 firlot and 1 lippy and 8s. 11$\frac{9}{12}$d. sterling out of West Kilbride, amounting in all to 3 bolls 1 firlot 3 pecks 2 lippies and 4-5ths of a lippy of meal, whereof 1 boll 1 firlot 1 peck 2 lippies and 4-5ths of a

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more than a century is the exact amount, even to a fraction, of the valued teind contained in the subvaluation and two decrees of approbation. The Lord Ordinary thinks that the inference is irresistible, that it was the valued teinds of the lands of Easter and Wester Kilbrides that have always been paid, and are now payable to the minister of Cardross. It would be a very forced and violent conclusion to hold that although the exact valuation is paid, it is not paid in respect of the teinds valued, but in respect of certain other teinds which are not valued. Possibly this might be made out by evidence, but certainly there is every presumption against it, and not a particle of evidence was adduced or referred to by Sir James. The Lord Ordinary was not asked to grant any proof, and indeed proof could hardly be otherwise than by documents, and the parties had none to produce. Viewing the matter as one of presumption, the Lord Ordinary can come to no other conclusion than that the valued teind paid in Cardross was the valued teind of Easter and Wester Kilbrides, and that no part of it was the unvalued teind of Middle Kilbride.

"It follows that all the prescriptive payments made in Row, in respect of Easter and Wester Kilbrides, are overpayments which must continue to be made to the exact amount fixed by prescription.

"In this view, there is no question about Middle Kilbride. The teind thereof is fixed by the valuation of 1870, and the whole amount of that valuation is now to be unconditionally surrendered, but no deduction can be made therefrom in respect of the payments made in Cardross, for these payments were made not for Middle Kilbride at all, but for Easter and Wester Kilbride alone.

"In like manner the exact overpayments for Easter and Wester Kilbride must be fixed upon the evidence, and, as prescriptive overpayments, must continue to be made notwithstanding the old valuations.

"The Lord Ordinary trusts the parties will now by joint minute apply the above findings, and exhaust the matters of detail connected with the surrender."

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lippy at 8 stones per boll, the rest being 9 stones, and £1, 9s. $3\frac{3}{4}$d. sterling money: Remits to the clerk to prepare a rectified locality and state of arrears of stipend," &c.

Sir James Colquhoun reclaimed, and argued;—Overpayments could only be sustained when they were made under a locality dated prior to the approbation of a subvaluation. The effect of that was, as in Maderty, to make these payments come out of surplus teind, and not out of stock, which would be the case if the overpayments out of Durling and East Kilbride under the locality of 1803 were sustained. In a question between heritors as to localling on teinds, the minister had no interest; he was only entitled to get his stipend, not to insist upon the stipend coming out of a particular heritor's teind, as long as there was free teind available. He could not insist on payments out of stock being continued, merely because these payments had gone on for upwards of forty years, especially when there was teind still to local on. By taking these payments out of stock he managed to leave more free teind available for subsequent augmentation.

The lands of Gairlochhead were in a different position. The teinds were valued by a valuation of the High Court, not by an approbation of a subvaluation, and a valuation of the High Court fixed finally the amount of the teind. A decree of the High Court never could be derelinquished. The payments made in excess of the valuation must have been out of stock, and could not be continued; and the valuation having finally fixed the amount of the teind, it was impossible here, as in the case of Maderty, to hold that the overpayments were out of surplus teind.

As regarded the question of the three Kilbrides, the documents produced shewed clearly that the stipend had really been paid out of all three lands in point of fact, and that was all the heritor had to make out to succeed in his contention. No mistakes in the approbations in 1793 and 1813 could affect the matter of fact.

Finally, the surrender as proposed, including overpayments, was quite competent, and the minute as tendered ought to be sustained.[1]

LORD PRESIDENT.—Three interlocutors of the Lord Ordinary on Teinds are brought under review by this reclaiming note. The first is dated 4th July 1871, and in it Lord Gifford "finds that for a period greatly exceeding forty years the condescender, the said Sir James Colquhoun, and his predecessors and authors, have, under final decrees of locality, paid to the successive ministers of the parish of Row amounts of stipend considerably exceeding the amount of the value of the teinds contained in the decrees of valuation held by the said Sir James Colquhoun and his predecessors and authors, and now proposed to be surrendered: Finds in point of law that the minister of Row, for himself, and his successors in office, has by such prescriptive overpayments acquired a right to insist that said payments shall be continued, notwithstanding the decrees of valuation: Finds that the said Sir James Colquhoun is not entitled by sur-

[1] *Authorities.*—Locality of Fearn (Munro), Nov. 21, 1810, F. C. 38; Maxwell v. Blair (Eastwood Locality), July 3, 1816, F. C. 182; Locality of Maderty (Moray), July 9, 1817, F. C. 371; Locality of Lamington, Jan. 24, 1798, F. C.; Tawse v. Earl of Glasgow (Locality of Paisley), June 20, 1821, Shaw's T. C. 8; Cuthbert v. Waldie (Ednam), Nov. 24, 1824, Shaw's T. C. 75; Baird v. Minister of Polmont, July 3, 1832, 10 S. 752; Richmond v. Common Agent in Orwell, March 8, 1866, *ante*, vol. iv. 554; Robertson v. Macknight (Locality of Fettercairn), Feb. 6, 1873, *supra*, p. 389; Chisholm-Batten v. Cameron, Jan. 16, 1873, *supra*, p. 292; Forbes on Teinds, 863; Connell, i. 521, *et sub.*; Buchanan, p. 216, *et sub.*

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rendering his teinds to free himself from the obligation to continue to make the overpayments in the same way as has been done during the prescriptive period, and decerns: And before further answer appoints the cause to be enrolled with the view of ascertaining the precise amount of the prescriptive overpayments, reserving meantime all questions of expenses." The Lord Ordinary has not specified to what particular lands these findings apply, but we find them in a subsequent interlocutor of Lord Mackenzie, dated 19th March 1873, and in a minute for Sir James Colquhoun in page 14 of the reclaiming note. It appears there are seven portions of lands to which the findings relate, viz.. Faslane, Durling, Gairlochhead, Stucknaduff, Auchinvennelwilling, East Kilbride, and West Kilbride. These lands are not all in the same position, Faslane, Stucknaduff, Auchenvennelwilling, and West Kilbride, are all similarly situated, that is, the valuations of these lands were subvaluations by the subcommissioners in 1630, which were afterwards approved by decrees of approbation in the High Court 1794, 1800, and 1813, but payments in excess of the subvaluations had been made under a final decree of locality in 1748, for a period beyond the years of prescription, before the approbations were carried through. The subvaluations were not acted upon, but disregarded, and if dereliction had been pleaded in the processes of approbation that plea must have been successful. It appears to me that, as regards these lands, the case of Maderty, which has been referred to both by the Lord Ordinary and in argument, is a direct authority in point, and we have no choice but to give effect to that decision.

The lands of Durling and East Kilbride stand in the same position as regards overpayments made under the final decree of locality in 1748, and if there had been no other locality they would have fallen to be dealt with in the same way. It so happens, however, that part of the overpayments from these lands was made under a final decree of locality in 1803, and although that makes no difference as regards the other lands, it does as regards Durling and East Kilbride. The decree of approbation of subvaluation of Durling was pronounced in 1794, and that of East Kilbride in 1793. The overpayments made under the decree of locality in 1803 being necessarily subsequent to these dates, the case of Maderty is not directly applicable, because the overpayments there were under a decree of locality long antecedent to the decree of approbation. I am of opinion that while the authority of that case does not apply to lands which were localled on under the decree of locality of 1803, no more can the principle of the decision be held to apply. A final decree of locality pronounced after and in the face of a subvaluation shews the true amount of the teind, and a decree of approbation following after the period of prescription must fix the value at that amount. That was the case of Maderty, but there can be no reason for saying, that, after the value of the teind is fixed by a final decree of approbation, the minister can insist upon overpayments being made to him, not out of teind but out of stock, because a final decree of locality of date later than the decree of approbation has burdened him with such overpayments, and these overpayments have been made for more than forty years. I am therefore of opinion that the small overpayments of 1 firlot meal and 7s. 9d. and 5-12ths of a penny from Durling, and 3 firlots 3 pecks and 4-5ths of a lippy and 4s. 2d. from East Kilbride, should not be continued, and to that extent I differ from the interlocutor of 4th July 1871.

There remains the case of Gairlochhead, which is in a different position from any of the others. There was a subvaluation of Gairlochhead, but it was never approved of, and has been completely derelinquished, and is entirely out of the case. Certain payments of stipend have been made from these lands under the decree of locality in 1748 greatly in excess of the subvaluation, and these payments have been continued up to the present day. But there was in this case a decree of valuation by the High Court in 1794, not a decree of approbation, and it is contended that a decree of valuation by the High Court never can be derelinquished, that it fixes, absolutely, the amount of the teind, and no overpayments of stipend afterwards can be allowed in excess of it. The Lord Ordinary seems to be of opinion that a decree of valuation by the High Court stands in the same position as a decree of approbation of subvaluation, because he states

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in his note—"It appears to the Lord Ordinary to be finally decided by the case of Maderty, above cited, that a minister may acquire a right to overpayments by prescription, notwithstanding a High Court decree of valuation."

The case of Maderty does not decide that. In that case the teinds of Ballyclone were surrendered, or proposed to be surrendered, by the heritor as of the value shewn in a subvaluation in 1629, and an approbation thereof by the High Court in 1760. The common agent objected, on the ground that the subvaluation had not been acted upon, and that the heritor had, by a decree of locality in 1650, been localled on for a greater stipend than was contained in the subvaluation, and had paid without challenge. In these circumstances, if Lord Ordinary Robertson's interlocutor had been a final interlocutor, there would have been something to be said for the Lord Ordinary's view here, because Lord Robertson found that the decree of the High Commission of 1760 could not be challenged on account of overpayments of stipend alleged to have been made prior to its date, and that it could not be derelinquished by any overpayments; but then, he added, "although when overpayments of stipend have been made, and continued during the years of the long prescription, the minister will have right to such surplus payment in time coming." That looks very much as if Lord Robertson intended to hold that there might be overpayments fortified by prescription, although a High Court valuation had been obtained. But that was not the view of the Court in the final judgment. They found that the subvaluation had never been acted upon, and, on the contrary, that a decree of locality had been pronounced in 1650, whereby the teinds of Ballyclone were rated higher than in the subvaluation, and that the heritor had continued to pay stipend according to that locality down to 1760, when he obtained approbation of the subvaluation by the High Court in absence. The interlocutor then proceeds:—"Find that by the possession following on the decreet of 1650 the minister acquired a prescriptive right to the surplus teind beyond the subvaluation 1629, and that the approbation 1760 must be limited and qualified by said prescriptive right, and that the minister has right to the teinds as modified to him by decreet 1650, without prejudice to the valuation in other respects; and find that this seems to have been the understanding of Abercairney himself, who, from the year 1760 downwards, has continued to pay stipend according to the decreet 1650, and not according to the subvaluation 1629."

It is obvious that the view of the Court was, that the amount of teind was to be taken, not as it appeared in the subvaluation, but as it appeared in the final decree of locality in 1650, and the subvaluation could only be approved on the footing of the amount of teind fixed, not by the subvaluation, but by the final decree of locality. The Court thus avoided giving decree for payment out of stock; the payments were to be out of teind, and the teind was to be held to be of a certain fixed amount. That is not the case here; we have a decree of valuation of the High Court in 1794, and that is in a very different position in many respects from an approbation of a subvaluation. First, I would observe, the amount of the teind is not necessarily the same at all times, and unless there be a valuation, the amount will vary according to the value and produce of the land at the time, until a valuation be obtained. Where there is valuation the teind is generally taken as one-fifth part of the rent, if the lands be let, but after decree of valuation has been obtained there is no longer room for inquiry; the amount is then fixed, and all increase or decrease necessarily stopped. Subvaluations, again, which are reports of subcommissioners appointed by the High Commission, required to be ratified and approved by the High Commission. These subcommissions were first appointed in or about 1628, and continued at intervals from that time, valuing teind and issuing reports until 1660, after which time no subcommissions were appointed or subvaluations made. These subvaluations, although effectual when approved of by the High Court, are not effectual if not acted upon. If there be contrary actings for a certain period they are lost, and cease to have any effect. Decrees of valuation of the High Court are in a very different position; it was not necessary to obtain them at a particular date in the 17th century; they can be obtained at any time, and indeed cannot be refused to a heritor, but of course the teind is valued as at the

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date when the process is brought, and according to the value at that time. An old valuation is better, of course, but still every heritor is entitled to get a valuation; he may get it whenever he chooses to ask for it, and when he has once obtained it, it cannot be derelinquished; no amount of overpayments will put an end to such a valuation. What is proposed here is that payments in excess of teind as fixed by a decree of valuation of the High Court should be continued, because such overpayments have been made for a period beyond the period of prescription. There are two points to be considered in connection with this contention—(1) The payments before the High Court valuation, but after the subvaluation, which was derelinquished, were made in good faith, and cannot now be gone on. They were made on the supposition that the teinds had never been valued. (2) As regards the payments after the High Court valuation, it is impossible to resist the conclusion that so far as they were in excess of teind they were out of stock. That cannot be continued. The case of Maderty was decided on the footing that the overpayments were out of teind, and on no other ground, so it is no authority for such a proposition. I am accordingly of opinion that the Lord Ordinary's interlocutor of 4th July 1871 is erroneous, in so far as it is intended to apply to the lands of Gairlochhead.

The second interlocutor under review is that of 24th July 1872, also pronounced by Lord Gifford. This interlocutor applies to a wholly different matter. The Lord Ordinary "finds that the subvaluation of the teinds of the lands of Kilbrides, dated 7th January 1629, approved of by final decrees of approbation dated 20th February 1793 and 10th March 1813, must be held to apply only to the teinds of the lands of Easter Kilbride, and to the teinds of the lands of Wester Kilbride, and not to the teinds of the lands of Middle Kilbride." Then he finds further, "that the amount of the valued teinds of Easter Kilbride and of Wester Kilbride, as contained in the said subvaluation and decrees of approbation, has always been paid by the proprietors of these lands to the minister of Cardross, under the original arrangement, when the present parish of Row was disjoined therefrom: Finds that, in considering and fixing the overpayments to which the minister of Row is entitled by reason of prescriptive possession thereof, the payments of the valued teind to the minister of Cardross must be held to have been solely in respect of the lands of Easter Kilbride and Wester Kilbride, to the teinds of which lands alone the final decrees of approbation apply; and finds that all sums paid to the minister of Row for the full prescriptive period, in respect of the lands of Easter Kilbride, Wester Kilbride, or Middle Kilbride, must be held to be overpayments over and above the valued teinds of Easter Kilbride and Wester Kilbride; and finds that the said payments made to the minister of Row for the full prescriptive period must continue to be paid without deducting therefrom any part of the valued teind paid during the same period to the minister of Cardross."

The history of these lands is certainly peculiar; the subvaluation of the lands is stated in this way: "And for the parsonage teyndis of the saidis landis of Kilbryddis 9 bollis meill with ane merk also for the merkland thairof of viccarage." That is understood to mean, and does mean, that the 9 bolls are payable from the whole lands, and one merk is payable from each merkland; and we see from the titles that the whole lands of Kilbride, East, West, and Middle, are a 9 merkland, so that the value of the teind of the whole three lands, according to the subvaluation, is 9 bolls meal, and 9 merks money, being 1 boll and 1 merk on each merkland. It appears, therefore, from the subvaluation by the subcommissioners that the Lord Ordinary is wrong in his finding. But then the difficulty arises, which seems to have influenced his Lordship, namely, that a mistake was made. One of the Kilbrides—East Kilbride—in 1793 belonged to Herbert Buchanan of Arden, and at the same period West Kilbride belonged to Andrew Buchanan of Ardenconnel. Herbert Buchanan of Arden, in carrying through an approbation of the subvaluation as regarded his lands of East Kilbride, proceeded on the supposition that East Kilbride was one-half of the whole Kilbrides valued in the subvaluation, and libelled his summons accordingly. In 1813 the proprietor of West Kilbride fell into the same mistake, and stated that the teind of his lands was 4½ bolls meal and "one merk for ilk merk thereof

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of vicarage;" whereas in point of fact the subvaluation really put only 3 bolls of meal on West Kilbride and one merk for each merkland. Undoubtedly this valuation went on the principle of dividing the whole payments equally between these two parcels of land. But that is not conclusive of the question. The question is, whether in point of fact the payments to the minister of Cardross were made for two Kilbrides or for all three. The mistake made cannot be taken into account when there are facts to decide the point. Is the Lord Ordinary right in finding that the "payments of the valued teind to the minister of Cardross must be held to have been solely in respect of the lands of Easter and Wester Kilbride?" In order to ascertain whether he is or not it is necessary to look at the locality of Cardross and the other documents before us. These throw some light upon the matter. First, we have the scheme of rental of the parish of Row in 1748, which shews the payments in use to be made to the minister of Cardross. This is necessary, because it shews the value of the lands at that time. From it we find that the lands of West Kilbride pay to the minister of Cardross 3 bolls meal and £2 money (Scots), and the lands of East Kilbride pay exactly the same. The only conclusion from this is that West Kilbride pays one-third of the whole valued teind of the Kilbrides, and East Kilbride another one-third. In the same rental we find the lands of Balemenoch included among other lands, but they are proved to be identical with the lands of Middle Kilbride. So it is apparent that a portion of the stipend was necessarily allocated on these lands. If the statement in that rental be correct in point of fact the Lord Ordinary must be wrong. That this is the true state of affairs is further confirmed by the report of the common agent in the locality of Cardross in 1836. In it again, it is made clear that the whole three Kilbrides contributed to pay that amount of stipend, viz.—9 bolls meal and 9 merks money. Again, in the rectified locality of the stipend of the parish of Cardross made up in 1815, and made final in 1859, we have the Kilbrides entered at 9 bolls meal and 10s. sterling as surrendered teinds. That surrender was on a decree of approbation in 1839 of the subvaluation of 1630, which contained the whole three Kilbrides. The three subjects thus evidently paid jointly. It is true this decree of approbation of 1839 was subsequently reduced, but from that time it had been adopted as the statement of what was paid to the minister, and so it is clear that the minister was paid not out of two, but out of three Kilbrides. The Lord Ordinary's interlocutor is therefore not well founded. I do not think that it matters much that the heritor in 1870 obtained a separate valuation of the teind of Middle Kilbride. That cannot affect the question of fact as to the teinds out of which the stipend was paid.

The result of the whole matter is, in my opinion, that, while a great part of the surrender by Sir James Colquhoun may be sustained, part cannot be sustained, in consequence of prescription—*i.e.*, the surrender of those lands, which, I agree with the Lord Ordinary, have overpaid under the locality of 1748. As regards East Kilbride and Durling, I differ as regards the overpayments upon the locality of 1803, and hold that they cannot be insisted in; and as regards Gairlochhead, there can be no payments sustained in excess of the valuation of 1794. Lord Mackenzie, in his interlocutor of 19th March 1873, while he sustains the surrender to a certain extent, also sustains the surrender in respect of lands out of which overpayments are to be continued. That, I confess, is a new form of interlocutor to me. A surrender must either be sustained or not. The effect of a surrender is to make the minister titular of the teinds *quoad* the surrendered teinds. It is impossible to make him parson of what is not surrendered. We should, I think, refuse to sustain the surrender of these lands. The best course perhaps will be to recall all the interlocutors, and make one new interlocutor disposing of the whole case.

LORD DEAS—The only point of difficulty is with reference to the stipend payable out of the lands of Gairlochhead. I entirely concur with your Lordship that payments of stipend must not be out of stock, but out of teind, and unless it be held that there is teind sufficient to meet the prescriptive overpayments

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these overpayments cannot continue to receive effect. In the case of Maderty the Court held that the overpayments to which they gave effect were just so much teind over and above the teind as valued in the decree of subvaluation, which had been approved of by the High Court. The subvaluation had been made in 1629, and the interlocutor bears that "by the possession following on the decreet" (of locality) "of 1650, the minister acquired a prescriptive right to the surplus teind beyond the subvaluation 1629, and that the approbation 1760 must be limited and qualified by said prescriptive right, and that the minister has right to the teinds as modified to him by decreet 1650, without prejudice to the valuation in other respects."

Now, the difficulty here is, whether the same principle does not apply (as the Lord Ordinary has held it to do) to the decree of valuation obtained in 1794 of the teind of Gairlochhead. No doubt there are some differences, which your Lordship has pointed out, between decrees of valuation of the High Court and decrees of approbation of subvaluations. But the question is whether these differences are sufficient to warrant a different result. It is very true that a subvaluation may be derelinquished, and a decree of valuation of the High Court cannot be derelinquished. But in the case of Maderty the subvaluation was not held to be derelinquished. On the contrary, the subvaluation was approved of, and yet the Court held it must be read as limited and qualified by the prescriptive right to the teinds as modified to the minister by the decreet of 1650. The summons of 1794 concluded alternatively, either to have the subvaluation of the lands of Gairlochhead approved of, or to have a new valuation. It looks somewhat anomalous that the heritor, by taking decree in the one form, could get free from liability for overpayments which, on the authority of the case of Maderty, he would have been under if he had taken decree in the other form.

Overpayments were made for upwards of forty years on each side of 1794. Why should we not hold that these payments were made out of surplus teind, as in the case of Maderty? If your Lordships had taken that view, it would not have occurred to me to be objectionable. My difficulty is that if we sanction the proposed distinction we may seem to shake the authority of the case of Maderty altogether. I do not say so, however, with any confidence, in the face of your Lordship's decided opinion.

LORD ARDMILLAN and LORD JERVISWOODE concurred with the Lord President.

THE COURT pronounced the following interlocutor:—"The Lords having considered the reclaiming note for Sir James Colquhoun, No. 108 of process, and heard counsel for him and the minister, recall the interlocutors of 4th July 1871, 24th July 1872, and 19th March 1873: Sustain the surrender, in so far as concerns the teinds, parsonage and vicarage, of the following lands, viz. . . . Gairlochhead, Auchenvennelmore, East Kilbride, Middle Kilbride or Ballemeanoch, amounting in whole to 92 bolls, 0 firlots, 1 peck, and $3\frac{7}{16}$ths lippies meal, 23 bolls 2 firlots 3 pecks $2\frac{1}{16}$ths lippies bear, and £93, 18s. $4\frac{8}{12}$d. money sterling, under deduction of the teind or stipend of the said lands of Auchenvennelmore, East Kilbride, and Middle Kilbride, payable to the minister of Cardross, amounting in whole to 37 bolls 1 firlot 2 pecks 2 lippies meal, 1 boll 1 firlot bear, and £18, 0s. $7\frac{7}{12}$d. money, leaving as the amount of the surrendered teinds 54 bolls 2 firlots 3 pecks $1\frac{7}{16}$ths lippies meal, 22 bolls 1 firlot 3 pecks $2\frac{1}{16}$ths lippies bear, and £75, 17s. $8\frac{1}{12}$d. money sterling: Refuse the surrender in so far as regards the teinds of the lands of Faslane, Durlin, Stucknaduff, West Kilbride, Auchenvennelwilling, and find that the minister has acquired right by prescription following on the locality of 1748 to the undermentioned payments from these lands, viz., from Faslane, 8s. 4d., Durling, 7s. $9\frac{8}{12}$d., Stucknaduff, 5 bolls meal and 7s. 5d., West

Kilbride 1 boll 3 firlots 2 pecks meal, and 8s. 11$\frac{9}{12}$d., and Auchenvennelwilling and Ballecknock 19s., and has also acquired right by prescription following on the locality of 1803 to a further payment from West Kilbride of 1 firlot 2 pecks and 1 lippy meal at 8 stones to the boll: Find neither party entitled to expenses: Remit of new to the Teind Clerk to prepare a rectified locality and state of arrears of stipend, and remit to the Lord Ordinary to proceed with the cause."

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TAWSE & BONAR, W.S.—W. H. & W. J. SANDS, W.S.—Agents.

TANNETT, WALKER, AND CO., Pursuers.—*Sol.-Gen. Clark—Blair.*
HANNAY AND SONS, Defenders.—*Watson—Balfour.*
Et e contra.

No. 152.
July 18, 1873.
Tannett, Walker, & Co. v. Hannay & Sons.

Process—Proof—Confidentiality.—In counter actions arising out of a contract to construct machinery the Court refused to grant diligence for the recovery of letters between the partners of the contractor's firm, but granted diligence to recover letters written to them by their foreman or other workmen employed in the construction of the machinery.

1ST DIVISION. B.

TANNETT, WALKER, AND CO., engineers, Leeds, raised an action against Hannay and Sons, of Blochairn Malleable Iron Works, Glasgow, for the balance of an account incurred for iron rolling machinery and reversing apparatus. The defenders refused payment, on the ground that the machinery was disconform to contract and incapable of doing useful work, and that the great part of the account charged had been incurred owing to defects in the original construction of the machinery.

Messrs Hannay and Sons raised a counter action for damages said to have been caused by the bad working of the machinery. The two actions were conjoined and issues adjusted. It appeared that during the whole time the machinery was being worked or experimented with Tannett, Walker, and Company had a gang of men at Glasgow to look after it, who first erected the machinery, and subsequently executed repairs and improvements as required. These men were under the charge at first of Thomas Harrison, and then of Matthew Duncan, whose names occur below.

Mr Walker, one of the pursuers, was also frequently at Glasgow for considerable periods, and, it was believed, had communications with his partners both as to the repairs on the machinery and the question as to who was to bear the expense of these. In these circumstances Messrs Hannay and Sons asked for a commission and diligence to recover certain documents.

Among other articles of their specification were the following:—"(2) All letters and memoranda, telegrams, reports, or written communications sent or made to Tannett, Walker, and Co., or to any of the partners of that firm, or to any one on their behalf, by Thomas Harrison, or Matthew Duncan, their foreman, or other person or persons employed by them in connection with the machinery on record, relating or referring to said machinery, or to the articles or things supplied by Hannay and Sons to Tannett, Walker, and Co., or to any matter mentioned or referred to on record in either action prior to 19th April 1872." "(4) All letters, memoranda, telegrams, or written communications between Mr Benjamin Walker, of the firm of T., W., and Co., to his other copartners in the firm, or to the firm or by the firm, or any one or more of the copartners thereof, to him, relating to the machinery mentioned on record, or to the furnishing or fitting of the same prior to April 19, 1872."

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The pursuers objected to these two articles, and maintained that the letters were confidential, and could not be put in evidence. If they could not be made evidence they ought not to be recovered.[1]

The defenders argued that the letters were written at the time the work was going on, and so were the best evidence. It would be very useful at the trial to have the letters in order to put them into the witness's hands in order to refresh their memory. The letters to the workmen were the information on which they proceeded in executing the work, and even if they could not be evidence *per se* they might be useful in refreshing the memory of the witnesses.

At advising,—

LORD PRESIDENT.—The decision in the case of Livingstone v. Dinwoodie is very important, because it was pronounced by the Second Division after deliberate consideration, and after consultation with the other Judges. It decided that letters can be recovered only if they can be made evidence in the case. Here the letters from the workmen may be evidence, and possibly important evidence in the case.

I am not inclined to allow the fourth article. I do not think that letters between partners of a firm can be allowed to be recovered unless under very exceptional circumstances, and unless specific grounds are stated for their recovery. If one partner had been sent to another country to act for the firm in a particular transaction there might be a reason for recovering the letters to him, to shew what his transactions were. But very special cause would be required, and we have none such here.

LORD DEAS.—I am of opinion that the letters from the workmen may be recovered, and may possibly afford important evidence in the case. It would be strange if it were not so. Suppose a building contract takes years to complete, the workmen employed might not remember everything which took place during that period, and it would be unreasonable to hold that letters written by them to their employer at the time could not be recovered in aid of defective memory. The case here is quite different from the case of Livingstone v. Dinwoodie.

With regard to communications said to have passed between the partners, something very special would be requisite to authorise these being recovered.

LORD ARDMILLAN and LORD JERVISWOODE concurred.

THE COURT pronounced the following interlocutor:—"Grant diligence at the instance of Hannay and Sons, defenders in the issues, against havers for recovery of the writings in the specification annexed to notice of motion, No. 54 of process, as amended at the bar."

HUNTER, BLAIR, & COWAN, W.S.—WEBSTER & WILL, S.S.C.—Agents.

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July 19, 1873. Millar's Trustees, &c. v. Leith Police Commissioners.

MILLAR'S TRUSTEES AND ANOTHER, Pursuers.—*Adam—Kinnear.*
LEITH POLICE COMMISSIONERS, Defenders.—*Sol.-Gen. Clark—Harper.*

Road—Statute 25 *and* 26 *Vict. c.* 101 (*General Police and Improvements (Scotland) Act*, 1862), *secs.* 3, 150, 396, 397—*Private Street.*—A piece of ground within a burgh, which had been originally intended to form a continuation of a street, and had been enclosed by walls marking out the line of the intended street, was held by three joint proprietors, whose titles conferred right on any one of their number at any time to insist upon it being thrown open as a public thoroughfare. It was used as an access to workshops and yards belonging to the several joint proprietors, and occupied by various tenants. For a long time it was shut off from the street of which it formed a continuation, by a wall

[1] Livingstone v. Dinwoodie, June 28, 1860, 22 D. 1333.

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ı a locked gate therein; the wall was, however, broken down and the gate oved about fourteen years before the present action, but the ground was ır thrown open as a public thoroughfare. The General Police and Improve- t Act having been adopted in the burgh, the Police Commissioners, after ng the statutory notice, caused a portion of the ground to be paved. *Held*, ın action at the instance of two of the joint proprietors against the ce· Commissioners, that the ground was a private street in the sense of 3 of the Act, and as such fell under the regulations of the Act applicable rivate streets, and that consequently the pursuers, who had failed to object ıe execution of the work in the manner prescribed by the Act, were barred ı complaining thereof.

2D DIVISION. Lord Jerviswoode. R.

HIS was an action of declarator at the instance of the trustees under marriage-contract between Christian Hoyer Millar, merchant, Mon- e and Miss Marion Marshall Watson, and James Hay, manager of the nburgh Roperie and Sail-cloth Company, against William Henderson per, town-clerk of Leith, clerk to and as representing the Provost, ıistrates, and Council of the burgh of Leith, commissioners acting ıin the burgh under the General Police and Improvement (Scotland) , 1862.

he summons concluded for declarator "that All and Whole that e of ground lying within the lines of Pattison Street, Leith, which been intended to form a continuation of that street towards lar Lane, extending in length from a line drawn at right angles ss Pattison Street at the eastern gable of the tenement of houses he north side of that street onward to Poplar Lane, pertains herit- to the pursuers, but jointly and in common with the successors of n Hutton, merchant in Leith; and the defender ought and should be ırned and ordained to cede possession of a portion of the said piece of ınd extending from the foresaid line a distance of eighty-five feet or eby onward towards Poplar lane, taken possession of by the said commis- ers, and formed or attempted to be formed into a continuation of Pat- ı Street, and to restore the same to the condition in which it was pre- ıs to its having been taken possession of as aforesaid: And, further, the nder ought and should be decerned and ordained, by decree foresaid, to e payment to the pursuers of the sum of £200, or such other sum as be found to be the loss and damage occasioned to them by the ng possession of and forming or attempting to form the foresaid portion round into a street as aforesaid, with the legal interest thereof from date of citation till payment."

he pursuers were proprietors of certain subjects in and near Pattison et, Leith, and, *inter alia* (along with the successors of John Hutton, chant, Leith, who were not parties to this action), were infeft as joint prietors of "All and Whole that piece of ground lying within the lines attison Street, and which had been intended to form a continuation of street towards Poplar Lane, extending in length from a line drawn at t angles across Pattison Street at the eastern gable of the tenement ouses on the north side of that street onward to Poplar Lane."

t was provided in their titles that the joint proprietors should have ll right and liberty to use the said pieces of ground either as a private osure or as a private road communicating to their own properties, to ch no one else should have right, or to throw it open as a public oughfare communicating between Poplar Lane and Elbe Street, their ıg it in one way by no means precluding them from afterwards using it in other way they may choose, and their having thrown it open as a public oughfare not even precluding them from resuming close and private ession thereof; but declaring that any one of their number should e at any time right to insist upon the said piece of ground being thrown

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open as a public thoroughfare and continuation of Pattison Street in the manner originally intended."

The General Police and Improvement (Scotland) Act, 1862, was adopted in whole by the Provost, Magistrates, and Council of the burgh of Leith in October 1862.

On 13th April 1872 the Commissioners advertised the following notice in the "Daily Scotsman," "Leith Herald," and "Leith Burghs Pilot" newspapers:—"Burgh of Leith.—Whereas Hope Street, North Leith, and Pattison Street, being private streets as defined in 'General Police and Improvement (Scotland) Act, 1862,' formed or laid out at or before the adoption of the said Act by the Magistrates and Council of the said burgh, are not, together with the footways thereof, sufficiently levelled, paved, or causewayed, and flagged to the satisfaction of the Commissioners for the purposes of the said Act acting in and for the said burgh, notice is hereby given that it is the intention of the said Commissioners to cause said streets and the footways thereof to be freed from obstructions, and to be properly levelled, paved, or causewayed, and flagged, and channelled, according to plans thereof, to which reference is hereby made, and which may be seen within the Town-Hall, Charlotte Street, Leith. (Signed) W. H. COUPER, Clerk of the Commissioners.—Town-Clerk's Office, Leith, 11th April 1872."

On 13th May 1872 the clerk laid before a meeting of the Commissioners a copy of each of the newspapers in which the foresaid notice had been advertised, and certified that no person had appeared to object or be heard thereanent. The meeting therefore resolved to proceed with the intended works, and ordered the execution thereof. The works were accordingly forthwith begun, and on or about 5th August 1872 the burgh surveyor reported that the same had been completed. Notice was thereafter sent to the pursuers of the assessment imposed upon them, to defray the expense of paving.

The pursuers were not aware of these operations until the beginning of July 1872. On 5th July a letter was addressed by the agents of Millar's trustees to Mr Couper—"5th July 1872. Sir,—We beg leave to call your attention to certain operations now being carried on at Pattison Street. This street was never opened further than a distance of about 128 feet from Elbe Street, and a little further on there existed, until removed a day or two ago, a stone wall which cut off the formed part of the street from the private property beyond. At one time there was a gate upon this wall, but it was removed a good many years ago. When we were down at the place yesterday we saw the remains of the wall, and part of one of the gate posts, and we found workmen engaged apparently in lowering the level of this private property and adding it to the public street. On behalf of our clients, the marriage-contract trustees of Mr and Mrs Millar, joint owners of this property, we shall be obliged by your informing us upon what authority their private property is being encroached on, and we beg leave to intimate that we shall hold the Commissioners responsible for the consequences.—We are," &c., "ADAM, KIRK, and ROBERTSON." To which the following reply was returned:—"10th July 1872. Dear Sirs,—I submitted your letter as to Pattison Street to the Paving Committee of Police yesterday, and am directed to inform you that having made inquiry they find that the wall mentioned by you was not interfered with by them or their servants or contractor, and that the street, so far as the Commissioners propose to deal with it, was open to and used by the public before the Commissioners gave notice of their intention to pave it in terms of the Police Act.—I remain," &c. "W. H. COUPER."

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The pursuers accordingly raised the present action. They averred— (Cond. 3) "At a distance of about nine feet east from the eastern gable [referred to in the titles] a wall was built across the intended line of Pattison Street, having a gate for the convenience of those having right of access. This gate was removed some years ago, but the piece of ground was never thrown open to the public. It remains the private property of the joint proprietors, none of whom have ever consented or wished that it should be thrown open as a public thoroughfare." (Cond. 4) "Sometime about the end of June or beginning of July last the Police and Improvement Commissioners of Leith, or others acting by their orders or for whom they are responsible, entered upon the said piece of ground and removed the wall. They have in part lowered the level of the said piece of ground, and have causewayed it for a distance of about 85 feet in the direction of Poplar Lane, and they have attempted to throw that portion of the pursuers' joint property into a public thoroughfare. By lowering the level of the said piece of ground the Commissioners have interfered with the access to the pursuers' properties, and have caused damage thereto."

The pursuers pleaded;—(1) The pursuers, jointly with the successors of the said John Hutton, were, in terms of their titles, the sole proprietors of said piece of ground. (2) The Police Commissioners had no right to enter upon the said piece of ground, or to interfere with it in the manner condescended on, without the consent of the proprietors. (3) The Commissioners were bound to restore the said piece of ground to the condition it was in previous to their operations. (4) They were liable in reparation for the damage caused by these operations.

The defenders founded on the provisions of the General Police and Improvement (Scotland) Act, 1862, relative to private streets. Sec. 150 provides—"Where any private street or part of a street is at the adoption of this Act formed or laid out, or shall at any time thereafter be formed or laid out, and is not together with the footways thereof sufficiently levelled, paved, or causewayed, and flagged to the satisfaction of the Commissioners, it shall be lawful for the Commissioners to cause any such street or part of a street and the footways thereof, to be freed from obstructions, and to be properly levelled, paved or causewayed, and flagged and channelled in such a way and with such materials as to them shall seem most expedient." By the interpretation clause (sec. 3) of the statute, "The expression 'private street' shall mean any road, street, or place within the burgh (not being or forming part of any harbour, railway or canal station, depot, wharf, towing-path, or bank), used by carts, and either accessible to the public from a public street, or forming a common access to lands and premises separately occupied, and which has not been before the adoption of this Act well and sufficiently paved and flagged by the owners of premises fronting or abutting on said street, and which has not been maintained as a public street." By the immediately preceding definition, "the word 'street,' shall mean a public street, and shall extend to and include any road, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh, used either by carts or footpassengers, not being a 'private street,' and not being or forming part of any harbour, railway or canal station, depot, wharf, towing-path or bank." Sec. 151 provides that the expenses incurred by the Commissioners in respect of private streets shall be repaid to them by the owners of lands or premises fronting or abutting on such street, in proportion to their frontage. Sec. 157—"That as regards the paving or causewaying and maintaining streets, public or private, including the footways thereof, it shall be lawful for any person whose pro-

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perty may be affected, and who thinks himself thereby aggrieved, to appeal to the Sheriff in manner after provided." Sec. 396—"Any person liable to pay or to contribute towards the expense of any of the works aforesaid, or otherwise aggrieved by any order of the Commissioners relating thereto, may, at any time within seven days next after the making of any such order, give notice in writing to the Commissioners that he intends to appeal against such order to the Sheriff, and along with such notice he shall give a statement in writing of the grounds of the appeal; and if within four days next after giving such notice the party grant bond to the Sheriff, with two sufficient cautioners to the satisfaction of the Sheriff, to abide the order of the Sheriff, and pay such costs as shall be awarded by the Sheriff thereupon, the work so appealed against shall not be begun until after the judgment of the Sheriff upon such appeal; and the Sheriff, upon due proof of such notice, and upon such caution being found, shall hear and determine the matter of the appeal, and shall make such order thereon, either confirming, quashing, or varying the same, and shall award such costs to either of the parties as the Sheriff in his discretion thinks fit; provided always, that the appellant shall not be heard in support of such appeal unless such notice and statement have been given, and such caution found as aforesaid, nor on the hearing of such appeal shall he go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid." Sec. 397—"And in respect to appeal as to all other matters and things which the Commissioners are by the police provisions of this Act empowered to do or perform, or to authorise to be done or performed, and the cost attending which falls by this Act to be provided for by way of private improvement assessment, the Commissioners shall, where not otherwise hereby directed, give notice of their intention to do or perform, or to authorise to be done or performed, such matter or thing, either by public advertisement in some newspaper circulating in the burgh or in the county in which the burgh is situated, or by posting handbills in conspicuous places in the burgh, or by notice in writing to be transmitted through the post-office, or delivered personally, or at their dwelling-houses, to the individuals having interest, as the Commissioners shall think proper; and it shall be lawful for any person whose property shall be taken or affected, and who shall consider himself injured or aggrieved in respect of such other matters and things by this Act so directed to be done or performed and provided for, to appeal to the Sheriff from any order made or notice given by the Commissioners in respect of such matters or things in the manner and to the effect herein last before provided and directed; and if such matter or thing shall not be made the subject of appeal to the Sheriff, or being appealed shall be allowed by him, the Commissioners may proceed with the same, and levy the assessments in reference thereto authorised by this Act; provided always that all such appeals provided for in this and the immediately preceding clause, and all other appeals to the Sheriff allowed by this Act not otherwise provided for, shall be disposed of summarily, and the decision of the Sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way."

The defenders stated;—(2) The place or piece of ground forming the continuation of Pattison Street, situated within the burgh of Leith, has for many years formed part of and been known as Pattison Street, and has been known by no other name. (3) Pattison Street extends at least from Elbe Street to the wood-yard at the end thereof, entering from Poplar Lane. For many years it was accessible both from Poplar Lane and Elbe Street, from and to which it formed a common thoroughfare. It is a private street within the meaning of clause 3 of the Act foresaid. It is

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ted within the burgh of Leith, and does not form part of any harbour, ray or canal station, depot, wharf, towing-path or bank. It has for s been used by carts, and been accessible to the public from a public t, and has formed a common access to lands and premises separately pied. It had not, before the adoption of said Act, been well and suf- ntly paved and flagged by the owners of premises fronting or abutting he same, and had not been maintained as a public street; and at the of the adoption of said Act by the said Commissioners the said street formed or laid out, but was not, together with the footways thereof, ciently levelled, paved, or causewayed, and flagged to the satisfaction ie said Commissioners. (8) The pursuers did not make any objections nst the said intended works, nor did they seek to be heard before the Commissioners upon any objections; and they did not appeal against foresaid order for the execution of said works, nor did they take any s competent to them under the said Act or otherwise against the said r, or the execution of the said works; and the proceedings of the said missioners have now become final, and are not subject to review in manner of way.

he defenders pleaded;—(1) The action is incompetent, and should lismissed; alternatively, the action is irrelevant, and should be dis- ed. (4) The pursuers having failed to object to the execution of the works in manner provided by the Act, the whole proceedings of the missioners are now final, and not subject to review, and the pur- s are barred from complaining of or objecting thereto. (5) The e of ground claimed by the pursuers being a private street within the ning of "The General Police and Improvement (Scotland) Act, 1872," Police Commissioners were entitled to execute the works complained (6) The Police Commissioners having given statutory notice of their nded operations, and the pursuers having made no opposition thereto, Commissioners were entitled to proceed with and to execute the said ations.

he Lord Ordinary (Jerviswoode), on 3d December 1872, pronounced following interlocutor:—"The Lord Ordinary, having heard counsel he procedure roll, and made avizandum, and considered the debate whole process, sustains the fourth plea in law stated on behalf of the nder, and therefore dismisses the action, and decerns: Finds the pur- s liable to the defenders in expenses," &c.*

he pursuers reclaimed, and argued;—The Lord Ordinary's interlocu- proceeded on the assumption that the piece of ground in question was private street" in the sense of the Act. But this was the *de quo ritur*. The pursuers averred that it was not a "private street," but ate property with which the Police Commissioners had no title to in- ere. The pursuers should be allowed a proof.[1]

rgued for the defenders;—To make a place within a burgh a private et in the sense of the Act it was not necessary that it should be acces- e to the public. It was sufficient that it be used by carts and form a mon access to premises separately occupied. According to the pur- s' own shewing, this place communicated with their several properties, it was not disputed that it was used by carts. It was therefore a ate street.

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* NOTE.—The Lord Ordinary has here come to the conclusion, after having the fit of a full argument on the whole cause, that the plea which he has sus- ed as above is well founded; and if this be so, it follows that there is no to go, and indeed no propriety in going, further."

[1] Lord Advocate v. Police Commissioners of Perth, 7th December 1869, *ante*, viii. p. 244—Scot. Jur., vol. xlii. p. 106.

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The Court allowed the pursuers a proof before answer.

A proof was accordingly taken, the import of which was as follows:—Pattison Street was laid out towards the close of last century, and was intended to run eastwards from a street named Elbe Street to a lane named Poplar Lane. In point of fact, the houses terminated at a distance of 128 feet from Elbe Street. The continuation of the street eastwards was from an early period enclosed by walls marking out the line of the intended street. Down to about the year 1858 this piece of ground was shut off from the rest of Pattison Street by a wall which ran across the street at right angles, a few feet east from the eastmost house, which was long occupied by a Mrs Munnoch, and subsequently by her daughter. To the piece of ground so enclosed access was obtained by a locked gate, the key of which was kept at Mrs Munnoch's for the convenience of the persons entitled to have access. The eastmost part of the ground was occupied as a wood-yard, and shut off from Poplar Lane by a paling. The ground between the wall and the wood-yard, extending to 85 feet in length, was what the Commissioners paved in 1872. Previous to that time it did not appear to have been put to any special use; it formed a common access both for carts and persons on foot to several yards and workshops; it was covered with litter of various kinds, and was always in an untidy condition. About the year 1858 the wall on the west side of the ground in question was broken down and the gate removed. Footpassengers occasionally passed through the ground from Elbe Street to Poplar Lane, but it was not a recognised thoroughfare. A few years before this action was raised a public lamp was placed on the east side of the remains of the wall.

The pursuers argued;—This piece of ground was never occupied as a street, or public thoroughfare, but was private property, used as a yard by the tradesmen who resided there. The Commissioners, therefore, had no right to interfere. Then as to the pursuers not having taken objection upon the defenders' advertisement, that could only be read as applying to Pattison Street proper, and could not be taken to apply to the yards. By the titles under which the ground was held it could not be opened up as a street without the consent of one or more of the co-proprietors, and no such consent had been given.

The defenders argued;—When there is a private street, the Commissioners can go on irrespective of the property in the street, and in this case the proof went to shew that it was a private street within the meaning of the Act.[1]

The argument that the advertisement could not be taken to apply to the ground in question was not tenable, for in documents having reference to the property, and in the receipts to tenants, it was always called Pattison Street.

At advising,—

LORD COWAN.—There is a considerable difficulty in arriving at the true grounds on which the judgment of the Court in this case ought to proceed,—not less from the obscure terms in which the provisions of the Police and Improvement Act founded on by the defenders are expressed than from the peculiar circumstances in which the ground alleged to form part of Pattison Street is placed, having regard to the recent possession of it as appearing from the evidence.

In the month of April 1872 a notice was duly advertised in terms of the 397th clause of the Act, that "Pattison Street," with two other private streets which were mentioned, was to be made free from obstruction, and to be properly levelled and paved by the Commissioners acting under the Police and Improve-

[1] Campbell v. Leith Police Commissioners, June 21, 1866, *ante*, vol. iv. p. 853.

ment Act, 1862. No party appeared, as required by the statute in every case where private property might be affected, and where any one might think himself aggrieved by the proposed operations; and in this situation the Commissioners proceeded with the execution of the works, and these were reported by the surveyor to have been completed on 5th August 1872.

The pursuers do not seem to have been aware of these operations until the beginning of July, when a communication was addressed by their agents to the Town-Clerk of Leith, remonstrating against the ground being operated on as part of Pattison Street, inasmuch as it was alleged to be private property, and, being such, illegally encroached upon by the Commissioners. On this remonstrance a report was required from the burgh surveyor, who reported "that the street was lighted with a public lamp beyond the point where the wall (alleged to be the west boundary of the ground in question) stood, thus shewing that it was open and used by the public," to a line shewn on the plan, up to which the operations of the Commissioners were intended to be carried. And in a letter addressed to the agents of the pursuers on 10th July 1872, it was intimated by the burgh clerk "that the street, so far as the Commissioners proposed to deal with it, was open to and used by the public before they gave notice of their intention to pave it in terms of the Police Act." This led to the action of declarator now before the Court at the instance of the pursuers. It concluded that "the piece of ground lying within the line of Pattison Street, Leith, and which had been intended to form a continuation of that street towards Poplar Lane," extending as therein described, "pertains heritably to the pursuers, but jointly and in common to the successors of John Hutton, merchant in Leith;" and this conclusion is followed by other relative conclusions, to the effect of having the ground restored to the condition in which it was before the operations complained of. The defences to this action on its merits were,—first, that the pursuers ought to have objected to the proceedings of the Commissioners in the manner pointed out by the Police Act for parties to obtain redress whose property is affected and who are aggrieved by their proceedings, and that, not having been objected to, what was done was final, and could not be made the subject of review in this Court; and second, that the piece of ground in question was part of a "private street" within the meaning of the Police Act, with which the Commissioners were entitled to deal under the Act by execution of the works complained of.

The Lord Ordinary found, on 3d December 1872, that the first of these pleas was well founded, and dismissed the action, because, as stated in his Lordship's note, the statutory remedy not having been adopted, "it follows that there is no call to go, and indeed no propriety in going further."

Under the reclaiming note presented against this interlocutor the Court, on hearing parties, considered that the question of jurisdiction, and the finality of the proceedings by the defenders, depended upon the result of an inquiry into the fact of the ground, when interfered with by the Commissioners, being truly 'private street," or private property belonging exclusively to the pursuers. For, on the one hand, if the ground was possessed by the pursuers as their private exclusive property, and not street at all in any proper sense, it was manifest that the Commissioners, by interfering with it, might justly be held to have exceeded their statutory power, and in that case to have no defence to this action, on the principle of construction recognised by this Division of the Court in the case of the Perth Commissioners v. The Lord Advocate, 7th December 1869, 8 Macpherson, 244. And, on the other hand, it was considered that if the ground, having regard to the condition in which it was at the date of the operations, came within the description of "private street," the defence in that view of it must be sustained, and this action dismissed, as found by the interlocutor under review. A proof "before answer" was accordingly allowed, and the recent argument had regard to the import of the evidence in its bearing upon the two views of the case now stated.

To understand fully the effect of the evidence on the question at issue it is proper to have in view the definition of "private street" contained in the interpretation clause of the statute.

There is first given a definition of the word "street," as used in the statute,

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which is declared to mean a public street, and to extend to and include "an road," &c., and so forth, "thoroughfare and public passage, or other place withi the burgh, used either by carts or footpassengers, not being a 'private street.' Then there is given the definition of "private street" in these terms: "Th expression 'private street' shall mean any road, street, or place within the burg (not being or forming part of any harbour, railway or canal station, depot, whar towing-path or bank), used by carts, and either accessible to the public from public street, or forming a common access to lands and premises separately occ pied."

There is no doubt that the ground in question is a place within a burgh, an that it does not form part of any of the subjects described in the parenthetic portion of the clause, so that the inquiry resolves into the applicability of th other descriptive terms,—*i.e.*, whether the ground is "used by carts," and wheth it is accessible to the public from a public street, or forms a common access t lands and premises separately occupied. There is no mention in this definitio of the place being "thoroughfare and public passage," as in the description of public street. All that is required is that the ground is used by carts, and alte natively either accessible to the public or forming a common access. Ther having reference to this definition, the 150th section, "for the convenience o the inhabitants and for the public advantage," empowers the Commissioners t take such measures as were here resolved on, "where any private street or pa of a street is at the adoption of this Act formed or laid out, or shall at any tim hereafter be formed or laid out," and has not been "levelled, paved, or caus wayed and flagged to their satisfaction." The question is, whether the evidenc that has been led brings the ground within the definition of private street thu given.

Now (1) one thing is clear from the terms of the titles of the pursuers, tha Pattison Street was intended to be continued through the ground in question eas ward to Poplar Lane, and that any one of the proprietors might and may at an time insist on it being opened as a thoroughfare or public passage from Elbe Stre on the west to Poplar Lane on the east, and that from an early date there wer walls built on the north and south sides of the ground all through, marking i out as the intended continuation of Pattison Street. Unfortunately the origin feuing plan has fallen aside, and the precise date when this took place has n been ascertained. The side walls, however, north and south, in continuation what is certainly Pattison Street, have existed from the earliest times. To th extent, although there was no proper formation of the street, the ground may b considered to have been laid out as part of Pattison Street, and to be so appr priated and used whenever any of the proprietors should choose to insist on i being opened up as a thoroughfare; and it will be observed that the wor "formed or laid out" are not conjunctive but alternative.

Again (2) as to the state of the ground—There is no doubt that it was at on time enclosed by means of a wall running from the east end of Mrs Munnoch house, on the north, across the roadway or line of street to the south, as describ by the witnesses, and delineated on the plan, between the letters S T in "street This is proved beyond question, and at that time access was obtained to th ground thus enclosed by a gateway in the wall,—the gate being always ke locked, and the key obtained at Mrs Munnoch's by all parties entitled to ha entrance. But while this was the state of matters at an earlier period it is l less certain on the proof that from and after 1858, or at all events for ten twelve years prior to 1872, this wall, except at the north side of it, was brok down and the gateway removed, so as to form no obstruction to access into th previously enclosed ground, whether by footpassengers or by carts having occ sion to go to the premises, the entrance to which was on the one side or other this piece of ground. Such lands and "premises" are "severally occupied There are at least five or six such subjects,—an "asphalter's yard," a "coa yard," a wood-yard," a "stable," besides other yards, &c., within what was e closed ground. A public lamp has been in recent times placed for the co venience of the public resorting to this place or street. Then it is clear beyon controversy that this ground, in its now open condition, forms a common acce

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to those separately occupied premises. I hold these facts to be established by the proof, and it is for determination whether they are not sufficient to bring the ground within the statutory description of private street.

No thoroughfare or public passage from Elbe Street to Poplar Lane is proved to exist, but that is not required in the case of a private street as defined by the statute. The ground is used by carts, in so far as the occupiers of the several subjects require for the purposes of their possession to have carts to and from their premises. The ground as a continuation of the west end of Pattison Street is accessible from a public street, and it is a common access of the description set forth in the definition. The object contemplated by the statute appears to have been that such common accesses should be brought into such a state of repair as to allow them to be used, by those of the public having occasion to resort to them, with safety and convenience. And it cannot be doubted that this object will be fully served by the operations resolved on by the Commissioners in reference to this ground.

It was strongly pressed on us that by these titles this ground could not be opened up as a street without the express consent of one or more of the co-proprietors. But consent to the effect stated may be inferred from their acts and deeds, or from their allowing the ground to fall into that condition and to be used in such a manner as, having regard to its proximity to the west portion of the private street, to bring the ground in its present state within the statutory definition.

On the whole, therefore, although the question is not unattended with difficulty, I hold that the definition of private street does apply to this common access to the several premises entering from the ground in question. And I do not think that the pursuers have any good ground to complain of the general terms of the notice given by the Commissioners. It is in evidence that the several premises belonging to them entering from the ground in question have all along been described as situated in Pattison Street. Both in their own receipts to their tenants and in their rental books, as also in the public assessment receipts for the rates paid by them for these premises, they are so described. Notice of operations being intended to be done on the private street called Pattison Street, therefore, was due statutory notice, on the assumption always that the ground is to be regarded as part of a private street, and that the reasoning I have stated is sound. The result is that, in the state of the facts established by the proof, the Lord Ordinary's interlocutor is well founded.

The other Judges concurred.

THE COURT adhered to the Lord Ordinary's interlocutor.

[ADAM, KIRK, & ROBERTSON, W.S.—J. C. IRONS, S.S.C.—Agents.

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Pirie v. Pirie.

ALEXANDER GEORGE PIRIE, Pursuer.—*Watson.*
FRANCIS LOGIE PIRIE, Defender.—*Shand—Asher.*

Condition—Testament.—When a bequest is made subject to a condition in favour of a third party the condition is held to be fulfilled when the third party voluntarily renders its fulfilment impossible.

Condition—Testament.—A father in his testament gave a direction that a sum of money due to him by one of his sons should be allowed to remain in his hands for eight years, on condition that the executor and residuary legatee should remain a director of the company in which the sum was invested. The executor voluntarily resigned his office as director. *Held* that the condition must be held to have been satisfied, and that the son was entitled to retain the loan.

2D DIVISION. Lord Gifford. I.

MESSRS ALEXANDER GEORGE PIRIE and FRANCIS L. PIRIE were, along with their father, the late Mr Francis Pirie, partners in the firm of Alexander Pirie and Sons, paper-makers in Aberdeen. That firm was re-

* Decided 10th December 1872.

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modelled in the year 1868 with a view of being registered as a limited liability company. Under the articles of association then adopted by the existing partners of the old firm the capital of the company was declared to consist of £360,000 in 7200 shares of £50 each. Of these the late Mr Francis Pirie held 1500, the pursuer 1200, and the defender 900, the book-value of which, £41, 13s. 4d. per share, being held as paid up, was respectively £62,500, £50,000, and £37,500. The company never was registered as limited, but its business continued to be carried on in terms of the articles of association then entered into, the existing partners of the old firm being constituted directors of the new company.

In order to pay up to the company the value of his 900 shares the defender, Francis Logie Pirie, borrowed from his father in 1864 the sum of £21,000, and in 1868 a further sum of £3000, in respect of which sums, amounting together to £24,000, he on 13th March 1868 granted a bond to his father. The interest stipulated in the bond was at the rate of six per cent per annum. Of even date with the bond a separate agreement was entered into between the defender and his father, Francis Pirie, containing the following clauses, modifying the absolute terms of the bond, to the effect,—"Second, That the said Francis Logie Pirie, notwithstanding the terms of the said articles of agreement, shall, until the year ending the 31st day of December 1871, on drawing his share of the profits of the said copartnery or company, yearly hand over one just and equal half thereof to the said Francis Pirie, for his, the said Francis Pirie's sole and absolute use and behoof; and that, on and after the said 31st day of December 1871, or at the death of the said Francis Pirie at any time before the said 31st day of December 1871, the said Francis Logie Pirie shall have the sole and absolute property and control of all the parts, business, or shares standing in his name in the books of the said copartnery or company of Alexander Pirie and Sons, or of Alexander Pirie and Sons (Limited), as the case may be, for his own absolute use and behoof: Third, That till the 31st day of December 1871 the said Francis Logie Pirie shall annually, on the 31st day of December in each year, commencing on the 31st day of December 1868 for the year then ended, while any part of the said sum of £24,000 sterling remains unpaid, apply one-fourth part of the profits of three twenty-fourth parts, or of 900 shares, as the case may be, of the said business of the said copartnery or company, towards payment thereof, if and when required to do so in writing by the said Francis Pirie, until the whole sums in said bond, principal, interest, and penalties, if incurred, are paid: Fourth, That so long as the said Francis Logie Pirie shall regularly apply one-fourth of the share of the profits of the said copartnery or company standing in his name in the books of the said firm annually at the 31st day of December as aforesaid towards payment of the sums in said bond due to the said Francis Pirie, or others in right of said bond for the time, if and when required as aforesaid, and also regularly pay the whole interest due thereon in terms of said bond, it shall not be lawful for the said Francis Pirie, or others in his right, notwithstanding the terms of said bond, until the said 31st day of December 1871, to demand payment of any further sums under the same from the said Francis Logie Pirie."

Interest was regularly paid by the defender, but no requisition was made in terms of clause 4 of this agreement that he should apply a fourth part of his profits from the business towards the extinction of the debt. Accordingly at 31st August 1870, when his father died, the whole sum of £24,000 remained due.

Mr Francis Pirie by his trust-disposition and settlement left his elder son, the pursuer, his sole executor and residuary legatee. He had pre-

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iously transferred to him 1200 of his own 1500 shares in the company n return for a bond of annuity for £3350 per annum, which fell by his leath a few days after it was granted. Besides what he had thus received luring his father's lifetime, the pursuer, in terms of his father's settlement, succeeded, *inter alia*, to a bond granted by himself to his father for £44,000, and to his brother's bond for £24,000. To the defender, on the ther hand, his father bequeathed his remaining 300 shares in the company, the value of which in the books of the company was £12,500, but burdened by the condition that he should grant to his mother a bond of annuity for £750 per annum (a like bond of annuity for £750 being to be granted by the pursuer), and with regard to his debt of £24,000 he conferred on him the privilege contained in the following clause:—"Farther, n reference to £15,000 sterling of the capital contained in the said Francis Logie Pirie's personal bond to me, dated 13th and registered 21st March 1868 for £24,000, I hereby direct that on interest being paid regularly, and in the event of my eldest son, the said Alexander George Pirie, while alive, being throughout a director of the said firm of Alexander Pirie and Sons, or Alexander Pirie and Sons (Limited), the said Francis Logie Pirie may and shall have right to refrain from paying up the said sum of £15,000, and that for the period of eight years after my death, and until the arrival of 31st December 1879, if that be later; and I also direct that the rate of interest on said bond from the date of my death shall be five per cent per annum.

Alexander George Pirie was at his father's death a director of the firm of Alexander Pirie and Sons, which office he held till 12th May 1871, when, in virtue of article 97 of the articles of association of the company, he sent in written notice of his resignation, with the avowed intention of voiding the condition in his father's will, and calling up the defender's bond for £24,000 at 31st December 1871, being the earliest date at which, n terms of the separate agreement between the defender and his father, t could be demanded. Francis L. Pirie admitted his obligation to pay £9000 at that date, but declined to pay the remaining £15,000, founding n the clause in his favour in his father's settlement. Alexander George Pirie accordingly raised this action for payment of the sum due under the bond.

He pleaded;—(1) The defender having intimated that he disputed his right to enforce payment of the bond libelled on, *quoad* £15,000 of the capital sum therein contained, till 31st December 1879, he was entitled o raise the present action. (2) The terms of the clause in the deed of settlement of his late father, as to £15,000 of the sum in the defender's bond, did not in the circumstances entitle the defender to withhold payment or preclude him from enforcing payment, later than 31st December 871. (3) According to the construction of the deeds he, as executor-ominate of his father, was entitled to enforce payment of the bond as oncluded for.

The defender pleaded;—(2) He was entitled to absolvitor, in respect he was entitled under his father's settlement to refrain from paying up the said sum of £15,000 until 31st December 1879. (3) The pursuer having resigned his position as a director of the said company, in the circumstances and for the reasons set forth in his, the defender's statement, he was not entitled to found on said resignation to the effect of claiming payment of the said sum of £15,000 at 31st December 1871. (4) *Separatim*, n a sound construction of the said settlement the pursuer's resignation f his position as a director of the said company, in the circumstances and or the reasons above set forth, did not deprive him of his right to refrain rom paying up the said sum of £15,000 till 31st December 1879.

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The Lord Ordinary (Gifford), on 25th June 1872, pronounced the following interlocutor:—"Finds that, according to the true intent and meaning of the *mortis causa* settlement of the late Mr Francis Pirie, dated 26th March 1870, the defender is not bound *hoc statu*, or at present, to pay to the pursuer the sum of £15,000, being part of the principal sum of £24,000 contained in the defender's personal bond to the deceased Francis Pirie, dated 13th March 1868, and to this effect assoilzies the defender from the declaratory conclusion of the action," &c.*

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* "NOTE.—It is now clearly and conclusively established by the proof that the pursuer voluntarily resigned his directorship in the firm of Alexander Pirie and Sons for the sole purpose of enabling him to enforce payment from the defender of the £15,000 now in question, and to deprive the defender of his right to retain the sum, paying interest thereon till 1879. The pursuer was not compelled to resign; he did it voluntarily. He was not induced to resign by ill health, by any inability to act, or by any unpleasantness arising between him and his partners. His sole purpose in resigning was to compel the defender to pay now the £15,000 which the defender has in the firm, and which the father of the parties contemplated should remain in the firm till 1879, the defender paying interest at 5 per cent thereon. But for this object the pursuer would still have been a director of the firm, and if he gets decree, there is nothing to prevent him becoming next day a director again.

"In the pursuer's own examination as a witness he admitted that his letter to his uncle of 12th May 1871 'correctly sets forth the purpose which I had in resigning my directorship.' . . . . 'The object I had in view in resigning was to obtain money.' . . . . 'It was expressly and exclusively for the purpose of enabling me to raise that money that I sent in my resignation. If I had not been pressed for money at that time I would not have taken such a step.'

"This evidence is quite fair and candid. It was given frankly and without the least hesitation, and it removes all doubt as to the purpose of the resignation, and the circumstances in which it was made, and it raises the pure question in point of law whether by such resignation—the voluntary and arbitrary act of the pursuer himself—the pursuer can bring about the condition which will deprive the defender of the postponement of the term of payment for which the father's settlement provides.

"The Lord Ordinary has again anxiously considered the terms of the settlement, and the argument of the pursuer, which excludes as irrelevant everything about the resignation but the mere fact, and asks the Court to apply the words of the provision, irrespective altogether of equitable construction or of inquiry from the deeds themselves into the purpose and intention of the testator.

"The Lord Ordinary remains of the opinion indicated in his note of 30th ultimo. He thinks there is room for equitable construction. He thinks the Court are entitled and bound to look to the nature of the debt and the surrounding circumstances, so far as these can be gathered from the contracts of copartnery, minutes of agreement, bond, and settlement; and if it appear, as the Lord Ordinary thinks it does, that the condition in question was a condition for the pursuer's security, and not a condition which was to be entirely dependent upon the pursuer's mere pleasure, then he thinks that the pursuer was not entitled by his own arbitrary act to purify the condition as against the defender.

"The argument of the pursuer would lead to obvious injustice in many cases. On the one hand, and as against the pursuer, the Lord Ordinary does not think that the defender would be entitled to sell out his whole interest in the firm of Pirie and Sons, to withdraw his whole funds, and yet to insist upon retaining his brother's money and use it in his own speculations for eight years. This would be to follow the letter of the provision to the destruction of its spirit; and the pursuer would be well entitled to resist such a construction. But then, on the other hand, while the money remains in the firm, and while the pursuer has or may have full control of the affairs, if he choose to remain a director, he is not

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The pursuer reclaimed, and argued;—During his father's lifetime disputes existed among the partners of Alexander Pirie and Sons, on points of the partnership business. The pursuer and his father took one side, and the defender another. These disputes still continued, and had his father lived he could and most probably would have called up the bond at 31st December 1871. Being now in his father's place, he had exercised his right under the bond, which it would be conceded was an absolute obligation. He was met with the objection,—"You are not entitled to call up this sum in the bond, so far at least as £15,000 of it is concerned, because you have voluntarily retired from the directorate." This defence was founded on a clause in Mr Francis Pirie's settlement. That clause must be read on the footing that he, the pursuer, was creditor, and the defender debtor, in the bond; and it merely conferred on the defender a right to refrain from paying under certain circumstances. The two circumstances which bestowed this right were (1) the regular payment of interest, and (2) the pursuer's remaining a director. If these two things concurred, the defender would have right to refrain from paying till 31st December 1879. The question was, what is the meaning of these words, "the said Alexander George Pirie, while alive, being throughout a director?"

The defender contended that these words were intended only to apply to the case of his not being elected a director, or being ejected after election, and not to extend to the case of his voluntary resignation. But it was inconceivable that his father, had such been his meaning, would have so expressed himself. He admitted that he could not sue without giving up his seat at the board, but contended that his right to sue depended on the bond, and not on the condition. The condition was one attaching to the defender's defence, not to his, the pursuer's, right of action. His father selected the retention of a seat on the board as a check on his calling up the defender's bond, and he did so because he thought it improbable that he would sacrifice his seat in order to call up the bond, or that the defender would provoke him to do so, by assisting to eject him. But he left his retirement in his own hands, and placed no condition on that. There were various circumstances which might conduce to a partner retiring from the directorate of a company. Were the Court to inquire into every case of resignation and say whether it was warranted in the circum-

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entitled, for the sole purpose of benefiting himself and of injuring the defender, to decline to be or to act as a director, or to exercise the control which everybody is willing he should have.

"The Lord Ordinary looks upon the condition as if the will had provided that the money should not be called up while the defender left it in the firm, and while the pursuer as a partner could look after it till 1879. The obvious purpose was, that the testator's younger son should have a chance or opportunity of paying the sum out of the profits instead of being compelled to sell out the whole or the greater part of his capital in a concern so lucrative. If this purpose can be legitimately looked at it seems to follow that the pursuer cannot arbitrarily defeat it.

"The Lord Ordinary does not rest his judgment upon that portion of the proof in which it was attempted to shew that the pursuer had no very pressing need of money. It seems clear enough that at the utmost he wanted £1000 or £2000, and his accruing profits for a few months greatly exceed this sum. Even if there had been want of funds, however, for the pursuer's private purposes, the Lord Ordinary thinks this would not entitle him to defeat a provision which was intended for the benefit of his younger brother, and which the Lord Ordinary thinks must be construed fairly and equitably, so as to secure to the younger brother the benefit which his father intended to give him."

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stances before acknowledging the pursuer's right under the bond? The testator had committed no such function to the Court. He had simply bestowed on the debtor the privilege of postponing payment during the continued existence of two circumstances; one of these was entirely in the debtor's power, the other was not; and the latter having failed, the debtor could no longer plead his right to refrain from payment.

The defender argued;—In referring to the differences which existed among the partners of the firm it must not be forgotten that these were of the pursuer's own making. But the main question was one of construction of the deed. His father, Mr Francis Pirie, by agreeing to postpone any payment of the sums in the bond till 31st December 1871, manifested from the outset his intention of giving him, the defender, an opportunity of paying up the sum out of the profits of the business, in which he had established him, and which he well knew were his only means, otherwise he would not have subserved the object he had in view. He had, moreover, in contemplation the event of his death; and therefore, to carry out his beneficial intention towards him still further, he inserted the clause in question in his settlements. He was not satisfied to leave matters to their natural course in that event, but conferred on him the right to refrain from paying for eight years at least, or till 31st December 1879; his object still being the same—to enable him to provide funds out of the profits of the business. That right depended upon this condition, that the pursuer should continue a director of the company. The question was, could that condition be voided and the right defeated by a voluntary resignation on the pursuer's part? Now, the clause said distinctly that he, the defender, should have right to refrain from paying. That a right was given was contrary to the idea of voluntary defeat on the part of the pursuer. There could be no right at all if its existence lay at the mercy of the obligant. Therefore the pursuer's contention was inconsistent, both with the intention of the testator and with the special words of the settlement. The true meaning of the condition was that the pursuer should be retained in the direction. It was their father's wish to perpetuate the family influence in the firm, as well as to give the pursuer every means of protecting a property in which, on his own account, and through his the defender's debt he had such an interest. He therefore laid on him, the defender, every inducement to assist in retaining the pursuer in the office of director. Such an interpretation gave a meaning to the clause without defeating the right conferred thereby, and was the one which the Court, taking an equitable view, must necessarily adopt.

At advising,—

Lord Justice-Clerk.—This case, which raises some questions of importance, turns on the construction of a clause in the settlement of Mr Francis Pirie, the father of the pursuer and defender in the action. The testator was a partner, and had a very large interest in the firm of Alexander Pirie and Sons, paper-makers in Aberdeen. Before his death, in 1870, he had made over to his two sons, Alexander George Pirie and Francis Logie Pirie, a large share of that interest, so that they were themselves, before that event, partners in the firm. It appears that Alexander Pirie and Sons had in 1868 taken steps to convert their business into a limited liability company, but they had gone no further than to adopt articles of association, and had not registered the new company. Prior to the death of Francis Pirie it appears that some disputes had arisen between the elder son and some of the other partners regarding the affairs of the concern, and particularly about the amount of dividend to be declared, and that the father took the side of his elder son. The trust-deed came into operation in 1870. Prior to that the shares of the two brothers in the firm stood thus:

Alexander Pirie, the elder, had received more than £100,000 worth of stock, and he had granted to his father bonds to the amount of £44,000 as the price. On the other hand, Francis Logie Pirie had received £36,000 worth of stock, and had granted a bond for £24,000 to his father, and come under certain other obligations. On the death of Mr Pirie the settlement came into operation, and the effect was that Alexander Pirie not only retained the amount of stock he held before, but became the creditor in his own bond for £44,000, and in his brother's bond for £24,000. On the other hand, in addition to the nine hundred shares he already held, Francis Logie Pirie acquired, through his father's death, three hundred more, worth about £12,500, but burdened with his mother's life-rent provision for £750 a-year; and he acquired further this benefit, that, in reference to £15,000 sterling of the capital contained in his personal bond to his father for £24,000, he should have right to refrain from paying up the said £15,000 for the period of eight years after his father's death, or until 31st December 1879, if that were later; but this on condition that the interest be regularly paid, and in the event of the truster's elder son, "the said Alexander George Pirie, while alive, being throughout a director of the said firm of Alexander Pirie and Sons." The clause containing this provision is the one we have now to construe.

Now, the dispute that had arisen before the testator's death continued after that date, and seems still to exist. Alexander Pirie was not in the habit of taking an active part in the business of the firm, but he had always been a director. At the end of eight months, however, he wrote resigning his directorship, in terms of the articles of association. In the present position of the firm there are only two other partners besides the pursuer and defender. The pursuer having taken this step forthwith made a demand upon the defender for payment of the principal sum in the bond. And the question is, whether Francis Logie Pirie has lost his right to refrain from paying till the time mentioned by his father, or whether the condition of his right to refrain has failed. The Lord Ordinary thinks that the condition has not failed, and I am disposed to concur with him, though not in all the reasons given for his judgment.

What we have to consider is, whether this condition has been violated? In the view I take of this question I do not suggest any other reading of the words than that which they reasonably and naturally admit of. A strictly literary construction of them is impossible, for so read they would imply that the right would never commence until the period fixed for its termination, seeing that it cannot be known that the interest for these eight years is regularly paid, or that Alexander is a director throughout the whole of that period, until the period has expired. But of course the words, although inaccurate, must receive a construction according to their true meaning. And that meaning, however they may be read, plainly implies that, as long as the interest is regularly paid, and as long as Alexander is also a director, Alexander shall have no right to exact payment of this bond until 1879, and that Francis during the same period shall have right to refrain from paying it. As far as Francis is concerned, the condition is rather resolutive than suspensive. His right to refrain from payment arose instantly on his father's death; but it was liable to be terminated by the failure of either of these conditions. On the other hand, Alexander acquired no right from his father to exact payment of the bond prior to 1879, unless he could shew that the condition had failed.

Conditions of this kind, resolutive of testamentary gifts or bequests, which truly partake of the nature of a penalty, are, when they are what are called voluntary or potestative conditions, to be construed favourably for the donee, and according to the spirit and direction of the object which the testator had in contemplation. Lord Stair clearly states the distinction between such conditions and those which are casual. He says,—"These uncertain conditions are of two kinds,—voluntary, which depend on the free will of some persons; and casual, which depend on the casual events of that which cannot naturally be foreknown" (i. 3, 8.) Whatever may be the rule in regard to casual conditions, which depend on events indifferent to the subject of the grant, and over which no one concerned has power, in regard to potestative conditions, which depend on the will of the party bound,

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or on that of a third party, it is essential to look to the relation of the condition to the subject of the gift, and the effect which it was intended by the testator to operate. Such conditions need not always be performed in terms, or specifically. In some cases equivalents may be sufficient fulfilment. In others fulfilment of part may suffice instead of complete fufilment, and in others, again, the condition need not be performed at all. These results all depend on the substance of the condition more than on the mere words in which it may be expressed. I cannot better explain what I take to be the law in regard to this matter than in the words of a celebrated French jurist on this very subject. Writing on potestative conditions in testaments, Domat says (iii. 8, 24)—"It follows from the preceding rules that where testators have burdened their heirs or legatees with conditions dependent partly on their own act, and partly on that of others, it is impossible to lay down any general rule as to whether the gift is null, if the condition is not strictly performed, or whether the condition will be held as accomplished if it be not the fault of the heir or legatee that it has not been satisfied. For there are cases in which such conditions are held as accomplished, although they have not been fully so, in respect the party bound has done all in his power to fulfil them; and there are others in which it is essential that they should be absolutely performed. But the general rule is, and one common to all these sorts of conditions, that their nature must be judged of by the quality of the acts on which they depend, by the interests of the persons which the testator was providing for, and the motives which he had in view." "And it is by all these views, and others, by which the intention of the testator may be ascertained, that one can judge of the effect of such conditions, giving them such effect as that intention may seem to demand."

Looking, then, at this condition in the light of these views, it appears that there was a voluntary or potestative condition. The right to confer or to withhold this office of director was a matter partly within the power of Francis himself, and partly within that of two or three other persons, partners of the company. I infer from this that the bestowal of this office was the consideration or counterpart which Alexander was to receive in respect of the postponement of his right to realise the bond; and that the testator's object was, by this inducement, and by giving his brother a motive to maintain him in that position, to protect or secure Alexander in the enjoyment of it. About this there can be little doubt.

It might have been doubtful if, contrary to the remonstrances of Francis, the other partners had removed Alexander from the direction, under which of the categories mentioned by Domat the case would have fallen. I incline to think that the election of the pursuer as a director was essential to the condition. The testator, however, knew that if the two brothers were agreed, the exclusion of the pursuer was substantially impossible, because the amount of stock which they held gave them a potential voice in the company. But I am very clearly of opinion that it was no part of the condition, and was not implied in it, that Alexander should accept the consideration. It was enough that he had it in his power. It was open to him to accept or refuse it. The condition being one for his benefit, he might abandon or discharge it as he pleased. In the same way, he might, if he chose, decline to accept the interest. It was enough if payment was offered. The condition about the directorate was not a matter left in Alexander's choice. It was a benefit of which he was to be the recipient at the hands of others. When the others tendered it the condition was performed. Whatever construction, therefore, may be put on the words, it is impossible to spell out of them a merely casual condition. It is by no means necessary to support this view, that we should hold that Alexander was a director when he was not a director. But it is quite reasonable to hold that he has renounced the benefit of the condition by refusing to accept of its fulfilment. If he had agreed with his brother to postpone payment of the interest for a term, it might be quite truly alleged that the interest had not been regularly paid, but it would be equally true that the condition had not failed. As it is, those on whose will the condition depended have exercised it in conformity with the condition, and that is all which the testator, in my opinion, intended. The case, however, may be

solved on a simpler and more general rule, applicable to all conditions, whether in obligations or in contracts. The condition has been fulfilled, because the pursuer, who had the sole interest in its not being fulfilled, has, by his voluntary act, and intentionally, made it, as circumstances at present stand, impossible to fulfil it.

No one else had any interest in this condition. The partners had none, for the choice of directors lay absolutely with them; and it signified nothing to them whether the bond was paid up or not. The pursuer admits that his resignation was intended for no other purpose than to make the condition fail.

There can be no higher authority on such a question quoted in this Court than the rules and principles of the civil law. Far more scientific than the law of England, and far more copious than our own, the civil law in this case, as in many others, furnishes the only repository where such difficulties are satisfactorily solved. To this authority I shall shortly refer, and I think it clear and conclusive.

There are three texts in the Digest on this subject. The first is in L. 35, tit. 1, 81, in relation to conditions in testaments—"Tunc demum pro impleta habetur conditio, cum per eum stat qui, si impleta esset, debiturus erat." The second is in L. 45, tit. 1, 85, sec. 7, and relates to conditions in contracts—"Quicunque sub conditione obligatus, curaverat ne conditio existeret nihilominus obligetur." The third is in the 161st law of the last title, *De Regulis Juris*, and is of general import. It is in these terms—"In jure civili receptum est quotiens per eum cujus interest conditionem non impleri, fiat quominus impleatur, perinde haberi ac si impleta conditio fuisset; quod ad libertatem, et legata, et ad heredum institutionem perducitur."

These texts, for my present purpose, require no comment at all. They are perfectly precise and to the purpose. They have, however, been very fully illustrated by the commentators. The whole body of law contained in the Pandects on this subject will be found in Pothier's methodised work on the Pandects, under the i. 35, tit. 1, secs. 11-20; and a great number of instructive examples are there given. Pothier states the law relative to contracts in the same terms in his treatise on Obligations, part 2, chap. 3, sec. 212; and repeats the doctrine as regards legacies in his work on the customs of Orleans (introduction to tit. 16, sec. 5, 2). Domat thus expresses himself (Civil Law, i. 5, 16)—"If the occurrence or accomplishment of a condition is prevented by that one of the persons contracting who has an interest that it should not arrive, whether it depend on his own act or not, the condition, as far as he is concerned, shall be held as accomplished, and he shall be held to that which he was bound to do, to give, or to suffer, as if the condition had been accomplished."

It is of less moment what the law of England is on this head, for we follow the civil law, and the distinction between law and equity introduces an element perplexing to us, but I imagine the principle to be the same. In the case of Hotham v. E. India Co., in 1778 (Langdell's Cases on Contracts, ed. 1871, p. 789), I find Mr Justice Ashurst thus expressed himself—"It is unnecessary to say whether the clause relative to the certificate be a condition precedent or not; for granting it to be a condition precedent, yet the plaintiff having taken all proper steps to obtain the certificate, and it being rendered impossible to be performed by the neglect and default of the company's agents, which the jury have found to be the case, it is equal to performance. If it were necessary to cite any case for this, which is evident from common sense, it was so held in Rolle's Abridgment, p. 455, and many other books." Story also, in his work on Contracts, holds similar language, and quotes many American cases in support of it.

These authorities appear to me to be conclusive of this case. It is true that the civilians also lay down that it is not every act by the debtor making the condition impossible which will be held as fulfilment; and that if the result be only indirect, or in the assertion or maintenance of a separate right, it may not have that effect. But this cannot avail the pursuer. It is very clearly proved that in resigning his office as director he acted with no object but that of making fulfilment of the condition impossible. I do not even think it proved that he was only acting as a prudent man, for the purpose of obtaining money which

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was necessary or important to him. I doubt if he was in any urgent need of funds, seeing that his interest in the company is worth more than £100,000. He has the interest of £15,000 at 5 per cent, and he had £9000 paid over to him at his father's death. The impression produced on my mind, and I regret to say it, has been that his primary if not his sole object was to deprive his brother of the benefit his father intended for him. He has failed in this, and, in my opinion, has deservedly failed.

LORD COWAN.—The provision, the true construction of which is for decision of the Court, is contained in the last will and settlement of Francis Pirie, the father of the two parties to this litigation. He died 1st August 1870 possessed of a large fortune. The deed is in the form of a general conveyance to his eldest son, Alexander George, the pursuer of the action, as universal disponee and executor, with directions as to certain provisions settled on his widow, and on the defender, his second son.

The testator and his two brothers, Alexander and Gordon, were partners of the company of Alexander Pirie and Sons, paper-manufacturers, Aberdeen; and subsequently, as appears from the deeds referred to in the contract and agreement of March 1868, the pursuer and defender were assumed as partners. Their respective shares are therein stated to be as follows:—The father of the pursuer and defender 5-24th shares, his brother Alexander 8-24th shares, his brother Gordon 4-24th shares, the pursuer Alexander George 4-24th shares, and the defender Francis Logie 3-24th shares, and the capital stock of the company at £300,000. And it further appears from said deed that the partners had resolved to increase their capital to £360,000, divided into 7200 shares of £50 each, and to form the company into a limited liability concern, as soon as could be effected consistently with the statute as to such companies, under certain articles of agreement which are narrated in the deed. Upon the defender's admission into the concern his father, upon certain terms and conditions, had advanced him in loan £21,000, being the amount of capital effeiring to his 3-24th shares. The resolution of the partners to the effect mentioned made it requisite for the defender, with the aid of his father, to provide for his share of the increased capital; and this led to the contract and agreement in March 1868 and the execution of the new bond by the defender to his father for £24,000, in lieu of the previous bond for £21,000 with the addition of £3000 of further advance. This is the bond for £24,000 of which payment is sought in this action; but it is not immaterial, as bearing upon their father's willingness to aid the defender in the matter of capital, that it is provided that notwithstanding the bond being payable at Whitsunday 1868 neither the father nor any party in his right, in the event of the defender complying with the condition as to payment of interest and certain stipulations as to payment of the principal sum by instalments out of the profits, if enforced, was to exact payment of the amount of the bond until 31st December 1879. That accordingly is the date on which the whole amount would have been payable but for the direction contained in the settlement as to this matter.

The deed of settlement in favour of the pursuer contains various directions with which, by his acceptance of the deed, he was bound to comply in the administration of the large estate left to him by his father. The direction now in question is to this effect:—"Further, in reference to £15,000 stg. of the capital," and so forth, "I hereby direct that on interest being paid regularly, and in the event of my eldest son (the pursuer), while alive, being throughout a director of the said firm of Alexander Pirie and Sons," or of the limited company to be formed, "the said Francis Logie Pirie (defender) may and shall have right to refrain from paying up the said sum of £15,000, and that for the period of eight years after my death and until the arrival of 31st December 1879 if that be later," and it is also directed that the rate of interest from the date of the granter's death should be 5 per cent. That it was the intention of the father, by this direction to his general disponee, to confer a substantial advantage on the defender, is manifest. The capital of which he required to have the command, in order to the retention of his shares in this prosperous company, had been advanced to him by the testator, who was well aware that by no other means

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could the necessary capital be raised. For this reason it was that the delay in payment was provided in the bond itself; and for the same reason it evidently was that the father by his settlement conferred upon the defender right to refrain from paying up the bond to the extent of £15,000 for eight years after his death. This was the primary purpose of this latter part of the fourth direction of the settlement, and the advantage thus conferred is subject to certain conditions, with which, so far as within his power or under his control, the defender was bound to comply. One of those conditions was within the defender's power, viz., due and regular payment of the interest of the bond; the other was under his control only to a certain extent, viz., that he should, as far as his share in the concern would enable him to do so, give his aid and vote at the annual election of directors for the pursuer's continuance at the board. And hence had the case occurred of the defender in either of these respects acting otherwise the right conferred on him subject to these conditions might well be held to have fallen. But this is not the construction of his father's declared will for which the pursuer contends. The words "in the event of my eldest son while alive being throughout a director of the said firm" were intended, or, whether intended or not, are capable of no other meaning than one which gives him power at any time to put an end to the right conferred on the defender at his own will and pleasure by simply resigning the office of director, or by refusing to continue in office when re-elected. By his own act, whenever he pleased, after his father's death, it is contended, that the settlement empowers him to remove the restraint under which he was placed, and to exact full payment of the bond—*sic volo sic jubeo*. Such is the pursuer's contention.

I cannot, any more than the Lord Ordinary, take this view of the pursuer's position, and his relation with the defender under their father's settlement. It seems to me all-material, in the first place, that we are dealing here with the meaning and effect of an express direction by the granter of the deed which constituted the pursuer his father's universal disponee, and carried to him the right to the bond now sought to be enforced. Second, that this being a question affecting the construction of certain provisions in the deed of settlement, intended by the father to regulate the mutual rights of his two sons, the words employed are to be freely and liberally construed, so as to give full effect to what in the circumstances must be regarded to have been his will and intention; and, third, that under the provisional bequest (for that is the true character of the right given to the defender by the will) it cannot be held, consistently with the nature and the words of the deed, that their father intended to confer on the pursuer as universal disponee an absolute and capricious right, by resigning his office of director, to deprive the defender of that advantage which he so anxiously conferred, and which he plainly contemplated as necessary for the defender's continued connection with the company of which he had in his lifetime constituted him a partner. The fourth direction of the settlement is the only provision in favour of the defender which it contains; and that provision and bequest is conferred on certain onerous conditions being implemented by him, viz., (1) that he should grant a personal bond for an annuity of £750 in favour of the granter's widow, payable half-yearly during her lifetime, and this to be executed within two months after the father's death and (2) that he should execute and deliver a deed validly and effectually approving of the father's settlement, and accepting the provisions made in full satisfaction of his whole claims, right, and interest under his mother's marriage-settlement, and also of all rights competent to him in name of legitim or bairn's part of gear or otherwise. Subject to these conditions, which were fulfilled, the right to the three hundred shares in the concern and the right to refrain payment of the bond of £15,000 till 1879 were conferred, and it would be little better than mockery and delusion had the provision contained words so absolute and incapable of construction as to entitle the pursuer at his own hand and by an act of his, over which the defender had no control, so far to destroy the father's declared will. It may be difficult to understand the exact object which the condition had in view. Probably it was to secure that the pursuer by continuing a director, with consent of the other partners, might see the business so conducted as would con-

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duce most for his own and the defender's interest. And this, for anything that appears to the contrary, might have been his position now. But he voluntarily abdicates that position, and resigns his office of director, although none of his copartners were otherwise than perfectly willing that he should remain a director, as he had been in his father's lifetime. Certainly the defender has done nothing adverse. He is willing to do all that in him lies to give effect to this condition, and that may be held sufficient for his defence. The condition in one view of it may be held as qualifying the defender's right, and if so then the defence is complete. But whatever may be thought of this, I am very clear that, according to the sound construction and true meaning of the provision, it was not left within the power of the pursuer to act as he has done, and deprive the defender of the benefit secured to him by his father's will.

That conditions of this kind will not be permitted to destroy the rights conferred by the deed is consistent with those rules of construction which have been recognised, so as to secure full effect being given to the *enixa voluntas* of the testator, to be gathered from the terms in which the provision to be construed is expressed in the deed of settlement. The rules of construction are different with regard to conditions in contracts from those applicable to questions arising under deeds of settlement. Yet even in cases of that kind principles have been acted on very analogous to those here applicable,—the case of Lord Hopetoun v. Hunter's Trustees, House of Lords, 13th June 1865, *ante*, vol. iii. p. 50. This distinction bears very directly on the question of the testator's meaning, on which I have already dwelt. But apart from this view, as matter of general law, Pothier, in his work on Obligations, states—"It is a rule common to all conditions and obligations that they be taken to be accomplished when the debtor, who is obliged under such conditions, has prevented its accomplishment," and he refers to various texts in the civil law in support of the proposition. Now, I think it cannot be doubted that the principle applies to this case. The pursuer's right to enforce payment of the bond to its full extent was subject to his continuing a director of the company, and this he would have been at this moment but for his own voluntary resignation. He has prevented the accomplishment of that condition on which he says, in consequence of its non-existence, the defender's right to withhold payment was made dependent. The contest between these parties must be viewed in such circumstances as if the pursuer was still in the direction of the company. One other quotation from the same author, as bearing on the general argument which I have explained, may be here stated viz., "that conditions ought to be accomplished in the manner that was probably intended by the parties, and this serves to decide the question made by the doctors, whether conditions ought to be accomplished literally *in forma specifica*. The answer is that commonly they ought to be accomplished *in forma specifica*, but they may nevertheless sometimes be accomplished *per equipollens* when from the subject-matter it appears that this was probably the intention of the parties." This proposition may not meet the precise case before us, for in many respects it is quite singular, there being conditions attached, not to the debtor only as regards his obligation to pay, but to the creditor as regards his right to enforce the obligation. But the rule appears to me to be clearly applicable in principle, and this all the more from the question being one as to the meaning of a testamentary deed, and the true intention of the father of these parties in stating their relative rights and obligations as to this bond for £24,000.

Lord Benholme.—I concur with your Lordships in regretting that the civil law has not been made matter of more serious inquiry at the bar with regard to its bearing on this case. I regret that that law does not seem to have the same authority at the bar now, and does not now receive the same attention that it did in my younger days. Then, whenever the principles of the civil law could in such cases of equitable construction in equity be applied, they were recognised as the law of Scotland.

My view of this case does not require any detailed examination of the circumstances out of which it has arisen. I think the case is to be solved on a very general principle,—namely, that where a party pleads a condition, which he

himself has been the means of defeating, he cannot take any benefit from the failure of that condition.

This is a very general rule repeatedly recognised by the civil law, and nowhere more distinctly than in the sec. 161 of the title *De Regulis Juris*, referred to by your Lordship. It applies to the case exactly. For here, Alexander, the elder brother, was bound to refrain from exacting this debt so long as two conditions continued to be implemented. The first of these conditions has been regularly fulfilled, while the second has been rendered impossible by Alexander's own act. As he was debtor in the conditional obligation of refraining, I apprehend he has, as so clearly laid down by the civil law in the passages referred to by your Lordship, no right to found upon the failure of that condition which he has himself rendered impossible.

LORD NEAVES.—If this case were to be decided on the special grounds stated by the Lord Ordinary in his interlocutor, or on the particular grounds mainly relied on in support of that interlocutor, I confess I have considerable doubts whether I should have concurred. In particular, I am not satisfied as matter of fact that the intent and meaning of old Mr Pirie's settlement was that which has been contended for. I have a difficulty in arriving at the testator's real meaning where I find it is the case of a father inclined to favour one child at the expense of another. The ground which your Lordship in the chair has explained is, I think, the true ground for deciding this case,—a ground established by the civil law, and which equity will enforce in every country deriving aid from that source. That ground is totally independent of what was in the mind of the testator. This is a legacy by the father to the second son, a legacy of a peculiar kind, of the nature of a *legatum liberationis*. The eldest son is the debtor in this sense, that he is bound to recognise his younger brother's right to refrain from paying the £15,000 until the expiry of eight years, the right being dependent on two conditions, first, the regular payment of interest by the younger brother, and, second, the continuance of the elder son in the directorship. Both of these conditions must be complied with, or held in law to be complied with. The first has been literally implemented. The second has not. The pursuer has not remained in the directorship. But why? Because he declines to continue. That raises the very point on which the civilians have laid down the principle, that wherever a man for whose benefit a condition is created prevents the fulfilment of the condition he cannot claim as if the condition had failed. The present case appears to be a peculiarly strong example of the principle; for this is a condition not to be performed by strangers and third parties, or to which their concurrence was necessary. The second condition was one to be fulfilled by the joint act of the two brothers, and of them alone, namely their concurrence in continuing the elder brother in the directorship. The civilians illustrate the principle by a great many cases. A testator leaves his property to Titius if he marries Sempronia. Suppose Titius does all he can to implement the condition, but Sempronia declines to have him, the condition does not apply. Or, a property is left to Titius if he marries Sempronia; if he does not it goes to her. Suppose she refuses to marry him, the prætor would not put her in possession of the property because of the non-fulfilment of the condition which she had rendered impossible, the condition being obviously intended for his benefit. The civil law said, "Pro impleta habetur conditio quum per eum steterit qui, si impleta esset, debiturus erat." This is a principle founded on equity, and which we are bound to apply, on grounds of plain justice, independently of the authority which the civil law possesses with us, and which I hope it will long continue to enjoy.

THE COURT accordingly pronounced the following interlocutor:—

"Find that, as the pursuer has voluntarily renounced and resigned his position as a director of the company of Alexander Pirie and Sons, he is not thereby entitled to demand present payment of the bond libelled, but that, in respect that specific implement of the condition expressed in the settlement of Francis Pirie has been prevented by his own act, it must be held as accomplished;

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and to that extent and effect adhere to the Lord Ordinary's interlocutor: Find the defender entitled to additional expenses, and remit," &c.

WEBSTER & WILL, S.S.C.—STUART & CHEYNE, W.S.—Agents.

No. 155.

JAMES FORBES BEATTIE AND ANOTHER, Compearers.—*Birnie.*

July 19, 1873.
Beattie, &c.

Judicial Referee—Fee—Expenses.—A judicial referee and the clerk to the reference are entitled to decree for their fees and expenses against both parties conjunctly and severally.

1st DIVISION.
Ld. Ormidale.
M.

IN an action (Steuart v. Bremer) the parties entered into a judicial reference, with power also to the referee to dispose of the question of expenses, to which the authority of the Lord Ordinary was interponed.

After some procedure the clerk to the reference intimated to the parties that the award, which was in favour of the pursuer and awarded expenses against the defender, was ready to be issued, on payment of the fees and expenses of referee and clerk.

The defender tendered one-half of the sum.

The pursuer refused to pay any part.

The referee and clerk compeared, and moved the Lord Ordinary for decree against the parties conjunctly and severally.

Lord Ormidale reported the case to the First Division.[1]

LORD PRESIDENT.—I do not entertain any doubt. The general principle is that wherever a person of skill or a professional man is appointed or authorised to do anything under the orders of the Court the Court will enforce payment of his remuneration or expenses against both parties conjunctly and severally, and this applies to the case of a judicial referee. I am not surprised that there is no reported decision directly in point, because in practice there is no doubt entertained that a judicial referee is entitled to decree for his fee, and the clerk to the reference for his remuneration and expenses against the parties conjunctly and severally. The reason is very clear, and the principle runs through a number of cases. An illustration of the general principle is to be found in the case of the Common Agent in the Locality of the Barony Parish of Glasgow, 11th Feb. 1871, 9 Macph. 520.

The other Judges concurred.

THE following interlocutor was pronounced on 6th December 1872:—"The Lord Ordinary having heard the counsel for Mr James Forbes Beattie, the judicial referee in this case, and for Mr Arthur David Morice, advocate in Aberdeen, the clerk to the said reference, and no appearance being made on the part of either the pursuer or the defender, and having advised with the Lords of the First Division of the Court, approves of the

[1] The following cases were cited for the compearers:—Fraser v. Johnston's Trustees, 13th December 1833, 12 S. 209; Baxter, 1st June 1838, 16 S. 1805; Brodie, 7th July 1836, 14 S. 1095.

Reference may also be made to the case of Mackintosh and Others v. M'Arthur Moir, in which the Court, of consent of both parties, made a remit to Mr James Peddie, civil engineer, and thereafter, 4th July 1872, pronounced the following interlocutor in regard to the expenses incurred to him:—"Find the pursuers and the defender liable each in one-half of the expenses incurred to the said James Peddie junior, conform to note thereof, No. 158 of process, and decern against the pursuers and defender, conjunctly and severally, for payment to him of the sum of £89, 16s. 4d. sterling, the amount of said expenses."

Auditor's report on the amount of the fee to be paid to the judicial referee, being £36, 15s. sterling, No. 26 of process: Finds the pursuer and defender conjunctly and severally liable in payment to the said James Forbes Beattie of said sum of £36, 15s., reserving to the said parties their relief *inter se*, and decerns against them accordingly: Further, approves of the Auditor's report on the account of expenses incurred to the said Arthur David Morice, as clerk aforesaid, No. 27 of process, amounting as taxed to the sum of £23, 16s. sterling: Finds the pursuer and defender conjunctly and severally liable in payment to the said Arthur David Morice of the said sum of £23, 16s. sterling, reserving to the said parties their relief *inter se*, and decerns against them accordingly."

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Beattie, &c.

HENRY & SHIRESS, S.S.C.—Agents.

MRS MARIA ANSTRUTHER OR SMITH CUNINGHAME AND HUSBAND, Pursuers.—*Shand.*
MRS ANNABELLA AGNES ANSTRUTHER AND OTHERS (Anstruther's Trustees), Defenders.—*Balfour.*

No. 156.

July 19, 1873.
Anstruther, &c. v. Anstruther's Trustees

Appeal to House of Lords.—After a judgment had been pronounced by the House of Lords containing a remit to the Court of Session the parties compromised the case, and the Court, upon a joint minute in manuscript, applied the judgment, and assoilzied the defenders.

Appeal to House of Lords.—Observed, that when after or in consequence of a judgment of the House of Lords, anything remains to be done in the case in the Court of Session, the proper mode of bringing the case before the Court is by petition.

IN the House of Lords, *ante* vol. x. H.L. p. 39. In the Court of Session, *ante*, vol. vii. p. 689, vol. viii. p. 1013, and vol. ix. p. 619.

1st DIVISION. M.

In this case the House of Lords remitted back the cause to the Court of Session "to do therein as shall be just and consistent" with certain declarations, findings, and directions.

The case was subsequently compromised, and the parties presented a joint minute in manuscript craving the Court to apply the judgment and assoilzie the defenders.

LORD PRESIDENT.—In all ordinary cases where anything remains to be done, after or in consequence of the judgment of the House of Lords, the proceeding in this Court must begin by a petition. But this case is peculiar. Although there is a remit from the House of Lords we are not called upon to carry out that remit nor to apply our minds judicially to the remit at all. I am of opinion therefore that in respect of the joint minute we may apply the judgment and assoilzie the defenders.

THE COURT, in respect of the joint minute, "apply the judgment of the House of Lords, and assoilzie the defenders from the conclusions of the action, and find neither party entitled to expenses."

The same course was followed in a claim at the instance of Mrs Mercer and husband.

HAMILTON, KINNEAR, & BEATSON, W.S.—A. & A. CAMPBELL, W.S.—Agents.

No. 157.

July 19, 1873.
Walker v. Bathgate.

WILLIAM WALKER, Respondent and Appellant.—*Watson—W. A. Brown.*
JAMES DUNCAN BATHGATE, Complainer and Respondent.—*Asher—A. J. Young.*

Expenses—Procurator-Fiscal—Statutes 20 and 21 Vict. c. 148 (Local) (Tweed Fisheries Act, 1857), sec. 82; 31 and 32 Vict. c. 123 (Tweed Fisheries (Scotland) Act, 1868), secs. 18, 38, and 41; 27 and 28 Vict. c. 53 (Summary Procedure (Scotland) Act, 1864), sec. 22.

The Tweed Fisheries Act, 1857, authorises an award of expenses against a person convicted of an offence under the Act.

The Summary Procedure Act, 1864, provides that expenses shall not be awarded to or against any public procurator or party prosecuting under the authority of any Act of Parliament for the public interest, unless such award of expenses is authorised by such Act.

Held that the former Act by implication authorised an award of expenses against a procurator-fiscal when the person accused was acquitted, and therefore that the provision of the Summary Procedure Act did not prohibit it.

High Court of Justiciary.
Lord Justice-Clerk.
Lord Cowan.
Lord Neaves.
Justiciary Clerk.

THIS appeal from the Sheriff-substitute of Peebles to the Circuit Court of Justiciary at Jedburgh was certified to the High Court of Justiciary.

In the month of November 1872 William Walker, the appellant, was served with a complaint at the instance of the respondent, the procurator-fiscal of the county of Peebles, and designed in the complaint "procurator-fiscal of Court," charging him with a contravention of section 18 of the Salmon Fisheries Act of 1868, in respect, on the occasion libelled in the complaint, he was guilty of fishing with salmon-roe in the river Tweed. Section 18 of the Salmon Fisheries Act of 1868 is by section 41 thereof made applicable, along with three other sections, viz., the 13th, 20th, and 33d, to the river Tweed, and is declared to form a part of and to be incorporated with the Tweed Fisheries Act of 1857 and the Tweed Fisheries Amendment Act of 1859. The complaint was brought under the Summary Procedure Act, 1864.

Three witnesses were examined in support of the complaint, after which the procurator-fiscal withdrew the case. The appellant's agent thereupon moved for expenses against the procurator-fiscal, but the motion was refused by the Sheriff-substitute (Orphoot), who pronounced the following interlocutor:—"In respect the procurator-fiscal gave up the case, finds the said William Walker not guilty, and assoilzies him from the foregoing complaint."

Against this judgment Walker appealed to the next Circuit Court of Justiciary to be held at Jedburgh, and in his appeal craved the Court "to sustain the said appeal, to recall the said decree in so far as it does not find the appellant entitled to expenses in the Sheriff-court, but not otherwise; to find the appellant entitled to said expenses, and to the further expense of the appeal, and to decern against the said James Duncan Bathgate for the same."

The appellant made the following statement:—"The said James Duncan Bathgate, the complainer against the appellant, is procurator-fiscal of the county of Peebles for the public interest, but he is also the agent of the Tweed Commissioners. He is paid by the Tweed Commissioners for prosecutions under the said Acts and relative statutes, and he is responsible and accounts to them only for his actings in these respects. The said complaint against the appellant was prosecuted by the said James Duncan Bathgate in his capacity of agent of the Tweed Commissioners. The said complaint against the appellant was not a prosecution for the public interest, and does not bear to be such. The said complaint might have been competently prosecuted by any of the several persons possess-

ing a title in respect of the above recited Acts, and any penalty or penalties recovered under said complaint would have been applied for the purposes of the said recited Acts, and not otherwise, for the public interest. The Tweed Fisheries Acts of 1857 and 1859 are local Acts."

By section 22 of the Act 27 and 28 Vict. cap. 53 (Summary Procedure Act), it is provided as follows:—"In all cases of complaint under this Act for the recovery of any penalty it shall be lawful for the Court to make an award of expenses without the same being prayed for in such complaint, but expenses shall not be awarded to or against any public procurator or party prosecuting under the authority of any Act of Parliament for the public interest, unless such award of expenses is authorised by such Act: Provided that in all cases where a complaint for the recovery of a penalty is at the instance of a private complainer it shall be lawful for the Court before which such complaint is brought to award expenses to the successful party, if the Court shall think fit, and such expenses may be recovered, and imprisonment awarded in default of payment or recovery thereof, in the manner and form specified in the said schedule (K) in connection with the several forms of convictions and judgments therein contained, or, if necessary, by separate judgment for expenses in such form as may be appropriate."

By section 82 of the Tweed Fisheries Act of 1857 it is provided as follows:—"Every penalty imposed by this Act may be recovered by action of debt in any County Court, or by summary proceeding before the Sheriff or a Justice or Justices having jurisdiction in the place where the offence is committed, or where the offender resides or is found; and on complaint being made at the instance of the procurator-fiscal or other public prosecutor of the county, district, or place where the offence may have been committed, or where the offender or offenders shall reside or may be found, or at the instance of any one or more of the Commissioners, or of their clerk, to any such Sheriff or Justice or Justices, he or they shall issue a summons or warrant requiring the person complained against to appear before the Sheriff or any Justice or Justices at a time not less than six free days after service, and at a place to be named in such summons or warrant, and every such summons or warrant, with a copy of the complaint, shall be served on the person complained against either personally or by leaving the same with some inmate at his usual place of abode, and upon the appearance of the person complained against, or in his absence, after proof of the due service of such summons or warrant, it shall be lawful for the Sheriff or Justice or Justices to proceed to the hearing of the complaint, and upon proof of the offence either by the confession of the person complained against or upon the oath of one credible witness or more, or in default of appearance of such person, it shall be lawful for such Sheriff or Justice or Justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty incurred, as well as such costs attending the conviction as such Sheriff or Justice or Justices shall think fit."

Argued for the appellant;—The Sheriff-substitute refused expenses to the appellant on the ground that the complaint in question was at the instance of the public prosecutor, and was a proceeding in the public interest; and further, that although the Tweed Act of 1857 authorised expenses to be given to the public prosecutor, in the event of a conviction, it did not authorise expenses to the party complained upon in the event of absolvitor. In both respects the Sheriff-substitute was wrong. The complaint was not a proceeding in the public interest, and the respondent, although convicting on it as procurator-fiscal of Court, was only in the position of a private complainer. The title to prosecute under the Tweed

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Acts was conferred on four different parties—(1) the procurator-fiscal of Court, (2) the clerk of the Tweed Commissioners, (3) any one of the Commissioners, (4) the superintendent of water bailiffs; and the Act created no difference or distinction in the title. It would not seem to be doubtful that a prosecution at the instance of the superintendent of water bailiffs would not be a proceeding in the public interest, and if a complaint at the instance of the procurator-fiscal were held to be so, the result would follow that a prosecution under the Tweed Acts might be a proceeding in the public interest one day, and another day in the same Court a mere private proceeding. Further, the procurator-fiscal of Court in these cases represented no public interest; he was not prosecuting *ad vindictam publicam*. He was the mere servant of the Tweed Commissioners; he was paid by them, and under sections 81 and 87 of the Act of 1857 he accounted to the Commissioners for all the penalties recovered under the Acts. The alternative ground on which the judgment of the Sheriff failed was that expenses were authorised by the Act. By section 82 of the Act of 1857 the Sheriff had authority to deal with costs, which without authority he could not do; but after questions as to costs must be governed by the ordinary rule that they were awarded to the party with whom success lay. No doubt section 82 enacted *per expressum* only what was to be done in the case of conviction, but the contention of the appellant that expenses should follow on absolvitor was the necessary counterpart of the provision in the statute, and was by necessary implication contained in it. If this were not the sound construction, it would follow that nothing but conviction with costs could result under the statute, because nothing was said as to absolvitor at all; but that would be absurd. Further, section 38 of the Salmon Fisheries Act of 1868 provided for giving expenses to a party complained upon, who obtained absolvitor, and although that section was not made applicable to the river Tweed, it would be a strange anomaly to hold that a prosecution under section 18 of the Act of 1868 was to have one result in the Tweed, and a different one in every other river in Scotland. Looking to the terms of section 38 in the Act of 1868, it would require express excluding words in the Act of 1857 to establish the contention of the respondent. Moreover, it was evident, from the terms of section 98 of the Act of 1857, that the Act contemplated an award of expenses against the prosecutor both in the adjudication and the appeal in the case of absolvitor, and it would be a strong thing to say that expenses followed when proceedings were taken before the Justices, but did not follow when they were instituted before the Sheriff. If the appellant was right in his construction of the statute there was no difficulty in awarding expenses against a public prosecutor.[1]

Argued for the respondent;—Taking it to be a condition of the argument that the procurator-fiscal under this complaint was prosecuting in the public interest, the question standing for judgment lay within a very narrow compass. The 22d section of the Summary Procedure Act distinctly said that in such proceedings no expenses were to be awarded to or against the public prosecutor, unless these were authorised by the particular Act under which the complaint was brought. The question therefore was narrowed to this point, were expenses authorised to the person complained upon on getting absolvitor by the Tweed Fisheries Act of 1857, which turned on a construction of section 82 of that Act? The case of Ross v. Stirling, 1 Couper, 366, where expenses had been refused

[1] Prentice and Newbigging v. Bathgate, June 19, 1843, 1 Brown, 561; Wilson v. Morrison, June 15, 1844, 2 Brown, 231; Christie v. Adamson, Oct. 1, 1853, 1 Irvine, 293.

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altogether, in respect of a want of authority in the Act, laid down the principle by which the present question must be ruled. The provision of the statute was the authority for dealing with expenses, and the measure of its authority was the express terms of the statute, from which alone it could be deduced. The 82d section of the Act of 1857 did not satisfy this test, for it was altogether silent as to costs in the case where the public prosecutor did not succeed in obtaining a conviction. The provision in the 98th section of the Act of 1857 regulating expenses in proceedings before the Justices could not avail the appellant. The fact that they were dealt with in one clause of the statute, and excluded from the other, shewed that the mind of the Legislature had been applied to the question, and the failure to award expenses in cases of absolvitor under the 82d section must therefore be taken to be deliberate and intentional. A similar answer applied to the appellant's argument upon the 38th clause of the Salmon Fisheries Act of 1868. It was a later statute than the Tweed Fisheries Acts, and the fact that the 38th section was not incorporated into these Acts as other sections, including the one libelled in the complaint, were, must be taken as conclusive evidence that the Legislature intended the 82d section of the Act of 1857 to stand on its own proper construction; and it being silent as to expenses, except where a conviction followed, could not be pleaded as an authority for giving expenses where there was absolvitor. In any view expenses could not be awarded against a public prosecutor proceeding as the procurator-fiscal did under this complaint *ad vindictam publicam*.

At advising,—

LORD JUSTICE-CLERK.—I certified this case from the Circuit Court, not so much because I had any doubt as to what the decision ought to be, but because I thought it important that the case should be decided as authoritatively as possible, in order to afford a rule in similar cases.

The first question here is, whether the Act of 1857 does or does not authorise the Sheriff to deal with a matter of expenses under a complaint of this sort in the way of awarding them to the accused. The contention in support of the Sheriff-substitute's judgment is, that although the Act authorises the awarding expenses in favour of the prosecutor, it does not authorise any expenses being awarded to the successful accused. Now, I cannot understand on what ground this somewhat unjust and anomalous effect is supported. In my opinion, if a statute indicates that a Court is to deal with the matter of expenses at all, then, unless there is the clearest possible exclusion of it, the presumption in law and in ordinary justice is that justice is to be done to both parties. I am the more assured that this is the principle to be applied here from the fact that the reason why expenses are mentioned in the 82d section of the Act of 1857 is clearly to shew that the judge may impose expenses over and above the penalty. That leads to the implication that where the respondent is successful he is entitled to his expenses against the prosecutor. I think further that this view is strengthened by the provisions of the 98th section of the Act in regard to the Quarter Sessions.

Thus I do not think that the 22d section of the Summary Procedure Act applies in this case, for it does not take away power to award expenses, which formerly existed, but only applies to cases where there was no such authority, and in this case, as I have already shewn, authority to award expenses is given by the Act of 1857.

In these circumstances I do not think it necessary to go into the question as to what would be the presumption at common law if nothing were said about expenses in the statute. Nor do I think it necessary to inquire whether or not the procurator-fiscal was acting in this case as a public prosecutor.

I am therefore of opinion that we should sustain this appeal.

LORD COWAN.—The 22d section of the Summary Procedure Act rules the procedure in regard to expenses in all cases of complaint brought under that Act.

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The section provides, *inter alia*, that "expenses shall not be awarded to or against any public prosecutor or party prosecuting under the authority of any Act of Parliament for the public interest, unless such award of expenses is authorised by such Act." This provision leaves for consideration the question whether the Act under which this complaint is brought authorises expenses to be awarded against the public prosecutor. No such power is expressly given by the Tweed Fisheries Act of 1857, under which this prosecution is brought, but it is provided that the accused may be subjected in expenses; and in the argument it was contended that although in any particular statute there may be no express authority to give expenses against the prosecutor, yet if there is authority to give them in his favour justice necessarily leads to the inference that when the respondent is successful the Court are entitled to award expenses in his favour. This principle appears to be well founded, and has on two occasions been recognised and given effect to by me on Circuit,—once along with Lord Ivory, and again with my brother Lord Neaves. These cases were referred to in the discussion, and I see no ground to depart from the principle of construction applied to a statute expressed in very similar terms to the present as regards the matter of expenses. Applying this principle to the present case, it follows that the accused party having been successful the Sheriff was authorised to award them, if he considered them justly due in the circumstances of the case. That being so, this case does not come under that part of the 22d section of the Summary Procedure Act which provides that expenses shall not be awarded against the prosecutor.

I therefore concur with your Lordship.

LORD NEAVES concurred.

THE COURT, on 4th June, sustained the appeal.

GILLESPIE & PATERSON, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

No. 158.

July 19, 1873.* Watt v. Ligertwood and Another.

JOHN WATT, Pursuer.—*Scott.*

JOHN LIGERTWOOD AND ANOTHER, Defenders.—*Sol.-Gen. Clark—Shand.*

Process-caption—Sheriff-clerk—Sheriff-clerk-depute—Contempt of Court—Damage.—A procurator presented a petition to the Sheriff for interdict, and after the Sheriff had pronounced an adverse judgment, carried off the petition, so as to prevent the Sheriff-clerk-depute writing the Sheriff's interlocutor thereon, notwithstanding the Sheriff's intimation that he desired the petition to remain with the clerk. The Sheriff-clerk-depute thereupon carried into execution a warrant in the form of an ordinary process-caption, without any notice or special warning to the procurator, and incarcerated him thereon. In an action for reduction of the said caption, and damages, at the procurator's instance, *held* (1) (*diss.* Lord Justice-Clerk) that the course taken by the Sheriff-clerk-depute was inappropriate and irregular; (2) that it was unnecessary to reduce the caption, as no further action could be taken upon it; (3) that the pursuer was not entitled to damages, in respect that it was by his own culpable conduct and contempt of the Sheriff's authority that any warrant against him had been necessary.

2D DIVISION. Ld. Mackenzie. R.

THE previous stages of this litigation are fully reported *ante*, vol. vi. p. 1112, and vol. viii. H. L. p. 77. By the judgment of the House of Lords Mr Comrie Thomson, the Sheriff-substitute, was found entitled to have the action dismissed as against him. The proceedings were continued against Messrs Ligertwood and Daniel.

The pursuer concluded in his summons for reduction of a process-caption, obtained and executed against him by the defender Mr Daniel, Sheriff-clerk-depute, and for damages, on the ground that Mr Daniel wrongfully and illegally applied for and obtained that process-caption,

* Decided October 27, 1871.

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and incarcerated the pursuer thereon, and that the other defender, Mr Ligertwood, the Sheriff-clerk, was liable for the acts of Mr Daniel, who was his depute.

The facts which the Court, after allowing proof, held proved were these :—" On the occasion in question, upon a petition praying for interdict and interim interdict at the instance of Mrs Jane Mouat, presented to the Sheriff of Aberdeenshire by the pursuer as agent for the said petitioner, and upon a caveat presented for the respondent in that petition, the Sheriff-substitute, after hearing parties' procurators, pronounced his judgment that the prayer for interim interdict should be refused; that when the Sheriff was proceeding to have his judgment to that effect written out, the pursuer, at his own hand, took possession of the petition, then *in manibus curiæ;* and, notwithstanding the intimation of the Sheriff-substitute that he desired the petition to remain with the clerk, in order that the interlocutor might be written upon it, carried off the petition, and prevented the interlocutor from being written thereon, and thereafter, as it appeared, destroyed the said petition in his own place of business. Thereupon the Sheriff-clerk-depute obtained and carried into execution a warrant in form of an ordinary process-caption, without any notice or special warning to the pursuer that such was to be issued or executed, and the pursuer was incarcerated thereon."

The pursuer maintained that the process-caption was illegally and incompetently granted, because, " (1st) the petition, for recovery of which the caption was issued, was not a process, but was withdrawn by him before any procedure took place upon it, and was thereupon the private property of the pursuer, or of his client, and not under the control of the Sheriff-clerk, who was in no way responsible for it; (2d) the pursuer never borrowed or granted a borrowing receipt for the petition referred to; and (3d) the process-caption was obtained without any notice having been given to the pursuer that a complaint craving the issue of such a writ had been or was to be presented."

The defenders maintained, *inter alia;*—(1) The pursuer's averments were not relevant or sufficient in law to support the conclusions of the action. (2) The defenders ought to be assoilzied from the conclusions of the action, in respect the proceedings complained of were in all respects lawful and regular. (3) The pursuer having illegally and unwarrantably taken away the said petition from the control and custody of the Court, or of the clerk thereof, the defender Mr Daniel, was bound, and at least was entitled, to take the steps which were adopted to enforce the return thereof.

The Lord Ordinary (Mackenzie) pronounced the following interlocutor: —" Sustains the first plea in law stated for the defenders: Dismisses the action, and decerns: Finds the pursuer liable in expenses." *

* " NOTE.— . . . . 1. The Lord Ordinary is of opinion that the petition was, at the time that the pursuer took it away, not the property of pursuer, or of his client, and not within their control. The petition prayed for an interdict against Mr Alexander Edmond, the respondent therein, and also that immediate interdict should be granted. It is stated by the pursuer that a caveat having been lodged for Mr Edmond, the pursuer and Mr Edmond's agent met in the Sheriff-clerk's office, that they went with Mr Daniel, the Sheriff-clerk-depute, before the Sheriff-substitute of Aberdeenshire, who perused the petition, heard him and Mr Edmond's agent thereon, and stated that he would not grant the interim interdict. The Lord Ordinary considers that there was, according to the pursuer's own statement, a judicial application laid before and considered by the Judge Ordinary of the bounds, a competent judge, who heard the parties, and pronounced a judicial decision on the application for interim interdict. Mr

No. 158. The pursuer reclaimed. At advising,—

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LORD BENHOLME.—In this case we have had some very interesting discussion, and some of a novel kind. The result, in my opinion, is that neither party can

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Edmond, the respondent, was entitled to have that decision refusing interim interdict written out and signed by the Sheriff-substitute; and if the pursuer declined to proceed further with the application Mr Edmond had right to move that an interlocutor should be pronounced, dismissing the application, and finding him entitled to the expenses to which he had been put in opposing it. It is said that by immemorial practice in Aberdeenshire such a petition was the property of the petitioner, and might be disposed of by him as he pleased. Even supposing this averment to be true, it cannot affect the disposal of the present case, because such a practice, if it should exist, is, the Lord Ordinary thinks, contrary to law. The Lord Ordinary is therefore of opinion that the petition was a depending process, when the pursuer, contrary to the order of the Sheriff-substitute, given on the motion, or, as the pursuer calls it, the instigation of Mr Edmond's agent, carried it away—that the pursuer acted illegally and improperly in doing so—and that the Sheriff-clerk, who was the proper custodier of the petition, or his depute, was entitled to apply to the Sheriff for caption in order to its recovery from the pursuer.

"2. The pursuer further maintains that the process-caption was illegally and incompetently granted for recovery of the petition, because he had never borrowed it or granted a borrowing receipt for it. It cannot surely be maintained, that although a warrant or caption for the recovery of a process may be issued against an agent who has legally, and in ordinary form, borrowed it from the Sheriff-clerk, and granted the usual receipt for its return, and has failed to return it when required, yet that a warrant or caption cannot be issued against an agent for recovery of a process which he has illegally and improperly carried away. Such a proposition is, it is thought, wholly untenable. The ordinary warrant for recovery of a process is a caption, until the process be returned. If such a warrant can be issued for the recovery of a process from an agent who is in lawful possession of it, it can certainly be issued for the recovery of a process, or any step of or production in a process from an agent, or any other person, who has not only illegally and improperly, but in contempt of Court, as was the case in the present instance, taken it from the table on which it had been laid by the Judge, in presence of the parties, after he had perused it and heard them thereon, and pronounced his decision.

"3. The only other ground on which the illegality and incompetency of the process-caption are maintained is that no notice was given to the pursuer that a complaint craving the issue of such a writ had been or was to be presented. When an agent is lawfully in possession of a process by having borrowed it from, and granted a receipt for it to, the clerk of the process, such agent is entitled to retain it until he shall receive notice for its return; and before a caption is issued intimation of the application for caption is, according to practice, given to the agent, in order that he may return the process within a specified time. Such practice depends, not upon the provisions of any statute or Act of Sederunt, but solely upon the reasonableness and propriety of giving notice to an agent lawfully in possession of a process on a borrowing receipt, that he must return it to the Clerk of Court, otherwise it will be recovered by the caption or warrant of the Court. But such a notice was, the Lord Ordinary thinks, not required in the case of the pursuer. He had no right to take or retain possession of the process. He was a wrong-doer, who had not only illegally and improperly taken the petition out of the custody of the Court, but had, in contempt of Court, refused to return it when required by the Sheriff-substitute to do so, and carried it away. He had, the Lord Ordinary is of opinion, got all the notice that he was entitled to when the Judge, as he himself avers, desired him to return the petition to the Clerk of Court. The process-caption was the legal and competent warrant for the recovery of the petition. In the ordinary case, practice, based upon sense and reason, requires, before caption is issued, that

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be considered as quite successful in the proceedings. I think it is perfectly clear that Mr Watt, the pursuer of this case, acted in an irregular manner in carrying off the petition, especially after he had been requested in open Court by the Sheriff to leave it. I think the carrying off of the petition was a contempt of Court on his part, and I further think that his conduct was aggravated by his afterwards burning that petition. I am clearly of opinion that the Sheriff would have been well entitled to have, by summary warrant, brought him into Court, and, in case of his not giving up the petition, to have committed him to prison, and I think that was clearly the appropriate remedy for the wrong that he did. The course that was adopted was, I think, irregular. I do not think that a process-caption was the proper instrument in such a case. According to the practice which has prevailed, I think that a process-caption is a proceeding of this kind, that when an agent has granted his written receipt for a process or part of a process, and is under an obligation to return it whenever it is demanded, a process-caption is the mode of enforcing that obligation, but the issuing of the process-caption is always preceded by a certain intimation to him to perform the obligation, otherwise he will be incarcerated. Twenty-four hours is the regular *inducie* appropriate to that form. The result of the intimation is just this, that if he does not within the *inducie* perform the obligation, then he goes to jail. The messenger who is intrusted with the execution of the caption takes him and incarcerates him. It will at once be seen that it makes a material difference in the agent's position if such an instrument is not preceded by the usual notice. He has not the warning which invariably attends that summary mode of incarceration; he has not the warning that if he does not within a certain time perform his written obligation he will be incarcerated; but where there is no such notice the officer goes and incarcerates him without it. Now, in this case, when I look to the whole circumstances, and see what took place, and endeavour to ascertain whether Mr Watt—irregular as the process against him, in my opinion, was—is entitled to claim damages, I arrive at the conclusion that he is not. I think, in point of fact, what he has suffered already in the way of outlay, incarceration, and distress of feeling has been brought upon himself, and it cannot be considered as substantially more than he might have suffered had the more regular form of process been adopted. I am therefore of opinion that he is not entitled to damages. But while the defender is to be relieved, or at least, in my opinion, ought to be relieved, from damages, I think we should not do our duty —at least I should not conceive that I had done my duty to the law of the country, if I did not prefix that absolvitor from damages with a solemn declaration that the mode of procedure here adopted by the Sheriff-clerk was irregular, and contrary to practice, in the issuing of a process-caption and executing it in the way in which it was done. I have therefore to propose an interlocutor by which, whilst we intimate what the proper and regular mode of procedure would

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notice should be given to an agent, who has legally and properly borrowed, on a receipt, such a petition from the clerk. But such practice cannot apply to the pursuer's case, seeing that he had illegally and improperly carried away the process, in contempt of the order of the Court.

"It is further averred by the pursuer that he was not informed by the Sheriff-officer who executed the warrant that he was in possession of a process-caption against him. He does not say that the officer was not in possession of the warrant, which gave him authority to act, or that the pursuer asked to see it, and was refused. There was nothing illegal, so far as the pursuer avers, done by the officer in the execution of the warrant—Erskine, iv. 4, 33.

"The Lord Ordinary, after careful consideration of the pursuer's statements, is of opinion that these statements are not relevant or sufficient in law to support the conclusions of the summons. These averments do not set forth any grounds on which it can be held that the proceedings complained of were incompetent or illegal and wrongful, or on which the process-caption can be reduced, and the defenders found liable in damages. On the contrary, the application for and execution of the process-caption were fully justified by the circumstances disclosed in the pursuer's condescendence."

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be in the circumstances of this singular case—and it is a most singular one, for it is not within my recollection that I have seen any such contempt of Court—whilst we must, I think, intimate what our opinion is as to the proper mode of procedure, we must also make a finding as to the irregularity of that caption which was issued. Then, as to the conclusion for reduction, I think the law would be vindicated with a mere declaration. I think the reduction of a warrant which is at an end is useless, and therefore I would dismiss the conclusion for reduction, and find no damages due to the pursuer, and no expenses to the defender.

Lord Neaves.—I concur in the opinion just delivered, and have only a few remarks to make in connection with my view of the case. I concur in pronouncing the conduct of Mr Watt, whatever personal excuses there may be in connection with it, or however he may have acted under mistake, to have been highly irregular, improper, and a contempt of judicial authority. I cannot doubt that for that conduct the Sheriff, who witnessed these proceedings, and against whose authority and orders this contempt was committed, was entitled, from the cognisance he had of the whole matter, to issue a warrant in such special form as would have compelled this party to bring back the document he had improperly taken away, and failing his instantly doing so to commit him to jail. That appears to me to be a clear proposition. At the same time I think the mode followed by the Sheriff-clerk, in the difficult circumstances in which he was placed, was irregular and inappropriate, for this reason that it could not be followed out in the usual way without presupposing a notice, while any lengthened notice in the case would have been out of the question. Therefore it is that I think proceedings should have been taken of another kind. At the same time I do not say that if this process-caption—a proceeding which itself, I think, originates as much in the idea of contempt as of obligation—had been accompanied by something like a warning, and not immediately carried into effect as was done, it might not in the circumstances have been a right thing to do. But as it was conducted we have the proceeding exposed to this remark, that it is not a special warrant requiring the party to deliver up the paper, and immediately on his failing to do so, ordering that he should be carried to prison, but it is a mixing up of the warrant of imprisonment with a form that presupposes previous notice, and yet is not itself accompanied by any warning as to the consequences. But while I therefore think that this was an irregular and inappropriate proceeding in the mode in which it was immediately used and carried into execution, I must also say that the position which Mr Watt took up is one which precludes him from insisting on his claim for damages. The Sheriff-clerk-depute was called upon to vindicate the authority of the Sheriff in some way or other. The situation was an unprecedented one, owing to the unprecedented irregularity of a procurator carrying off a process in the face of a judgment of the Court. Although, therefore, the Sheriff-clerk-depute fell into this error in point of form, which was not much of an error in substance, I think that the individual procurator who caused all this difficulty, who led to the difficulty, who exposed himself to a proceeding which might have been adopted, and would in substance be the same as that which has taken place, and who acted in all respects and ways in the wrong-headed manner that we see, either through ignorance, or from a disregard of his duty as a procurator,—I think that this party is not in a situation to make Mr Ligertwood pay damages for an error of that description. I agree with your Lordship that there is no need to reduce the warrant. Warrants do not require to be reduced, especially when they have been executed. A warrant is not a decree of any kind. On the whole matter, I think the pursuer is not entitled to any damages, but, in respect of the irregularity that has taken place, that no expenses should be given to the defender.

Lord Justice-Clerk.—In the result of the judgment proposed, by which the action stands dismissed, and neither party is found entitled to expenses, I am inclined to concur. Even assuming that the warrant in question was regular, which I think it was, it is impossible to read the proof before us without seeing

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that in the execution of it there was a certain amount of precipitance and harshness which might well have been avoided. If the Sheriff-clerk, having obtained his warrant, had informed his brother practitioner that he held it, and requested him to save the necessity of having it executed by returning the process, he would have acted a more judicious part, and probably would have prevented the scandal which occurred. That both sides should bear their own costs is probably a just result, and is certainly one in which I am prepared to acquiesce. But in the views which have been expressed as to the regularity of the procedure I cannot concur. I think it was quite regular; and holding that opinion, it is only fair to those concerned that I should explain the grounds of it. It must be kept in mind what the occasion and the object of the procedure were. The occasion was the abstraction of the process in open Court, pending the discussion of the case, and in spite of the orders of the Judge, by the procurator who presented the petition, and that for the purpose of obstructing the administration of justice by preventing the Judge from writing his judgment upon it. The object of the procedure on the part of the clerk was, in obedience to the direction of the Judge, to compel the immediate return of the process. I am of opinion that for this purpose the procedure was entirely appropriate. No doubt the Judge might at once have granted a warrant to apprehend Mr Watt for contempt. He might also, had he chosen, have granted a process-caption, or, what is the same thing, a warrant to imprison Mr Watt until the process was restored, without the intervention of the clerk. But he was also entitled to do what he did—to leave the responsibility of recovering the process in these circumstances on the clerk, and to grant his warrant on his application. The right of the clerk to apply at all times for a process-caption when a process is unduly withheld cannot be doubted. He is responsible to the Court for it, and cannot part with it excepting under their regulations. But the supposed irregularity is said to consist in the want of notice to Mr Watt, and this is founded on the practice which is followed when a process has been regularly borrowed, and the agent's receipt has been granted for it in the clerk's books. I think the analogy entirely inapplicable and misleading, and consider the evidence led on this subject wholly irrelevant. The practice in this Court of lending the process on a borrowing receipt rests on the Act of Sederunt of the 20th November 1711, sec. 8, by which the clerks were discharged to part with processes except on receipt. Under this regulation the borrower is legally in possession of the process, and the twenty-four hours' notice which practice has introduced before a caption can be granted is not only reasonable, but essential to the conduct of business. But the power of the Court to grant a caption for a process improperly detained by the clerk, and of the clerk to apply for it, does not depend on or originate in the borrowing receipt. This procedure was certainly in practice long before 1711. The power of the Court to grant a process-caption rests on the principle laid down by Lord Stair (iv. 47, 23), in a passage in which he explains the power of the Court to issue caption without a charge on "contempt or disorders in process," and the right of the clerk to apply for it rests on his obligation to have the process in his hands. The borrowing receipt, no doubt, judicially ascertains the fact of the process being in the borrower's hands, and there may be cases in which it would be necessary for the clerk to state the special circumstances in which he had been deprived of the process, and for the Court to inquire how the warrant was issued. But we have no such case here. Mr Watt had acquired the process illegally. The Court were cognisant of the circumstances, and had already decided that his possession of it was illegal from the first, and that it was his duty instantly to restore it. There was nothing for the clerk to explain to the Court, or for the Court to inquire into, and the application being one incidental to a cause which was in the course of adjudication, and its object being instant restoration of the process, notice would have been entirely inappropriate, and would simply have enabled the wrong-doer to succeed in obstructing the course of justice.

LORD COWAN was absent.

THIS interlocutor was pronounced on 27th October 1871:—"Find that,

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on the occasion in question, upon a petition praying for interdict and interim interdict at the instance of Mrs Jane Mouat, presented to the Sheriff of Aberdeenshire by the pursuer as agent for the said petitioner, and upon a caveat presented for the respondent in that petition, the Sheriff-substitute, after hearing parties' procurators, pronounced his judgment that the prayer for interim interdict should be refused: Find that when the Sheriff was proceeding to have his judgment to that effect written out, the pursuer at his own hand took possession of the petition, then *in manibus curiæ*, and notwithstanding the intimation of the Sheriff-substitute that he desired the petition to remain with the clerk, in order that the interlocutor might be written upon it, carried off the petition, and prevented the interlocutor from being written thereon, and thereafter, as it appeared, destroyed the said petition in his own place of business: Find that the conduct of the pursuer in so acting was illegal and culpable, and amounted to a contempt of the Sheriff's jurisdiction and authority: Find that, in these circumstances, when the said petition had been so carried away, it was competent to the Sheriff, within whose cognisance and in whose presence the pursuer's proceedings took place, to have issued a summary order or warrant ordering the pursuer to restore the petition of which he so took possession, and failing his immediately restoring the same, for his immediate imprisonment till that order was implemented: But find that the conduct of the Sheriff-clerk-depute, in obtaining and carrying into execution a warrant in the form of an ordinary process-caption, without any notice or special warning to the pursuer that such was to be issued or executed, was an inappropriate and irrgular proceeding: Find, at the same time, that as no further action can be taken on the said process-caption or warrant, it is unnecessary to reduce or set aside the same: And further, find that as it was the pursuer's own illegal and culpable conduct and contempt of the Sheriff's authority which led to the necessity of a proceeding or warrant against him, and as he was in any view liable to be proceeded against in a summary manner, the pursuer is not entitled to damages as against either the principal Sheriff-clerk or against the Sheriff-clerk-depute for the error in point of form committed by the Sheriff-clerk-depute in the discharge of his official duty: Therefore, in the whole circumstances, dismiss the action, and decern, and to that extent adhere to the interlocutor of the Lord Ordinary: But find no expenses due to either party."

W. Officer, S.S.C.—Tods, Murray, & Jamieson, W.S.—Agents.

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July 19, 1873.* Milne's Trustees v. Lord Advocate.

Alexander Nicol and Others (Dr Milne's Trustees), Pursuers.—*Clark—Hall.*

The Lord Advocate (for Commissioners of Woods and Forests), Defender.—*Lord-Adv. Moncreiff—T. Ivory.*

Salmon-fishing—Barony Title—Prescriptive Possession.—Prescriptive possession of salmon-fishings in the sea will not confer a right of salmon-fishing on the proprietor of a barony bounded by the sea, when such possession cannot be ascribed to the barony title.

1st Division. B.

Ante, vol. vi., p. 972, and vol. vii., p. 26.

In this action, raised by Dr Milne's trustees against the Commissioners

* Decided on January 10, 1869.

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of Woods and Forests, the pursuers concluded for declarator, that the pursuers had the sole and exclusive right to the salmon-fishings in the sea and sea-coast *ex adverso* of the pursuers' lands and barony of Muchalls in the county of Kincardine.

The pursuers founded upon a crown charter of resignation dated in 1806, containing a grant of the lands and barony "cum decimis rectoriis et vicariis earundem et piscationibus alborum piscium et cymbis piscariis lie fisherboats cum molendino de Muchalls," &c., and they averred prescriptive possession of the salmon-fishings on this title.

The Lord Ordinary (Barcaple) found that the barony title founded on was a sufficient title to the salmon-fishings if followed by prescriptive possession of such fishings. The First Division, on July 1, 1868, adhered to this interlocutor, and subsequently the following issue was adjusted and sent to trial:—"It being admitted that the pursuers are proprietors of the lands and barony of Muchalls, excepting the parts and portions of the said lands and barony undermentioned, viz., . . . Whether for forty years prior to 16th April 1862, or for time immemorial, the pursuers and their predecessors and authors have, as proprietors of the said lands and barony of Muchalls, possessed the salmon-fishing in the sea and sea-coast opposite to the said lands and barony of Muchalls, belonging to the pursuers."

At the trial it was proved that in 1824 Mr Silver of Netherley, then proprietor of the barony, had presented a petition to the Treasury, praying for a grant of salmon-fishings. It was not proved that there was any fishing of salmon other than going out with a feith-net, and that few salmon had ever been caught.

It was then arranged between the parties, on the suggestion of the Court, that as the true question was whether the possession had by the pursuers and their predecessors was in law sufficient possession for forty years within the meaning of the issue a verdict should be taken for the pursuer, subject to the opinion of the Court on the said question, and with power to the Court to enter up a verdict for the defenders if they should be of opinion, on a consideration of the notes of evidence and of the documents put in evidence, that the possession proved to have been enjoyed by the pursuers and their predecessors during forty years preceding the 16th of April 1862, is not in law sufficient possession within the meaning of the issue.

A verdict for the pursuers was accordingly found by the jury.

When the case came before the First Division the Court held that for some portion of the prescriptive period the possession by the pursuers could not be ascribed to their barony title. In 1821 the proprietor of the barony had applied for a crown grant of salmon-fishings, which he would not have done if he had supposed that he had in his barony title a sufficient title to the fishings. Again, in 1824, and lastly, in 1859, the possession was not ascribed to the barony title, and therefore the possession had by the pursuers not being in law sufficient possession the verdict must be entered up for the defenders.

TODS, MURRAY, & JAMIESON, W.S.—ANDREW MURRAY, W.S.—Agents.

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Lord Advocate v. Hall.

THE LORD ADVOCATE (for the Commissioners of Woods and Forests), Pursuer.—*Lord-Adv. Moncreiff— Sol.-Gen. Young—T. Ivory.*
SIR JAMES HALL, Baronet, Defender.—*D.-F. Gordon—Macdonald.*

Salmon-fishing—Possession.—Held that the proprietor of a barony who had not an express grant of salmon-fishings had not instructed a right thereto by proving that the tenants of cottages on his estate had been in use to fish for salmon in the sea for their own behoof without paying rent therefor.

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1st Division. B.

THIS action was raised in 1869 by the Lord Advocate, on behalf of the Commissioners of Woods and Forests, against Sir James Hall of Dunglass, Baronet, for declarator "that the salmon-fishings in the sea and other waters *ex adverso* of the lands and estates in the counties of Haddington and Berwick, the property of the said Sir James Hall, or of any part thereof, belong to the Crown, and form part of the hereditary revenues of the Crown in Scotland, falling under the management, administration, and control of the said Commissioners of our Woods, Forests, and Land Revenues, and that the said James Hall has no right or title to fish for salmon, grilse, or salmon trout in the sea and other waters *ex adverso* of any part of his said lands and estates in the counties of Haddington and Berwick by means of stake-nets or bag-nets, or by net and coble, or in any other manner of way."

The estates of the defender consisted of two baronies, the barony of Dunglass and the barony of Cockburnspath, but he had no express grant of salmon-fishings.

The following issues were sent to trial:—"It being admitted that the pursuer in the issue, Sir James Hall, is proprietor of the lands and barony of Dunglass, and it being also admitted that he is also proprietor of the barony of Cockburnspath: (1) Whether, for forty years prior to 3d March 1869, or for time immemorial, the pursuer and his predecessors and authors have, as proprietors of the said lands and barony of Dunglass, possessed the salmom-fishings in the sea and other waters opposite to the said lands and barony of Dunglass belonging to the pursuer? (2) Whether for forty years," &c. The issue in regard to the barony of Cockburnspath, was in the same terms.

The nature of the evidence appears from the charge of the presiding Judge.

LORD ARDMILLAN.—Gentlemen of the jury, the case before you is partly a case involving principles of law, and partly a case involving considerations of equity. The pursuer of the action is the Lord Advocate on behalf of the Crown, and on behalf of the public; the defender in the action is Sir James Hall, proprietor of the estates of Dunglass and Cockburnspath; and the question is, whether Sir James Hall is entitled, as under his title from the Crown, to the salmon-fishing *ex adverso* of his properties. In order to establish that, he must instruct possession. It is not in dispute before you that Sir James Hall does not hold a title from the Crown, conferring on him a property in the salmon-fishings, but only a title conferring on him a general right of fishings in salt water and in fresh water, which is not construed in law as including a right to salmon-fishings. It is necessary for the proprietor who produces a title with right to fishings generally to instruct his possession for the purpose of explaining his right, and erecting it into a right to salmon-fishing. Therefore the pursuer in the issue is Sir James Hall, who undertakes to shew to you that he and his predecessors have, as proprietors of the baronies of Dunglass and Cockburnspath, possessed the salmon-fishings in the sea and other waters opposite these baronies for more than forty years. Now, it is quite true that a barony title is a very favourable title, and that it forms a very favourable foundation for a proof of possession in order to create or rear up into a title to salmon-fishing a general title to fishings in salt and fresh waters. But, notwithstanding that, the holder of the barony title must instruct his possession, as proprietor, of the salmon-fishings.

Now, it is very obvious to you, and I need not dwell upon it, that what shall be sufficient possession to instruct such a title must depend very much upon the nature of the subject and the circumstances of the case. In this case, the subject is confessedly of very little value; and in this case also the possession is of a somewhat unusual kind. It is important to bear in mind that from beginning to end no lease for any rent payable in money, or any rent whatever, has ever been granted by Sir James Hall or his predecessors. That is the first important

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matter which cannot be omitted. The second is, that while there has never been any such lease with a return of rent for possession, there never has been, if I remember right—and I have gone over the evidence very carefully—there never has been any money rent paid at all. Not only has there never been a lease for a money rent, but there never has been a money rent at all. But then, the pursuer of the issues maintains—first, that the whole possession of this fishing has been by tenants upon his estate; and I think that is clear. I think it is proved by every witness who spoke on the subject that, with the exception of two occasions, nobody has ever attempted to exercise the right, or to pursue the vocation of fishing for salmon or grilse in these waters except the persons who dwell as tenants upon the Dunglass estate. The two exceptions are—first, a night expedition from Burnmouth, of which we hear on one solitary occasion. Whether or not the Burnmouth fishermen caught any fish on that occasion is not proved, but it is proved that they did not come back, which I think shews that they did not find it was very encouraging or remunerative. But they did try it once, and no more. The other occasion was when Pike and Johnstone, who were both salmon-fishers, were sent from Northumberland by Mr Bell to make an attempt or inquiry with regard to settling a fishery at Dunglass. These two persons proceeded in this manner. They went to Sir John Hall as the proprietor, and they asked for his leave; that is important. They agreed to send Sir John the first fish they caught; they came and they sent Sir John the first and the last fish they caught, for they caught only one, and then they went back to the place where they came from, and there was an end of them. That was the only other occasion,—and that was in 1846,—on which any person fished who was not a tenant of Sir John Hall's. Well that does not go very far, because it is not likely, if the fishing was so bad as it was represented to be, you would have anybody but the tenants on the estate to try it. The tenants on the estate are people living in cottages at £3 of rent, which was lowered to £2 because of their being so poor, and because of the kindness of the proprietor. They are just the kind of people who are likely to put their nets across the mouth of a burn, and to attempt to assist themselves by taking a fish in that way; but when you are told by the people themselves that they are in the practice of doing a thing of that kind, without a lease, and without direct authority as in the exercise of a right, that is hardly possession in the legal sense. The proprietor, in order to instruct his right, must have open possession and the assertion of a right. He must either grant a lease as the proprietor of the right, or he must set up a fishery as occupant and user of the right himself. Or, to take the most favourable case that can be put for the pursuer of the issue,—it is said that instead of a lease with a money rent he gives a lease, or something of the character of a lease, the return for which is that the fisherman shall give up the first fish he catches to the proprietor for nothing, and that that is equivalent to a rent for the value of the fishery at the moment, and that it is such a rent as to constitute an exercise of the right of salmon-fishing by the proprietor, the first fish being the remuneration. His Lordship then read the evidence of Robert Gordon and Mrs Rodger with regard to the first fish, and proceeded:—You will observe from this evidence that the practice was, not that one fish was brought by each fisher or each tenant, but that one fish only was brought out of the whole fishing. Now, if there was a lease—if the first fish was given by any man as tenant instead of rent, then every man who was a tenant there should have given his first fish. But one single fish for the whole is not in lieu of rent. It is absurd to speak of it in that way; and therefore you are obliged to take some other view.

Mr Gordon.—Your Lordship will allow me to say that you have omitted to refer to the evidence of Grieve (taken on commission) who speaks to that point.

LORD ARDMILLAN read the evidence of Grieve as to the practice of giving the first fish,* remarking that the jury would also take that into consideration, and

* Grieve deponed,—"In the years 1817 or 1818 I applied to Sir James Hall's factor, Mr Bell, for leave to fish for salmon and fish of the salmon kind opposite Sir

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proceeded:—Now, if there had been a written lease in which the landlord, after stating that the tenant was poor, had commuted the rent to the rendering of a single fish in name of rent without payment, that would have been an intelligible thing. Whether that would have been an equivalent to the payment of rent may be doubted; still it would have been a strong circumstance; but you have no lease, written or understood, of any kind, with the exception of this statement by a man so very old that he could not be brought here. You will judge whether that is evidence of a contract or bargain for rent. You and not I have to judge upon that point. It does not appear to me that it was so; but you can judge. If you think that that one fish was truly a rent, and that the proprietor in taking it was asserting his right to the salmon-fishings, you will give that fact your consideration in judging of the case; but if you think it was a polite acknowledgment—a piece of ordinary politeness to a kindly landlord, and did not infer rent, you will come to a different conclusion. This at least is certain, that after 1860 the present Sir James Hall did, for the first time,—so far as I can make out, except from that statement of Grieve, demand a rent. The question was asked in these words at the witness, James Fairbairn, and was answered,—"The first salmon ever sent to Sir James as rent was after the Tweed Act in 1860. I cannot say that it was for more than two years that it was paid to him. I had never sent it for rent before." Now, the very fact of asking for

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James's ground, both in East Lothian and in Berwickshire. The laird then was the present Sir James's grandfather. The factor gave me leave provided I would give to him one fish every season we so fished. He made me agree to give that before he gave me leave. I understood that Sir James had the right to these fishings. I understood the factor to mean that we gave the fish as rent. I had a partner at the fishing at that time of the name of William Anderson, an old man long since dead. After I got liberty from the factor, Anderson and I commenced the fishing for salmon and fish of that kind. We began to fish at the foot of the Pease Burn, Berwickshire. That was the place we fished most at, and where we got most. We also used to fish opposite the Cove here, also at Gutcher's Hole and Robin's Loch in East Lothian. I think we have also tried Bilsdean Burn. We mostly fished with what they call bob-nets. We used to fish pretty regularly during the season, viz., May, June, and July, but we tried whenever we could get a chance. We generally kept at it until the herring-fishing came on in August, when we stopped it. Anderson and I kept fishing in this way for about eighteen years. We generally, as near as I could state, made from one pound to two pounds a year out of said fishing. The nets we used were put out to catch salmon and nothing else, though they occasionally caught flukes, but they were of no value. It was only for the salmon that we set them. They were about sixty or seventy yards long. We just had one net each at a time, but they were of great length. When our nets went done of course we got new ones, but we never used more than one each at a time. When Anderson and I stopped none of the other tenants fished for a long time. Mr Hood was tenant of the Cove Farm at that time. He sometimes fished, but he only fished for pleasure. Mr Hood, I think, began to fish when we stopped fishing as above mentioned. When I said that none of the other tenants fished I meant that I understood none of them fished for rent. Mr Hood fished with a net about one-half the size of ours. My daughter, who was in Mr Hood's employment at the farm, oftentimes took the fish out of the net for him, and laid it down again. The fishermen of Cove are all tenants of Dunglass. None of these fishermen fished for salmon from the time we stopped until James Fairbairn began to fish. I could not say there was a long time between our stopping and Fairbairn beginning. My memory does not serve me to tell me how long. I had no personal interest after we stopped. When I was fishing I paid a salmon regularly every year. That was just what I and the factor agreed upon. We took it up to the mansion-house of Dunglass. I remember on one occasion when Anderson and I took it up that the butler gave us too much beer, and we got tipsy. I never got any money for any of the fish that we took up for rent. The woman that served the house sometimes bought other fish for the house from us."

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it then as an acknowledgment of rent shewed that it was a new thing. You will judge whether there would be any possible use in taking that for an acknowledgment of rent then. If you think that the rent was substantially fixed by agreement in that way, you will then have to consider whether there is sufficient to support this averment of possession. The exclusion of others is a matter of universal testimony. There can be no doubt that no other persons but the tenants on the estate fished there, except on the two occasions I have mentioned; but that is very natural. The place was remote, and the fishing was not very remunerative. The mode of fishing was this. The net was laid down when the tide was low, and as the tide rose the net floated, and it was visible from the shore if any one chanced to be walking there. But there would be no one walking on the shore in all human probability, except those who lived in the neighbourhood, and who had the greatest interest and desire to keep the net there. Who was there to challenge it? It occurs to me that possession can hardly be instructed by acts, not within the family, but certainly within the proprietorship of the person claiming the right. However, that is also for your consideration. You have it proved in point of fact that there was a fishing by this hang-net by old Grieve, by old Anderson, by old Fairbairn, and others. There is a great deal of evidence to the fact of such fishing, and all by tenants on the estate, from about 1809 down till very lately. That is the character of the fishing which has been carried on. Whether it is sufficient to establish possession on the point of the proprietor is a thing which I leave to you. I have nothing to state to you in point of law except that the possession must be open possession, and possession in the assertion of a right; and that where there is no fishery or exercise of right by the proprietor or his servants in an open manner, it requires very strong evidence before you can substitute for a lease which has never existed an arrangement of this kind without written evidence, and resting on testimony which, although deserving of all consideration, appears to me to be only to the effect that the first fish of the season was to be delivered to the proprietor.

The Jury returned a unanimous verdict for the Crown on both issues.

On a motion for a new trial, on the ground that the verdict was against evidence, the Court held that as the only possession of salmon-fishings was by servants and cottagers of Sir James, who did not pay any rent therefor, the jury were right in holding that this was not possession by Sir James himself. The Judges reserved their opinion on the question whether a right of salmon-fishing could have been established by the taking of salmon with nets not of the ordinary kind, but of the only kind suitable for the purpose in the locality of the tenants of Sir James, who paid him a rent for the privilege.

TODS, MURRAY, & JAMIESON, W.S.—ANDREW MURRAY, W.S.—Agents.

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Galt v. Ritchie.

WILLIAM GALT, Suspender.—*Macdonald—H. J. Moncreiff.*
ALEXANDER RITCHIE, Respondent.—*J. C. Smith—Strachan.*

Suspension—Statute 30 *and* 31 *Vict. cap.* 141 (*Master and Servant Act*, 1867), *secs.* 4, 9, 13—*Fine.*—The Master and Servant Act, 1867, empowers the Court before whom a complaint is laid, if the same is found proven, to award compensation to the complainer, or to impose a fine, and if a fine is imposed, they may direct that a part, but not exceeding one-half, be applied to compensate the complainer. In a conviction under the statute, the Justices adjudged the person complained against to pay a fine to the complainer. *Held*, in a suspension of the sentence, that the conviction was bad, in respect that the entire fine was directed to be paid to the complainer, contrary to the terms of the statute.

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Complaint—Alternative penalties.—A complaint simply praying that the employed be summoned and adjudicated upon under sections 4 and 9 of the Master and Servant Act, 1867, is unobjectionable, although various alternative penalties are set forth in section 9.

High Court of Justiciary.
Lord Justice-Clerk.
Lord Cowan.
Lord Neaves.
Justiciary Clerk.

On 10th May 1871, Alexander Ritchie, contractor and quarry-master, Irvine, laid a complaint against William Galt, apprentice mason, under the Master and Servant Act, 1867, before the Justices of Peace for the county of Ayr at Irvine, in the following terms:—"Under the Master and Servant Act, 1867. Unto Her Majesty's Justices of the Peace for the county of Ayr: The complaint of Alexander Ritchie, contractor and quarry-master, Irvine, against William Galt, apprentice mason, now or lately residing in Quarrylane, Irvine. The complainer humbly sheweth,—That the said William Galt, hereafter called the said employed, being the apprentice of the said Alexander Ritchie (hereafter called the said employer) in his trade or business of a dresser and hewer of stones and other kindred services or employment or occupation as carried on by the said employer under a certain contract of apprenticeship for a period now unexpired, did, on the 21st day of January 1871, at Irvine, in the said county, unlawfully neglect or refuse, and has ever since neglected or refused to fulfil the said contract, and has absented himself from the service of the said employer without just cause or lawful excuse: And the said complainant, the employer, further says, that the amount of compensation which he claims for the said breach and non-performance of the said contract is £10 sterling, and he prays that the said employed may be summoned and adjudicated upon under sections 4 and 9 of the Master and Servant Act, 1867. May it therefore please your Honours to grant the said William Galt to appear before you to answer to this complaint, and thereafter to proceed in the matter in terms of the said Act.—According to justice. ALEXR. RITCHIE."

At a Justice of Peace Court held at Irvine on 18th April 1873 Galt appeared, and pleaded not guilty.

Evidence was led, and the following sentence was pronounced:—"The Justices, in respect of the evidence adduced, convict the said William Galt of the contravention charged, and therefore adjudge him to pay the sum of £5 sterling in name of fine to the said Alexander Ritchie; and also find the said William Galt liable in the sum of 25s. of expenses to the said Alexander Ritchie; and in respect it is inexpedient to give a warrant of ponding and sale, ordain instant execution by imprisonment, and grant warrant to officers of Court to apprehend the said William Galt and convey him to the prison of Ayr, and to the keeper thereof to receive and detain him for the period of two months from the date of his imprisonment, unless the said sum of £5 sterling and expenses shall be sooner paid."

Galt having been incarcerated, presented a bill of suspension and liberation, the reasons of suspension being—(1) That the complaint was irrelevant. (2) That it was not in the form required by the Master and Servant Act for proceedings before the Justices. (3) That the Justices refused to take any note of the suspender's objections to the competency or relevancy of the complaint. (4) That the Justices refused to take any note of the evidence. (5) That the deliverance or pretended judgment found a contravention proved, there being no contravention libelled. (6) That by the said deliverance or pretended judgment a fine was inflicted and costs found due, contrary to the statute.

Argued for the suspender;—The suspender was convicted and sentenced under sections 4 and 9 of the Master and Servant Act, 1867. It was objected, in the first place, that the complaint was not in the form prescribed

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by that Act, nor was it brought in terms of the Summary Procedure Act, 1864, although it was insisted in under the provisions of the latter Act. The 21st section of the Master and Servant Act directed that the statutes enumerated in schedule 2, among which was the Summary Procedure (Scotland) Act, 1864, should apply to proceedings under the Act, except as far as any provision of the Act was inconsistent therewith. The present complaint did not bear that it was brought under the Summary Procedure Act by having the usual heading "Under the Summary Procedure Act, 1864," prefixed, as required by that Act (sec. 4, schedule A). Notwithstanding that thus no notice was given that it was intended that advantage should be taken of the enactments in the Summary Procedure Act, the procedure taken did take place under its provisions. No notes of the evidence were taken, and expenses were awarded, though no power of awarding expenses was given by the Master and Servant Act. No doubt the Act made it optional to use the forms annexed to it, or to adopt the provisions of the Summary Procedure Act, but if the proceedings were carried through under the provisions of the latter Act its forms should have been adopted and adhered to.

Secondly, if the complaint was intended to be brought under the Summary Procedure Act it ought to have set forth the different alternatives which it was competent to the Justices to have adopted on conviction. The form annexed to the Summary Procedure Act for a complaint under a statute (schedule A, 2), directed that the "penalty and its alternative" be set forth. In the present case all the alternatives open to the Justices on conviction not having been before them at the time of pronouncing sentence, the proceedings were incompetent—Thomson v. Wardlaw, High Court, January 23, 1865, 5 Irvine, p. 45; Baird v. Rose, Ayr, September 7, 1865, 5 Irvine, p. 200.

Further, the sentence was bad by reason of uncertainty. It found the suspender "guilty of the contravention charged," while there were various alternatives in the 4th section of the Master and Servant Act, each of which would warrant a complaint being made.

Lastly, the suspender was sentenced to pay a fine of £5 to his employer, with 25s. of expenses, and instant execution by imprisonment was ordained unless these sums were paid. It was incompetent, in terms of sections 9 and 13 of the Master and Servant Act, to adjudge the whole fine to be paid to the complainer. The Justices could either award compensation to the party complaining or impose a fine (section 9); where a fine was imposed they were empowered to direct that a part not exceeding one-half of such fine, when recovered, should be applied to compensate the employer or employed for any wrong or damage sustained by him by reason of the Act or thing in respect of which the fine was imposed (section 13). A magistrate was bound to adhere strictly to the directions in regard to the disposal of fines contained in the statute by which the power to impose them was conferred—Lamond v. Baker, 9th February 1860, 2 D. 718; see also M'Callum v. M'Lullich, High Court, October 31, 1870, Couper, 486; Ferguson v. Thow, High Court, June 30, 1867, 4 Irvine, 196.

The Court directed the respondent's (Ritchie's) argument to the objections (1) that the alternative penalties were not set forth in the complaint; (2) that the whole fine was awarded to the respondent (Ritchie).

Argued for Ritchie;—The first objection, being one against the form of complaint, was excluded by section 20 of the Master and Servant Act—Holland v. Gauchalland Coal Company, High Court, December 24, 1867, 5 Irvine, 561. The complaint in the present case was in precisely the same form as the complaint in the case of Holland, which was also

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under the Master and Servant Act, 1867. The judgment in the case of Thomson, cited for the suspender, proceeded on the ground that the prayer of the complaint was misleading. In regard to the objection on the ground of the fine having been awarded to the employer, the word "fine" was obviously intended by the Justices to mean compensation. Compensation was what was craved in the complaint, and what the Justices intended to give. No notice of this objection was given in the bill of suspension.

At advising,—

LORD COWAN.—As this is a suspension and liberation, and imprisonment has followed upon the sentence, we must see that the sentence is in conformity with the statute which confers the power. There are several alternative penalties which can be imposed,—one of these being that "where no amount of compensation or damage can be assessed, or where pecuniary compensation will not, in the opinion of the Justices, Magistrates, or Sheriff meet the circumstances of the case," a fine may be imposed. Another part of the section refers to the case where compensation is asked by the employer. If compensation is to be assessed to the party, the sentence must bear to be an award of compensation. Where a fine is imposed, it is provided that a part, but not exceeding one-half, may be given to the party. Here we have the whole fine awarded to the party. I am therefore of opinion that the sentence is bad. It is very possible that the Justices meant compensation when they used the word "fine," but we must deal with the sentence as it was pronounced.

LORD NEAVES.—I am of the same opinion. The Summary Procedure Act is one of great value, and facilitates procedure. Complaints have been made that in some cases it screens irregularities; certainly the more that the proceedings are protected from examination the more incumbent is it that the final sentence should be in terms of the statute.

If the Justices did not know the difference between fine and compensation they are not very fit for their office. If they used the wrong word by mistake I do not see how we are to find that out. A fine is a pecuniary punishment, exigible by the Crown. Compensation is the private right of the party for what he has lost. Either course is competent. If a fine be awarded a part may be given to the party, but that part must not exceed one-half. I do not think that this sentence can be justified on the ground of confusion in the minds of the Justices, and I do not think we have any power to rectify the sentence.

LORD JUSTICE-CLERK.—In regard to the objection that all the alternatives competent to the Justices to adopt upon conviction were not set forth in the complaint, I believe your Lordships are of opinion with me that the case of Thomson v. Wardlaw, January 23, 1865, must now be held to have proceeded on the ground that the statement in the conclusion and prayer of the complaint of the alternatives which were open to the magistrates to adopt, was misleading, and that the case of Holland v. Gauchalland Coal Company, December 24, 1867, establishes that a complaint praying, as the present complaint does, that the employed be summoned and adjudicated upon under section 9 of the Master and Servant Act, 1867, is unobjectionable.

With reference to the objection raised regarding the imposition of the fine and awarding the whole to the employer, the 9th section introduces for the first time a provision empowering the Sheriff or Magistrates to award compensation to the party complaining. It leaves it to the Sheriff or Magistrates wherever it shall, in their opinion, best meet the circumstances of the case to award it. If compensation is awarded, it goes, of course, all to the party. There is power given also to impose a fine in like circumstances, and the 13th section of the Act applies to that case only. Under that section, if a fine be imposed, they are empowered to direct that a part, not exceeding one-half of such fine, be applied to compensate the employer or employed for any damage sustained by him. Here a fine of £5 was imposed, and the whole ordained to be paid to the em-

oyer. In so doing, the Justices exceeded the powers conferred in the statute. No. 161.
agree that we must therefore suspend the sentence.

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THE COURT pronounced the following interlocutor:—"In respect that the sentence directs the entire fine to be paid to the complainer in the inferior Court, contrary to the terms of the 13th section of the Master and Servant Act, pass the bill; suspend the sentence complained of *simpliciter*, and decern: Find the suspender entitled to expenses, which modify to four guineas, and for which, and one guinea as the dues of extract, decern against the respondent."

M'EWEN & CARMENT, W.S.—ANDREW BEVERIDGE, S.S.C.—Agents.

CASES ON APPEALS UNDER THE LANDS VALUATION ACTS (17 & 18 VICT., c. 91, 20 & 21 VICT., c. 58).

For previous cases see vol. iv. p. 1132, *et seq.*

No. 162. URQUHART FRASER.

Mar. 14, 1867. Fraser. Lord Kinloch. Ld. Ormidale. Case 52.*

Farm—Renewed Lease—Fair Annual Value—Sub-Lease—Surplus Rent.—The appellant's father had a lease of 200 acres of land from the Earl of Aberdeen at a rent of £5. The appellant succeeded to his father in 1848, and in 1849 he got a new lease for 19 years at a rent of £11. He thereafter trenched and reclaimed waste land, and built new buildings and dykes. In 1856 he had reclaimed upwards of 100 acres, and built a steading of offices, expending about £850. He renounced the old lease, and got a new lease from Whitsunday 1856 at the rent of £15, and under this lease he at present holds. Since this lease he has built an additional steading of offices and dwelling-house, and he has sublet a portion of the land, with such additional steading and dwelling-house, as a separate farm.

The assessor entered the Earl of Aberdeen as proprietor of the whole land and subjects, and the appellant as occupier of one portion, estimated as worth £40, and the sub-tenants as occupiers of the other portion, estimated as worth £55.

The assessor maintained that £15, for which the farm was let in 1856, was not the fair annual value, and therefore the farm was to be valued at what it was worth. The Commissioners reduced the valuation to £15, and directed the entry of the sub-tenants to be deleted.

The following opinion was returned by the Judges:—"We are of opinion that the determination of the Commissioners is right, in the special circumstances of the case, and more especially considering that the existing lease was granted on a renunciation of the previous one, which would otherwise be still in subsistence."

No. 163. W. A. SKENE.

Mar. 14, 1867. Skene. Lord Kinloch. Ld. Ormidale. Case 53.

Rent by nineteen years' Lease—Consideration other than Rent—(Tenant bound by lease to erect a dwelling-house, &c., according to plans approved of by Landlord—Claim for part value and other claims postponed to end of lease).—James Glenny was tenant of the farm of Lethenty, Aberdeenshire, under a lease for nineteen years, by which he became bound to erect a dwelling-house and steading of offices, according to plans approved of by landlord, the landlord becoming bound to pay £150 when the buildings were finished, and at the end of the lease to pay the value, exclusive of carriages and deducting the said sum of £150, to the extent of another sum of £150. The claim of the previous tenant, father of the present tenant, for the value of the millhouse, kiln, and machinery, to the extent of £200, was agreed to be postponed until the end of the present lease. The tenant erected the dwelling-house, &c., apparently of greater value than the two sums of £150, and also other buildings for which he had no claim at the end of the lease.

* These cases are quoted from the Abstract printed by the Commissioners of Inland Revenue.

The assessor valued the subjects, irrespective of the lease, at what they were worth to be let one year with another. No. 163.

The proprietor appealed. Mar. 14, 1867. Skene.

The Commissioners held that they should be assessed at the rent stipulated by the lease, £108, and interest at 5 per cent on the sums of £150 and £200, payable at the end of the lease, £17, 10s.—in all, £125, 10s. Held that the Commissioners were right.

ANNANDALE AND SON. No. 164.

Paper Mill—Annual Value—(7½ per cent on cost, or 11s. 1d. per ton of output—Rent).—Messrs Annandale and Son erected a large paper-mill at Beltonford, near Dunbar, and the assessor assessed the annual value of it at £2024, which he brought out by taking 7½ per cent on the cost of the buildings, and other percentages on steam engines, railway, and ponds. Mar. 14. 1867. Annandale and Son. Lord Kinloch. Ld. Ormidale.

The appellants stated that the mill was only partially in operation, and that the annual value should be ascertained according to output. According to valuation of other mills, the value should be 11s. 1d. per ton, and as the out-turn at Beltonford was 1040 tons, the annual value should be £580. Case 54.

The Commissioners found that the value should be according to the productive power or out-turn, and fixed the value at £580.

The Judges returned the following opinion:—"We are of opinion that the determination of the Commissioners is wrong, in respect of its proceeding on the amount of the out-turn, and that the value of the works is not to be ruled exclusively either by the amount of actual out-turn or by a percentage on the cost of erection, but is to be estimated according to the rent at which, one year with another, the premises might in their actual state be reasonably expected to let from year to year, having regard to the rent or annual value as assessed of other works of the like description, and taking into account the peculiar advantages or disadvantages of the Beltonford works."

DRUMGRAY COAL COMPANY. No. 165.

Oil Works—(Retorts—Pipes—Tanks—Sheds—Heritable or Moveable).—The Drumgray Coal Company are entered as proprietors and occupiers of oil works at the yearly value of £450, the amount being fixed on the principle of taking 15 per cent on the original cost, as a rate which would reimburse the proprietor for erecting the works and keeping them in repair. The works consist of retorts erected on a foundation of building, or built in, and these connected by pipes, with tanks for receiving the oil. The tanks are sometimes placed on the ground. In this case they are under ground. The sheds covering the works are on built or iron supports. The lease of the coal-field does not embrace the ground on which the oil works are erected. The entry of the Drumgray Coal Company as proprietors was not objected to before the Commissioners. April 8, 1867. Drumgray Coal Co. Lord Kinloch. Ld. Ormidale. Case 55.

The appellants objected to the assessment, on the ground that the oil works are not of the nature of subjects comprehended under the Valuation Act, that they are part of the coal-field, and the rent paid for it depended on the facilities for working up the minerals in the oil works; that 15 per cent on the original cost is not a proper and fair value, in respect the original cost does not afford a criterion for annual value.

The Commissioners refused the appeal. Held that the Commissioners were right in the circumstances as reported by them.

No. 166. DUKE OF RICHMOND.

April 8, 1867. Duke of Richmond. Lord Kinloch. Ld. Ormidale. Case 56.

Rent—Value—Deductions for Furniture and keeping up Garden.—Huntly Lodge, furnished, and gardens, with shootings in the parish of Huntly and five other parishes, were let for three years at the rent of £435 for the whole.

The portion of the rent applicable to the furnished lodge, gardens, and shootings in Huntly parish was fixed at £305, and deducting £80 as interest on the value of the furniture, left £225, which the assessor entered in the roll as the value of the subjects in Huntly parish. The appellant, the proprietor, claimed to be allowed a further deduction of £90, reducing the value to £135, as the expense of keeping up the gardens, which he undertook to do to a certain extent. Two gardeners were required for this purpose.

The Commissioners held that, as the rent included compensation for the furniture and for keeping up the gardens, it was not in the lease conditioned as the fair annual value of the subjects, and so not to be taken as the measure of value, and they fixed the value at £185. Held that the Commissioners were wrong. The value ought to be set down at £135.

No. 167. DUKE OF RICHMOND.

Feb. 8, 1868. Duke of Richmond. Lord Kinloch. Ld. Ormidale. Case 57.

Croft—Lease—Agreement—House built by Crofter—Rent or Value.—The Duke of Richmond is entered in the roll, 1867, as proprietor, and John Christie as occupier of croft—rent or value, £8. The Duke, or Christie, or either, is entered as proprietor, and Christie as occupier of house and shop, built by Christie on said croft—value, £6. Christie entered into an agreement with the Duke, whereby he was to enter to the croft at Whitsunday 1860, to occupy from year to year, but to have no lease, and to cultivate the croft in a certain manner. There being no house on the croft, Christie proposed to build one according to plan subscribed in reference to the agremeent, the Duke engaging to supply wood, and to pay for the slating and ridge stones. Christie obliged himself to pay £8 of rent. The Commissioners having been informed that the buildings had been erected in the first year of the occupation, and that the lease had been renewed from year to year, held that there was other consideration than the rent the first year, but the sole consideration for the lease annually renewed was the rent. They sustained the appeal, holding the entry of £8 as covering the entire subjects.

Held that the Commissioners were right, in respect no evidence that for the year in question £8 is below an adequate rent for the combined subjects.

No. 168. JOHN BRUCE.

Feb. 8, 1868. Bruce. Lord Kinloch. Ld. Ormidale. Case 58.

Father Proprietor—Son Tenant—Rent—Fair Annual Value.—Mr Bruce of Sumburgh, in Zetland, let to his son his whole estate, consisting of home farm, house, station, and land at Grutness, Station West Voe, and Station Boddam, and upwards of 100 small farms, under sub-tenancy, in 1859, for six years, at the rent of £440. The son was restricted from raising the rents of the sub-tenants. In 1865 the lease was renewed for six years, and the rent increased to £520, with the privilege to the son to raise the rents of the sub-tenants. The son immediately raised the rents of the sub-tenants to a greater extent by £30 than the increased rent. The assessor maintained, the sub-tenant's rents having been so raised above the increase to the landlord shewed that the rent was not the fair annual value. The increased rents of the sub-tenants were entered in the

roll, and the home farm and other subjects in the actual occupation of the son, which had been improved since 1859, were entered in the roll at the present value, being an increase over the entry in the rolls of previous years made according to the rent. The son appealed against the entries of the value of the subjects in his own occupation.

The Commissioners held that the rent, and not the value as in their present condition, should be entered in the roll. Held that the Commissioners were right.

No. 168.
Feb. 8, 1868.
Bruce.

THE BURGH OF RENFREW.

No. 169.

Compensation for Injury.—The burgh of Renfrew is proprietor of salmon-fishings in the river Clyde. The Clyde Navigation Trustees injured them by their operations, and agreed to make up to the burgh the difference between the rent the fishings now let for and the average rent received for them previous to the operations. For the year in question the difference was £207, 10s., and a proportion of the sum, £189, 10s., was entered in the county assessment roll, parishes of Inchinnan and Renfrew. The remainder of the sum was applicable to a portion of fishings within the burgh. In the roll the burgh of Renfrew is entered as proprietor, and the Clyde Trustees as occupiers and tenants. The Clyde Trustees maintained they were not occupiers and tenants of fishings. What they paid was in the nature of compensation for injury. The ground taken by the assessor was that the fishings were an existing subject, yielding revenue to the burgh, of which this sum of £207, 10s., formed part.

The Commissioners held the assessment to be right. Held that the Commissioners were wrong.

Feb. 8, 1868.
Burgh of Renfrew.
Lord Kinloch.
Ld. Ormidale.
Case 59.

CLYDE NAVIGATION TRUSTEES.

No. 170.

Bowling Harbour—River Clyde—Annual Value.—The assessor entered the harbour of Bowling at the yearly value of £700. The Clyde Navigation Trustees appealed against this entry, and stated that the gross average annual income of the harbour for the last three years was £637, and this was subject to a charge of 10 per cent for collection. This average was sevenfold more than the average previous to 1865, in consequence of exceptional circumstances.

The Commissioners fixed the valuation at £541, 9s., being the amount of the actual revenue, less 15 per cent for tenants' profits. They considered this a fair and moderate rent.

The Judges returned the following opinion:—"We are of opinion that the determination of the Commissioners is wrong, and that the value of the harbour should be stated at £407, 13s. 7d."*

Mar. 31, 1868.
Clyde Navigation Trustees.
Lord Kinloch.
Ld. Ormidale.
Case 60.

ROBERT ADDIE.

No. 171.

Ironwork—Furnaces out of Blast—Notes on Roll.—The appellant's ironworks of Langloan are entered in the roll at the yearly value of £1800, and in the column for observations the following note is made:—"In blast, £1500; standing, £300;" the meaning of which is, that

Feb. 8, 1868.
Addie.
Lord Kinloch.
Ld. Ormidale.

* "NOTE.—In the absence of satisfactory information we have assumed the income of the year, as originally stated to the Commissioners, at £637, from which we have deducted 20 per cent for charges of maintenance and the expense of collection, and a further deduction from the balance of 20 per cent for tenants' profits,—the percentage allowed by us in the case of Glasgow Harbour." Case 61.

No. 171.
Feb. 8, 1868.
Addie.

five furnaces were in blast, and one out of blast, £300 being the value of each furnace, according to the general practice of the county of Lanark. The appellant claimed that two furnaces should have been marked out of blast, as that number was out of blast the preceding year. The appellant got relief from certain local taxation by means of such notes. These notes do not form part of the information required by law to be given in the roll.

The Commissioners refused the appeal, and were of opinion that such notes should be discontinued. Held that the determination of the Commissioners was right.

No. 172.

CARNBROE IRONWORKS.

Feb. 8, 1868.
Carnbroe Ironworks.

Lord Kinloch.
Ld. Ormidale.

Case 62.

Ironwork—Furnaces out of Blast—Value.—The Carnbroe Ironworks consist of six furnaces, and are entered in the roll of the value of £1800, arrived at by assuming £300 as the value of each furnace. The appellant craved to have the value reduced to £1200, in respect that only four furnaces had been in blast. The assessor stated that he must value the works as a whole, the same as he would value a mill or warehouse.

The Commissioners held that the assessor's valuation was the fair rent or annual value of the works one year with another, and refused to make any abatement. Held that the Commissioners were right.

No. 173.

DUCHESS OF SUTHERLAND.

April 13, 1869.
Duchess of Sutherland.

Lord Kinloch.
Ld. Ormidale.

Case 64.

Mill Multures—Converted or Commuted Multures.—The appellant was assessed for the converted or commuted thirlages of the mills of Milton of Tarbat, £200. The estates of (1) Allan, (2) Drumgillie, (3) Culrossie, (4) Glustullich, and (5) Rhives, were thirled to these mills. The thirlages were converted under the Act 39 Geo. III. c. 55, into an annual payment by the proprietors of these estates to the proprietor of the mills of Milton. The assessor regarded the commutation as part and pertinent of the dominant tenement. The appellant maintained the commuted payment was no longer multures or a pertinent of the mills, but an annual payment by the proprietor of the estates formerly thirled in the nature of a feu-duty or like annual payment; and as the tenants of the estates, the thirlage of which was commuted, were now relieved of the thirlage, they would pay higher rents in consequence, which rents would enter the lands valuation roll, and in this way the roll would comprehend the commutation payments.

The Commissioners were of opinion that the payments in commutation of thirlage were not "lands and heritages" in the meaning of the Lands Valuation Act. Held that the Commissioners were right.

No. 174.

ROBERT BRUCE ÆNEAS M'LEOD.

April 13, 1869.
M'Leod.

Lord Kinloch.
Ld. Ormidale.

Case 65.

Multures (converted into annual payment by private arrangements).—The appellant is charged for multures of Milderg, Bayfield, &c., £60. The estates of Kindeace or Bayfield and Pitcalzeon were thirled to the mill of Morvich or Morrich, which mill does not now exist. The thirlages of these estates were changed into an annual payment. The proprietor of Morvich or Morrich conveyed the thirlages of Bayfield and Pitcalzeon to the proprietors of these estates, and in return got from each of the proprietors of these estates a disposition of an annuity of 40 bolls of victual, secured upon each of the estates. Infeftment followed upon these dispositions.

As in Case No. 64, the Commissioners were of opinion that these commuted annuities were not "lands and heritages" in the meaning of the Lands Valuation Act. Held that the Commissioners were right.

THE DUKE OF RICHMOND. No. 175.

April 13, 1869.
Duke of Richmond.
Lord Kinloch.
Ld. Ormidale.

Occupier (contrary to provisions of lease).—The Duke of Richmond let the wool mill of Rhynie to A. and F. Stephen, expressly excluding assignees, voluntary or legal, and all sub-tenants. The Messrs Stephen sub-let the mill to William and George Donald for five years, and inserted in the agreement of sub-lease a provision, that if the Duke of Richmond objected, the agreement should thereupon cease and determine. The assessor entered in the column for occupier William Donald, and in the column for tenant A. and F. Stephen. The Duke of Richmond maintained that Messrs Stephen were the only legal occupiers, and further, that if the name of Donald was to appear at all, both William and George Donald should be entered. Case 66.

The Commissioners ordered George Donald to be entered along with William Donald as joint occupier of the subjects. Held that the Commissioners were right.

STIRLING AND SONS. No. 176.

July 12, 1869.
Stirling and Sons.
Lord Kinloch.
Ld. Ormidale.

Value—Dye and Print-Works.—The Turkey-red Dye and Calico Printworks at Dalquhurn were valued, 1867-68, at £1100, and at Cordale at £540. The assessor increased the assessment on these works for the year 1868-69, principally on the ground of under-valuation in previous years, but also to some extent in consequence of additions and improvements,—Dalquhurn Works to £2180, and Cordale Works to £590. With the assistance of Mr Donaldson, the assessor for the city of Glasgow, he valued the ground for the works at so much per acre, and estimated the fair and reasonable cost of the works, less depreciation on the older portions, and fixed 7½ per cent on the amount, to bring out the rental at which one year with another the owners could afford to let them to a tenant. The assessor also found that the value he had put on the works brought out as the value of each superficial square yard of flooring of the Dulquhurn Works to be 1s. 3½d., and of the Cordale Works, 11d. That both these ways of valuing brought out results under the rent at which the Ferryfield Printworks were actually let. The appellants explained that the rent of the Ferryfield Printworks was exceptionally high, and the works were abandoned by the tenants as not remunerative. They referred to printworks in other counties of dimensions similar to theirs, which were let, and the rents got did not support the valuation of the assessor. Case 69.

The Commissioners by a majority reduced the assessment to that of 1867-68. The Judges, in the absence of other evidence than that in the case, held that the Commissioners were right, but referred to case 54 for what they thought were the correct principles of assessment in such cases as the present, and stated that, notwithstanding this judgment, it would be open to the assessor to proceed on these principles in making up the assessment in future.

HAY AND CO. No. 177.

July 12, 1869.
Hay & Co.
Lord Kinloch.
Ld. Ormidale.

Tenant—Sub-tenant or Occupier—Principal Tenants' Rent—Sub-tenants' Rent—Voters Act.—Messrs Hay and Co. are extensive fishcurers, and rent the islands of Barra and House, Zetland, under a lease for seven years, at a rent of £325. They sublet the islands in farms and houses from year to year to their fishermen at rents varying from 10s. to £8, 7s., amounting in the whole to £375, being £50 more than the rent they pay. Case 70.

Messrs Hay and Co. are entered in the roll as tenants at the rent of

No. 177.
July 12, 1869.
Hay & Co.

£325. Each fisherman is also entered at the rent he pays. But they maintained that the rent they pay under their lease is the true value of the subjects, and should alone be entered. And the rents of the fishermen are often not realised, from the heads of families being lost at sea, and such rents are not the real value.

The Voters Act, sec. 8, requires the entry in the valuation-roll of the person occupying a subject of the requisite value as the authority for registering the voter. By the Representation of the People Act, 1868, actual personal occupation of the subjects is the title to be registered as a voter.

The Commissioners directed the rent, £325, under the lease, to be entered in the roll, and suggested that the rents paid by the occupiers might also be entered, as a guide to the assessor in making up the roll of voters. Held that the Commissioners were right.

No. 178.
July 2, 1870.
Banffshire District Lunacy Board.
Ld. Ormidale.
Lord Mure.
Case 71.

BANFFSHIRE DISTRICT LUNACY BOARD.

Lunatic Asylum—(Statutory)—Proprietor—Tenant—Occupier—(Board)—Public National Purpose—Beneficial Interest—Liability to Taxation.—The Banffshire District Lunatic Asylum was erected under the compulsory statutory provisions, and is supported by the parishes from assessments or rates. It is alleged that property not liable for any tax ought not to be inserted in roll, and the asylum is not liable for any tax. The assessor stated that all lands and heritages should be in roll, and it was not his province to determine whether such liable to public taxes or not.

"Banffshire Lunacy Board, P. W. Coutts, solicitor, Banff," are entered in the columns of proprietor—tenant—occupier.

The Commissioners ordered entries to be expunged from roll. Held that the Commissioners were wrong.

No. 179.
Dec. 24, 1870.
The University & College of Glasgow.
Ld. Ormidale.
Lord Mure.
Case 72.

THE UNIVERSITY AND COLLEGE OF GLASGOW.

University and College of Glasgow—Exemption from Public and Local Taxation—Object of Act basis for Public Assessments.—The University and College of Glasgow buildings, principal and professors' houses, are entered on the roll. By royal charters, grants, and Acts of Parliament, the University, as a corporation, is exempted from all public and local taxation. The appellants maintained that the object of the Lands Valuation Act was to form a basis for taxation, and therefore subjects not liable to taxation should not be entered.

The assessor maintained that the statute required the valuation-roll to contain all lands and heritages, and sec. 41 specially provided that nothing in the Act should exempt from or render liable to assessment. That the question of exemption from rates should be raised before the different assessing bodies.

The Commissioners refused the appeal. Held that the Commissioners were right.

No. 180.
Jan. 28, 1871.
Graham Brothers.
Ld. Ormidale.
Lord Mure.
Case 73.

GRAHAM BROTHERS.

Shipbuilding Yard—Sawmill and Wood-yard—(Lease twenty-one years of ground, but not of Erections thereon)—Rent of Ground—Value of Erections—If Rent Fair Annual Value.—The city of Perth let ground for shipbuilding yard, and sawmill and wood-yard, many years ago, to appellants' predecessors. These predecessors erected sawmills, sheds, and engines on the premises. In 1860 the current lease was resigned, and city of Perth granted new lease of ground to appellants for twenty-one years, at rent of £63. The appellants acquired right to erections from predecessors, who

had right by their lease to dispose of them to successors or remove them. The erections did not belong to the city, and the rent did not include them. The appellants are entered in roll as proprietors and occupiers of erections of the value of £70, against which they appealed, on the ground that they should not be included in the roll. They did not appeal against the entry of the rent of £63 payable to the City of Perth.

No. 180.
Jan. 28, 1871.
Graham Brothers.

This rent did not include the erections which were on the ground when the renewed lease granted, and the rent not fair annual value of whole subjects.

The Commissioners dismissed the appeal. Held that the Commissioners were right.

CITY OF PERTH.

No. 181.

Shipbuilding Yard—(Lease ten years of ground, but not of Erections thereon)—Rent of Ground—Value of Erections—If Rent Fair Annual Value.—The city of Perth let ground for shipbuilding yard many years ago to appellants' predecessors. They erected thereon wood erections, sawmills, shed, and engine. In 1862 appellants' previous firm got lease of ground from city of Perth for ten years at rent of £26. Appellants' previous firm acquired right to erections thereon from predecessors, who had right by lease to dispose of them to city or successors in lease of ground, or remove them. The erections did not belong to the city, and the rent payable by the lease to the city did not include them. The appellants are entered in the valuation-roll as proprietors of the erections, at the value of £41, against which they appealed, on the ground that they should not be included in the roll. They did not appeal against the entry of the rent of £30 payable by the lease to the city of Perth.

Jan. 28, 1871.
City of Perth.
Ld. Ormidale.
Lord Mure.
Case 74.

The Commissioners dismissed the appeal. Held that the Commissioners were right.

WILLIAM CHALMERS.

No. 182.

Mills—Grain—Machinery—(Pairs of Stones—Dust Screen—Elevators, &c.—Fixed or Attached).—The appellant rents from the town of Dumfries wheat, corn, and barley mills, and whole machinery therein, at the rent of £300, and the mills are assessed at this sum. He appealed, and maintained the assessment should be restricted to the buildings, with the water-wheels and shafts, which he alleged were of the value of £100. The rest of the machinery, he maintained, was moveable. It consisted of flour-mill, two pairs of stones, dressing-mill, smut machine; corn-mill, two pairs of stones, dust screen, elevators, &c.; barley-mill, two pairs of stones, barley-mill, dressing-mill. The machinery was fixed, some to the ground by screws and bolts, and some to upright beams and joists, in the same manner. All the machinery could be removed without injury to the buildings. There was no difference between the appellants' mills, as regards the machinery, and the other mills in the district.

Jan. 28, 1871.
Chalmers.
Ld. Ormidale.
Lord Mure.
Case 75.

The Commissioners dismissed the appeal. Held that the Commissioners were right.

TRUSTEES OF ALEXANDER KERR.

No. 183.

Lease—Rent—Fair Annual Value.—The late Alexander Kerr's trustees are proprietors of the farm of Hopehead. In November 1868 the late Mr Kerr granted a lease of the farm for nineteen years, at the rent of £50, to Mr William M'Fegan, who was an old servant, to whose son Mr Kerr, by his will, left the farm. In 1860 a detailed valuation of the farm was made by a practical agriculturist, who made the value £71, and Mr Kerr returned and paid taxes on it at that sum as owner and occupier.

Jan. 28, 1871.
Trustees of Alexander Kerr.
Ld. Ormidale.
Lord Mure.
Case 76.

No. 183.

Jan. 28, 1871.
Trustees of Alexander Kerr.

The assessor entered the farm in the roll at the value of £71, against which Mr Kerr's trustees appealed, and contended that the lease was binding on both parties, and they would not receive more than £50 of rent during its currency, and the Commissioners were bound to enter in the roll the rent in the lease as the annual value.

The Commissioners were of opinion that the rent in the lease was not conditioned as the fair annual value, and dismissed the appeal. Held that the Commissioners were right.

No. 184.

THE BURGH OF DUMFRIES.

Feb. 4, 1871.
The Burgh of Dumfries.

Ld. Ormidale.
Lord Mure.

Case 77.

Bridge over the Nith—Bridge Dues and Market Dues Let on Lease.—The burgh of Dumfries have been, for many centuries, proprietors of the old bridge over the Nith, between the stewartry of Kirkcudbright and the burgh. In the end of last century the new bridge was erected. The titles of the burgh to the bridge are crown charters and other writs from 1591—the last crown charter being dated 1827. The burgh has right to levy dues and customs on certain horses, cattle, sheep, and merchandise passing the bridge, or the river, four miles above, or twelve miles below, the bridge. By the old charters the dues were granted for repairing and maintaining the bridge. The charter of 1827 grants "the whole customs of the bridge," with power to uplift and receive all customs and dues whatever at both ends of the bridge. At the old bridge the collection was made at the middle of the bridge. At the new bridge the collection is made at the end which lies nearest to the burgh of Dumfries.

The burgh let, at last term, the bridge dues and market dues, which are levied at the bridge, at £560, one-third being for bridge dues, and the remainder for market dues.

The assessor, on the ground that the bridge came under "lands and heritages," and the rent paid by the tenant for the bridge dues was the annual value of the subjects, entered one-half of the rent of the bridge dues in the roll for the stewartry of Kirkcudbright as the value of the subjects within the stewartry.

The burgh of Dumfries appealed, and maintained the bridge should not be entered in the roll; the bridge is not let—the right to levy the dues is let. They are levied at the Dumfries end of the bridge, within the burgh, but might be levied anywhere between four miles above the bridge and the sea. There is no pontage, in the proper sense of the word. The dues form a large portion of the revenue of the burgh, the maintenance of the bridge requiring only a small portion of them.

The Commissioners were of opinion that the bridge was correctly entered in the roll. Held that the Commissioners were right.

No. 185.

NISBET THOMSON.

Mar. 11, 1871.
Thomson.

Ld. Ormidale.
Lord Mure.

Case 78.

Mill—Grain—Value—(Price, and comparison with another Mill).—The appellant is proprietor and occupier of the grain-mill, Crossford, which is entered in the roll at the annual value of £100. He purchased the mill for £950, and no additions and repairs have been made since. The mill has three pairs of stones, and a mill in the neighbourhood has five pairs of stones and is entered at the value of £125. The appellant held that the valuation should not exceed £60. The former proprietor returned the mill and was assessed at £100, his son being tenant.

The Commissioners restricted the value to £80, this being 8½ per cent on the price, and the other mill in the neighbourhood, of two-fifths greater grinding power, being valued at £125. Held that the Commissioners were right.

GEORGE HENDERSON. No. 186.

Mar. 11, 1871.
Henderson.
Ld. Ormidale.
Lord Mure.

House, Offices, and Garden, and Farm, separately entered.—The appellant is proprietor and occupier of the farm of Turfhills, which he farms. The assessor made one entry of the farm in the roll at £675, and another entry of the dwelling-house, offices, and garden, at £35. The appellant contended that the house was, like the farm steading, a necessary adjunct to the farm. The house and offices were not unsuitable for a tenant of such a farm, and he held, in terms of the Act, the whole of such farm one entry under the description of "the farm of ——." In the parish of Kinross there is a classification of heritages for poors' rates—higher for dwelling-houses and offices, and lower for agricultural subjects. Case 79.

The assessor held that the statute, sec. 1, required "the specifying in each case the nature of such lands and heritages" in the roll, to enable the rates of the different classes of property to be determined—such as poors' rates, inhabited house duty, &c.; that the separate entry did not necessarily lead to assessment to poors' rates at the higher rate, if a house occupied with lands for farming them was liable at the lower.

The Commissioners sustained the appeal. Held that the Commissioners were right.

DAVID MACFARLANE. No. 187.

Mar. 21, 1872.
Macfarlane.
Ld. Ormidale.
Lord Mure.

Value—Dwelling-house—(Comparison with other houses by floorage).—The proprietor is occupier of a house, west end of Glasgow, which is assessed at £250. He alleged the value at which it would let was £175. The highest rental assessed on houses in the neighbourhood is £150. His house occupies the site of two ordinary houses, and is only two storeys, while the other houses are four, and much of the superficies is taken up with entrance hall, gallery, and well. Case 81.

The assessor stated that houses in the same terrace as appellant's are unusually large, and built for sale, not to let. When houses of the same class are let the rent obtained gave a value from 6d. to 7d. per square foot of flooring. Proportionally the rent of appellant's house would be £300 to £350.

The Commissioners reduced to £200 Held that the Commissioners were right.

UNIVERSITY OF GLASGOW. No. 188.

Mar. 21, 1872.
University of Glasgow.
Ld. Ormidale.
Lord Mure.

Value—(University of Glasgow—Principal and Professors' Houses—Comparison with other houses by floorage).—The principal and Dr Caird's houses assessed at £130, and eleven professors' houses assessed at £120 each. The appellants stated the houses had no back greens, no stabling, and were ineligible in construction and situation and from want of privacy, and were over-valued to the extent of £20 each. Case 82.

The assessor stated that the rents of houses let in the neighbourhood gave 6d. per square foot of floorage as the value, and the assessment on the appellants' houses gave only 4d. per square foot, and it would be an injustice to these others to reduce the value. The amenity of the houses was not inferior to others in the neighbourhood. They are almost entirely shut off from the University, and surrounded by *pro indiviso* pleasure ground.

The Commissioners reduced the principal and Dr Caird's houses to £110, and other professors to £100 each. Held that the Commissioners were right.

No. 189. HERITORS OF THE PARISH OF NEW MONKLAND.

Mar. 21, 1872. Heritors of the Parish of New Monkland. Ld. Ormidale. Lord Mure.

Church—School.—The parish church and parochial schoolhouse of New Monkland are entered in the roll, and the heritors are entered as proprietors. They appealed, and alleged the parish church and school were not "lands and heritages," did not constitute separate *tenementa*, but were pertinents of the respective properties of the heritors, and were *extra commercium* and of no value.

Case 83.

The assessor stated that the statute required all lands and heritages to appear in the roll, without reference to the tenure or the purpose for which used.

The Commissioners ordered the entries not to stand on the roll. Held that the Commissioners were wrong.

No. 190. SIR THOMAS GLADSTONE.

Mar. 21, 1872. Gladstone. Ld. Ormidale. Lord Mure.

Value—Mansion-house (in occupation of owner).—The mansion-house, offices, garden, lawn, and lodges of Fasque, in the occupation of Sir Thomas Gladstone, the proprietor, are assessed at £230, the sum of £200 of which is applicable to the mansion-house. Formerly the mansion-house was assessed at £120.

Case 84.

The appellant maintained that the house would not let, unfurnished, at half the rent assessed, and the statute provided that the estimated yearly value of the subjects was the rent at which, one year with another, they might reasonably be expected to let. The appellant explained as to Ury and Brotherton, houses of the same class and assessed at the same amount as his, and he referred to other houses, although smaller in size, of greater value to let unfurnished, as being better suited for that purpose. He also maintained that the assessor was bound in fairness by his predecessor's valuation, which he had adopted and repeated for years.

The assessor referred to the size of the house and its situation, and to Brigton, one-fourth the size, let unfurnished at £90, and Dunottar, half the size, let at upwards of £100; and he also referred to other houses let with shootings. He maintained that a mansion-house was not to be valued at what the bare house, unfurnished, would let for without shootings or fishings, but what it was worth to the proprietor of the estate.

The Commissioners unanimously sustained the valuation. Held that the Commissioners were right.

No. 191. INVERURIE GASWORKS.

Mar. 21, 1872. Inverurie Gasworks. Ld. Ormidale. Lord Mure.

Gaswork—Value.—The annual value of the Inverurie Gasworks is entered at £171. This was made up from the previous year's accounts of the company. The valuation made up from the accounts for the year at last balance brought out at £118, 2s. 7d., and the assessor consented that the entry should be restricted to this sum. It was brought out thus:—

Case 85.

Gross revenue from works, ...		£710	5 10
Less revenue from meters, ...		41	19 1
		£668	6 9
Less working expenses, including wages and repairs, .		470	3 8
		£198	3 1
Deduct 2 per cent for deterioration on .	£2150 0 0		
Value of works, less value of meters, .	312 12 0		
	£1837 8 0		
At 2 per cent,		36	14 11
Carry forward,		£161	8 2

Brought forward				£161	8	2
Deduct 20 per cent for tenant's profits on £161, 8s. 2d.,	£32	5	7			
Deduct manager's house, separately entered,	7	0	0			
Pipes in Port Elphinstone, parish of Kintore, separately entered,	4	0	0			
				43	5	7
Valuation of works,				£118	2	7

No. 191.

Mar. 21, 1872.
Inverurie Gasworks.

The chairman of the gas company objected to the principle of the valuation, alleging that it was on trade profits and not the rent at which the heritable property would let for; and he further contended that, even supposing some such principle as that proposed by the assessor for ascertaining the rent were adopted, no tenant would take the works and keep up the property for 2 per cent for deterioration on its value, or for a profit of £32, 5s. 7d. The risk of working such undertakings arising from explosions, fire, and other causes, is very great; and such works would not be let to a tenant without a guarantee that the property would not receive damage in his hands. This would involve the necessity of an insurance of the subjects, which would be costly; and no tenant would undertake the responsibilities of such a place for a paltry profit of £32, 5s. 7d. The appellant therefore submitted that, assuming the assessor's principle, the deduction for tenant's profits to cover insurance and risk of explosions, &c., could not be less than 75 per cent, which would bring out a valuation of £29, 7s. 1d. as follows:—

Sum as before,				£161	8	2
Deduct 75 per cent for tenant's profits, &c.	£121	1	1			
Manager's house,	7	0	0			
Pipes in Port Elphinstone,	4	0	0			
				132	1	1
Valuation of works,				£29	7	1

The Commissioners fixed the valuation at £90. The assessor appealed. Held that the Commissioners were right.

JOHN HENRY UDNY.

No. 192.

Mar. 21, 1872.
Udny.

Ld. Ormidale.
Lord Mure.

Case 86.

Rent of Farm by nineteen years' Lease—(Deductions from Rent for eleven years for Drainage).—From the rent of the farm, by the lease for nineteen years, deductions are allowed of £60 for the first year, and £50 yearly for the next ten years, for the drainage of the farm, to be executed by the tenant to the satisfaction of the proprietor. The proprietor maintained that the deduction was allowed for the first period of the lease in order to get the higher rent for the remainder of the nineteen years of the lease, and but for this the higher rent would not have been got. The annual value of the farm should, therefore, be entered at the rent, less the deduction.

The assessor entered the rent in the roll without deduction, on the ground that the annual expenditure of £50 in drainage was a condition of the lease, and was part of the consideration for the use of the subjects.

The Commissioners were of opinion that although £50 of the money did not come into the landlord's pocket it was spent on permanent improvements by the tenant as trustee for the landlord.

The Commissioners confirmed the valuation. Held that the Commissioners were right.

No. 193. ROBERT GLASS.

Mar. 21, 1872. Glass. — Ld. Ormidale. Lord Mure.

Case 87.

Entries in Roll—Lands in one part of Parish—House in another.—The appellant is proprietor of lands near Milnathort, held of Sir Graham Montgomery, and part is in his own occupation, valued at £130; and he is also proprietor of the estate of Arlary, held of the Crown, and occupies the mansion-house, offices, garden, lawn, and lodge and plantations. The lands near Milnathort and the estate of Arlary are in the parish of Orwell, and they are separated by the farm of Burleigh—Sir Graham Montgomery proprietor. The farm of Arlary is let to a tenant at the rent of £502, and has a suitable house on it. The appellant held he was entitled to have the portions of each property, in his own occupation, treated as one holding, and entered *in cumulo*, so as to give him the benefit of having the house of Arlary valued along with the lands near Milnathort as regards the assessment for the poors' rates.

The assessor made separate entries of the lands and offices at Milnathort, and the mansion-house, garden, and offices at Arlary.

The Commissioners unanimously resolved that the subjects should not be conjoined in the roll, as contended for by the appellant. Held that the Commissioners were right.

N.B.—The Commissioners added a note to the case, to the effect that a case to the Judges was only competent in a matter of valuation, and the question whether certain subjects were to be entered in the valuation-roll in two or more entries, or in one entry, they held was left to the discretion of the Commissioners, and their decision was final.

No. 194. ROBERT BINNING.

May 28, 1872. Binning. — Ld. Ormidale. Lord Mure.

Case 88.

Value—Dwelling-house (Glasgow)—Owner the Occupier—Comparison with other Houses—One House less in size in same Terrace let—Last year's value fixed at £140—This year reduced to £135.—The appellant is owner and occupier of a house in Princes Terrace, Glasgow, which is assessed at the value of £175. Last year it was assessed at £155, and was reduced on appeal to £140. The terrace consists of twelve houses, all of the same size excepting Nos. 6 and 7, which are two-thirds the size of the appellant's, and all occupied by the owners, excepting No. 7, which is let at £125. The appellant referred to the value, as assessed, of other houses in the west end of Glasgow, and stated if his house were valued at the same rate of floorage the assessment would be £115. The assessor alleged the houses referred to were entered at too low a rate, and although houses of the same description were seldom let, yet, where let, the rent obtained bore out his valuation.

The Commissioners reduced the valuation to £135. Held that the Commissioners were wrong, and that the assessable value of appellant's house should be £140.

No. 195. CALEDONIAN RAILWAY COMPANY.

May 28, 1872. Caledonian Railway Co. — Ld. Ormidale. Lord Mure.

Case 89.

Railway (Caledonian)—Dwelling-houses outside the Railway Fence—Occupiers Employees of Railway Company—Whether they should be in Railway Assessment or County Assessment.—Dwelling-houses belonging to the Caledonian Railway Company in the parishes of Dalziel and Bothwell, situated beyond the railway fence, occupied by employees of the railway, are entered in the county lands valuation-roll, the Caledonian Railway Company as proprietors, and the employees as occupiers. The employees occupy the houses only while in the service, and on leaving the service must vacate the houses without formal notice. They pay rent, which is deducted from their wages. They consist of five classes, who are entitled

to different periods of warning:—1. Heads of departments, three months; 2. Chief clerks, &c., two months; 3. Other clerks, one month; 4. Guards, &c., two weeks; 5. Porters, &c., one week. They are all liable to immediate dismissal for disobedience, &c.

No. 195.
May 28, 1872.
Caledonian Railway Co.

The appellants alleged that the houses were included in the valuation-roll made up by the assessor of railways, and fell within "stations, wharfs, docks, depots, counting-houses, and other houses and places of business," in sec. 21 of 17 and 18 Vict. cap. 91.

The Commissioners refused the appeal. Held that the Commissioners were right.

THE GLASGOW IRON COMPANY AND SAMUEL H. CAMPBELL. No. 196.

Goodwill or Prestige of a Shop or Store—Rent.—The Glasgow Iron Company let to Samuel H. Campbell store and dwelling-house in connection with their works. In the missive offer by Campbell £90 is offered as the rent of the subjects and £60 for goodwill of the business. The total sum of £150 is entered on the roll. The company and Campbell contended that only £90 should be entered, the £60 paid for goodwill not being of the nature of rent. The company had formed and carried on a successful business for some years in this store, and established connection with their works, and the assessor maintained that locality and connection were important elements in obtaining rent and fixing annual value.

Mar. 24, 1873.
Glasgow Iron Co. and Campbell.
Ld. Ormidale.
Lord Mure.
Case 90.

The Commissioners refused the appeal. Held that the Commissioners were right.

SIR ROBERT MENZIES. No. 197.

Church (Episcopal)—Whether "Lands and Heritages"—The Episcopal Church at Weem, Perthshire, is entered in roll at a valuation of £10, proprietor, trustees, p. Sir Robert Menzies, Bart. It is erected within the policies of Castle Menzies, and is the private property of Sir Robert. He stated that it was about to be consecrated to divine uses in perpetuity, and no revenue was derived from it. Sir Robert maintained that churches were *extra commercium*, and were not liable to assessments, and as by the Act the roll is to be the basis of assessment churches should not be entered.

Mar. 29, 1873.
Menzies.
Ld. Ormidale.
Lord Mure.
Case 91.

The Commissioners dismissed the appeal. Held that the Commissioners were right.

JOHN GRANT. No. 198.

Tenant—Purchaser—(Tenant became purchaser before expiry of lease)—Rent or Value.—Appellant was tenant of park and house, at rent of £12, on lease of twenty-one years from Whitsunday 1865. He purchased the subjects, and made considerable improvements, and they were then entered at £20, which was admitted to be a fair value; but appellant contended that the rent under the lease should remain in the roll until such time as the lease would have expired.

Mar. 29, 1873.
Grant.
Ld. Ormidale.
Lord Mure.
Case 92.

The Commissioners unanimously refused the appeal. Held that the Commissioners were right.

THE RENTON GAS-LIGHT COMPANY. No. 199.

Gasworks—Value—Tenant's Profits.—The annual value of the Renton Gasworks was entered at £260 by assessor, arrived at thus:—Profits, £279, 15s. 10d., plus rates and taxes, £25, 10s., deducted in ascertaining profits = £305, 5s. Deduct 15 per cent for tenant's profits, £45, 5s., leaves £260. Of the profits there was divided among shareholders the sum of £157, 16s., and carried to reserve fund £121, 9s. 10d.

Mar. 29, 1873.
Renton Gas Light Co.
Ld. Ormidale.
Lord Mure.
Case 93.

No. 199.
Mar. 29, 1873.
Renton Gas Light Co.

The company contended that, in considering what rent a tenant could pay, the profit of £279 would be subject to a deduction for (1) average cost of repairs and renewals of mains and apparatus, and (2) to tenant's remuneration for trouble and risk, which together would amount to not less than £109, leaving £170 as the annual value.

The Commissioners reduced the valuation to £170. Held that the Commissioners were right.

No. 200.

THE LEVEN GAS-LIGHT COMPANY.

Mar. 29, 1873.
Leven Gas Light Co.
Ld. Ormidale.
Lord Mure.
Case 94.

Gasworks—Value—Tenant's Profits.—The annual value of the Leven Gasworks is entered by assessor at £627, arrived at by deducting from the profits £737, 10s. 9d., 15 per cent for tenant's profits, or say £110, 10s. 9d. The company appealed, and claimed to have valuation restricted to £288, 16s., being 7½ per cent on the cost of the works, less 15 per cent on the result for tenant's profits. They contended 7½ per cent on the cost of the works is a fair return, and a higher rent than could be got, the tenant doing repairs, and that what has been divided among the shareholders in excess of that percentage represents their profits as manufacturers and retailers of gas.

The Commissioners restricted the valuation to £440, being the average sum divided among the shareholders for several years past. Held that the Commissioners were right.

No. 201.

JOHN FORBES.

Mar. 20, 1873.
Forbes.
Ld. Ormidale.
Lord Mure.
Case 95.

Moss of an Estate—Lands and Heritages—Value.—Portions of the estates of Crannah, Blacklaw, and Crombie, of which the appellant, John Forbes of Haddo, is proprietor, are moss. His tenants have the privilege of taking fuel therefrom, but portions are disposed of to other parties for annual payments. The revenue derived from the latter source is estimated by assessor at £60, which is entered as the annual value of the moss. The appellant contended that moss was not mentioned in the special enumeration of lands and heritages in the Act. If it should be held to be included, the moss should be valued at £9 as pasture land, or if the income derived from it shall be taken, then the moss-grieve's wages, and the interest of the money expended in making roads, drains, and ditches, should be deducted. The assessor assented to the moss-grieve's wages being deducted, but not the above interest. Such interest was of the nature of the interest on expenditure for farm drainage, which, if paid by the tenant, was added to the rent, and included in the roll.

The appellant's book of drawings was produced to the Commissioners, who went over it.

The Commissioners fixed the sum to be entered in the roll at £53, 4s. Held that the Commissioners were right.

No. 202.

MRS R. URIE.

May 20, 1873.
Urie.
Ld. Ormidale.
Lord Mure.
Case 96.

House and Shop—(Proportion of cumulo rent applicable to house).—The gross rent of the house and shop belonging to the same landlord is £56, and the assessor has entered shop at £36 and house at £20, on the ground that there were dwelling-houses in same tenement, similar in all respects to appellant's, let at £23 and £24 respectively.

The appellant had been tenant of shop since Whitsunday 1865. The rent was first £26, afterwards £30, then £34, and finally, from Whitsunday 1871, £38. She entered as tenant of the dwelling-house on the death of the former tenant, in February 1870, and she produced the landlord's receipts to shew that the rent has continued at £18 since entry.

The Commissioners, on the ground they were satisfied the house was actually let at £18, restricted the valuation to that sum. Held that the Commissioners were right.

THE NITH NAVIGATION COMMISSIONERS. No. 203.

May 29, 1873.

Nith Navigation Commissioners.

Ld. Ormidale.
Lord Mure.

Case 97.

arbour—Quay, &c.—(Wooden Erection at Carsethorn on the Nith, 12 from Dumfries—Goods exported and imported—Rates levied).—The Navigation Commissioners are appointed by statute for the purpose nproving the harbour of Dumfries and the navigation of the river . They are authorised to levy rates on shipping using the river Nith Southerness to the Caul of Dumfries, thirty-six miles, and on goods orted and exported. The river divides Dumfriesshire from the artry of Kirkcudbright. There are four quays on the Dumfriesshire —two entered at a gross valuation of £5, while no value is put upon other two,—and two quays on the other, valued in the roll of the artry at £2 each.

addition to these, there is entered in the roll of the Stewartry, ethorn Harbour—proprietors and occupiers, the Nith Navigation Comioners, value £25. Against this entry they appealed.

wooden erection was put up by the owners of a steamboat between ity and thirty years ago, at Carsethorn, which is twelve miles below nfries. This erection does not belong to the appellants, and is at pre- , and has been for fifteen years, in a state of decay, and almost useless. vessels discharge coals, &c., and take in country produce at Carsethorn. s are levied at Carsethorn; but the rates, the appellants allege, are he entire river, and could not be collected for this or any separate of the river.

he Commissioners dismissed the appeal. Held that the Commissioners wrong.*

THE BANK OF SCOTLAND. No. 204.

June 9, 1873.

Bank of Scotland.

Ld. Ormidale.
Lord Mure.

Case 101.

ank Offices—Value—Mode of stating Case.—The offices of the Bank of land in Dundee, and which belong to the bank, are entered in the at £468. The Bank of Scotland appealed, and submitted that the e should be entered at £280.

vidence was led before the Commissioners, and a printed copy thereof, n by a shorthand writer, was agreed to be held as the proof for both ies, and it and certain documents referred to in the evidence were re- d to, and signed as part of the case.

he Commissioners, by a majority, sustained the valuation. The ges returned the following deliverance:—"The Judges, in respect that is not a special case stated in the terms required by the statute 20 21 Vict. c. 58, sec. 2, cannot entertain it to any effect. It is therefore nissed." Case dismissed not being a special case stated in the terms uired by the statute.†

"NOTE.—There is, in the opinion of the Judges, no evidence in this case to uct that there is any harbour, or quay, or other artificial work, at Carsethorn, nging to or occupied by the Nith Commissioners, in respect of which any or duties are levied or leviable by them, so that the harbour does not, in opinion, fall within the rules laid down as applicable to such subjects in ase of the Bowling Harbour referred to, case 60."

"NOTE.—The counsel for the appellants did not maintain that there was a here such as is required by the statute, but, on the contrary, argued that e was not. In this view the Judges entirely concur, for the reasons which explained by them in the course of the discussion.

The Judges also explained, in the course of the discussion, that it was imible for them to determine what effect ought to be given to the proof, even it been competent for them to review it, considering the manner in which it been presented to them. For example, they observe (p. 10 of the printed

No. 205.

STIRLING AND SONS.

June 9, 1873.
Stirling and Sons.

Ld. Ormidale.
Lord Mure.

Case 104.

Value—Dye and Print-Works—Comparison with similar Works let.—The works at Dalquhurn and Cordale, in Dumbartonshire, belonging to Messrs Stirling and Sons, were entered at £2580 and £600 respectively having been previously entered at £1350 and £560. Other print-works in the county had been similarly increased in value, and the valuations were also appealed against, but the decision in the case as to Messrs Stirling's works was to rule them. The assessor referred to the previous case of Messrs Stirling and Sons, No. 69, and to the case No. 54. Following the principle indicated in these cases, he had again increased the valuation of the appellants' works, on the ground of a comparison of their works with a similar work at Barrhead, Renfrewshire, which was actually let. He had, in estimating the appellants' work, added to the annual value of the ground occupied 7½ per cent for the value of the machinery, and 7½ per cent for the value of the buildings. That the sum thus arrived at for the buildings was equal to 9½d. per square yard of flooring space for the Cordale works, and 1s. 0¾d. for the Dalquhurn works. That the same percentage on the value of the buildings in the other works gave from 10¼d. to 1s. 2¼d. per square yard of flooring space. The same percentage would give for the Barrhead work a gross value of £445, equal to 10½d. per square yard of flooring space, whereas the rent actually paid was £540, or about 1s. 1¼d. per square yard of flooring space; and, in addition, the tenants keep the premises in repair, and pay £100 a-year to another proprietor for an insufficient supply of water.

The Commissioners reduced the valuations to the previous amounts.

The Judges remitted the case to the Commissioners, and requested them to give the appellants an opportunity of proving that the sums at which the buildings, &c., were valued were excessive, and that the percentage of 7½ was too high. The appellants led evidence tending to shew that the rent of certain works produced only the percentage 3⅛, 3¼, 3½. The valuation of the assessor of the buildings, &c., was found to be fair.

Under a further remit and request by the Judges to the Commissioners, the assessor led evidence which went to shew that in the cases of the works to which the appellants' evidence referred the full facts of the cases brought out a larger percentage than 7½.

"Edinburgh, 17th June 1873.—From the manner in which this case has been presented to them, the Judges have found it impossible to form a satisfactory opinion on the question, whether the Commissioners, in the result arrived at by them, are right or not. But as the Judges are unable to find from the case and information laid before them that the Commissioners have not arrived at a right conclusion their determination must for the present stand as it is."

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evidence) that, in regard to what appears to be an important question—viz, whether the Bank of Scotland had a storey more than the adjacent properties—an answer was not allowed to be given, because the magistrates before whom the proof was taken all knew how the matter stood. But the Judges are not in possession of any such knowledge. The proof is, therefore, to them necessarily defective and unintelligible as a substitute for a special case"

INDEX OF MATTERS

IN

VOLUME XI.

[Points decided in the House of Lords are printed in *Italics*.]

ACQUIESCENCE. See *Mora*.

ADVOCATE, LORD, CONCURRENCE OF. See *Agent and Client—Bankruptcy*, 2.

AGENT AND CLIENT. *Personal Liability of Agent.*

An agent for a private pursuer of an action of declarator of contravention of lawburrows used the name of the Lord Advocate as joint pursuer without his authority. *Held* that the agent was personally liable in expenses to the defenders. Robertson v. Ross, July 16, 1873, p. 910.

AGENT AND PRINCIPAL. *Bankruptcy.*

1. A sum of £1000 was sent by clients to a law-agent on 8th June for the purpose of being invested in a heritable security. On 15th June the agent paid it into his own bank account, which shewed a balance in his favour, until the transaction should be formally completed; and he died on the 21st. His estates were thereafter sequestrated, and the trustee claimed the £1000 in bank as part of the bankrupt estate. In a petition at the instance of the clients, under sec. 104 of the Bankruptcy Act, *held* that the £1000 having been sent to the bankrupt for a specific purpose, and being still distinguishable from his funds, fell to be taken out of the sequestration of his estate and paid to the petitioners. Macadam v. Martin's Trustee, Nov. 5, 1872, p. 33.

Contract—Construction.

2. A commercial traveller agreed to act for a firm of wholesale tea merchants for a commission of one-third of the difference between the price quoted by his employers as the value of the tea, adding the charge for brokerage and other expenses, and the money obtained by the sale of the tea, his employers retaining the right of accepting or rejecting orders. *Held* that this entitled him to one-third of the profits, if any, on each sale effected through him, without deduction in respect of loss upon other sales. Laurie v. Lloyd and Co., Feb. 20, 1873, p. 413.

Mandate—Bill—Forgery.

3. A firm of merchants, by a letter addressed to a bank, granted authority to their manager "to sign, per procuration of their firm, all bills, cheques, cash-orders, and other documents necessary to the conducting of our business, and all vouchers so subscribed will be equally binding as if signed by any member of our firm." They also delivered to their manager a letter of procuration binding themselves to meet all cheques, orders, drafts, bills, &c., endorsed by the manager, and "to keep the parties dealing with you free and skaithless; and we bind ourselves to ratify, homologate, and confirm the actings and doings of you, the manager, in respect of such cheques," &c. This document was delivered by the manager to the bank. The manager, after forging the names of certain real and fictitious firms as accep-

AGENT AND PRINCIPAL—*Continued.*
tors of bills to bills drawn by himself as procurator of his principal's firm discounted the bills at the bank, and endorsed them per procuratory, and appropriated the money thus obtained to his own use.

Held that, as it was not proved that the bank had failed to exercise due caution in discounting any of the bills, or that the signatures thereto were manifest forgeries, or presented a suspicious appearance which should have put the bank on their guard, the firm were liable to the bank for the amount of the bills. Union Bank v. Makin, March 7, 1873, p. 499.

AGREEMENT. *Pactum de non petendo—Obligation—Conditional Discharge—Process—Sist.*

1. In an action by a tenant against the representatives of his landlord for payment of certain bills of exchange granted by the latter, the defenders founded on a letter by the tenant in proof of an alleged agreement by the tenant not to ask payment of the bills in consideration of a renewed lease being granted to the tenant. The pursuer, in reply, stated that the lease was threatened to be reduced by the next heir of entail in possession of the estate as in contravention of the entail. After a proof, *held* (*diss.* Lord Benholme) that a *pactum de non petendo* had been proved, and that the pursuer being still in undisturbed possession of the farm was not *in hoc statu* entitled to decree, reserving all further questions on the merits. Macvean v. Maclean, June 26, 1873, p. 764.

Proof—Parole Evidence—Competency—Damage—Reparation.

2. In an action of damages the pursuer averred that the defenders had arranged to board certain children with her, and that as both parties had contemplated that the arrangement should continue for a term of years she had incurred certain expenditure which she lost by the guardians suddenly bringing the arrangement to a close. *Held* (1) that parole evidence of such an arrangement was competent, and (2) that the pursuer was entitled to be reimbursed for actual loss. Dobie v. Lauder's Trustees, June 24, 1873, p. 749.

Superior and Vassal—Feu-Contract.

3. *A superior bound his vassal to build and maintain on his feu a house of a certain value, and reserved to himself the minerals, with power to work them at pleasure, and to remove as much stone, &c., as might be necessary for the proper working of the minerals, it being expressly agreed that he should not be liable for any damage to the vassal that might happen through the working of the coal, &c., by longwall workings or otherwise.* Held (reversing *judgment of the Second Division*) *that the vassal was not entitled to an interdict against the superior working the minerals under his house on the ground that the workings would probably injure or destroy it.* Buchanan, &c. v. Andrew, March 10, 1873, H. L. p. 13.

See *Error.*

ALIMENT. *Alimentary Provision—Discharge—Judicial Factor—Trust.*

1. By trust-settlement an annuity was directed to be paid, and was declared to be alimentary and "not assignable for causes onerous or gratuitous, and not subject to arrestment or other legal diligence, and not subject to the debts or deeds" of the donee. A judicial factor, who was appointed on failure of the trustees, carried out all the purposes of the trust except two. These were payment of the annuity and handing over the estate to the residuary legatee. The judicial factor, the annuitant, and the residuary legatee came to an agreement that the residuary legatee should grant a personal bond for payment of the annuity to the annuitant, who was to grant a discharge to the judicial factor, and that the trust-estate should be wound up and the residue paid over to the residuary legatee. The judicial factor presented a petition praying for exoneration and discharge on this arrangement being carried out. *Held* that the annuitant had not power to grant a discharge of the alimentary provision, and petition refused. Smith and Campbell, May 30, 1873, p. 639.

ALIMENT—*Continued.*

Annuity—Alimentary—Discharge.

2. A husband burdened certain lands with an annuity to his widow, declaring that it should be alimentary and not assignable, and should be exclusive of the *jus mariti* of any husband she might marry. He directed his trustees upon the death of his widow to convey the lands to A. The free rents of the lands were insufficient to pay the annuity, and the trustees required to borrow money to pay it on the security of the lands.

The widow and A agreed that she should disburden the lands for a certain sum, and that the trustees should on such payment convey the lands at once to A.

In a special case by A and the trustees, *held* that the widow could not discharge the annuity, and that the trustees were not authorised to convey the lands to A. Cosens v. Stevenson, &c., June 26, 1873, p. 761.

See *Succession.*

ANNUITY. *Testament—Legacy.*

1. A testator appointed his trustees to pay to his widow an annuity of £1000 a-year in lieu of her legal rights and of her claims under an antenuptial marriage-contract, and disposed of the rest of his estate in legacies, some of which he directed to be paid within three months after his death, and others after the death of his widow. The income of the trust-estate was not sufficient to pay the annuity. *Held* that the annuity was preferable to the legacies of which payment had been postponed, and that the widow was entitled to have it paid in full, whether the revenue of the trust-estate yielded that amount or not. Kinmond's Trustees v. Kinmond, Feb. 5, 1873, p. 381.

Succession—Testament—Statute 33 *and* 34 *Vict. c.* 35 (*Apportionment Act*, 1870).

2. A testator left an annuity of £200 to his sister "during all the days and years of her life," payable in equal portions at Whitsunday and Martinmas, "commencing the first year's payment" at the first term after his death. He died on the 9th November 1866. She survived till 27th October 1871, having received five years' payments of the annuity during the four years and eleven months of her survivance. Her representatives maintained that the testator's direction to make a year's payment at the first term after his death was intended to cover the half year current at the date of his death, and that the annuitant had thus only received four and a half year's payment of the annuity, and was entitled to a proportion for the half year current at the date of her death. *Held* that the testator's intention was that the sister should receive payment for the period during which she should survive him at the rate of £200 per annum, and that she had received full payment. Cuninghame's Trustees v. Duke *et al.*, March 18, 1873, p. 543.

Succession—Heir and Executor—Tract of future time.

3. A testator conveyed his whole estate of every description to trustees, for the purposes of entailing a certain estate on a series of heirs, of realising his other estate, heritable and moveable, of fulfilling and discharging the obligations contained in his antenuptial marriage-contract, of paying legacies, and, lastly, of paying the residue to certain persons. *Held* that an annuity payable to the testator's widow under his marriage-contract was due out of the residue, and was not a burden on the entailed estate. Gordon v. Scott, Jan. 22, 1873, p. 334.

Revenue.

4. *Held* that annuities granted by the proprietor of heritable and moveable estate were after his death payable out of the rents of the heritage. Breadalbane's Trustees v. Jamieson, &c., July 16, 1873, p. 912.

See *Aliment.*

APPEAL. See *Process.*

APPEAL TO HOUSE OF LORDS. See *Process.*

APPORTIONMENT. *Illusory Payments—Stat.* 11 *Geo. IV. and* 1 *Wm. IV., c.* 46.

1. *Question*, Whether the enactment in the above statute that all apportionments under a power shall be valid, whether illusory or not, applies to Scotland. Smith's Trustees v. Graham and Others, May 29, 1873, p. 630.

Succession—Testament—Statute 33 *and* 34 *Vict. c.* 35 (*Apportionment Act*, 1870).

2. A testator left an annuity of £200 to his sister "during all the days and years of her life," payable in equal portions at Whitsunday and Martinmas, "commencing the first year's payment" at the first term after his death. He died on the 9th November 1866. She survived till 27th October 1871, having received five years' payments of the annuity during the four years and eleven months of her survivance. Her representatives maintained that the testator's direction to make a year's payment at the first term after his death was intended to cover the half year current at the date of his death, and that the annuitant had thus only received four and a half year's payment of the annuity, and was entitled to a proportion for the half year current at the date of her death. *Held* that the testator's intention was that the sister should receive payment for the period during which she should survive him at the rate of £200 per annum, and that she had received full payment. Cuninghame's Trustees v. Duke *et al.*, March 18, 1873, p. 543.

*Heir and Executor—*33 *and* 34 *Vict. c.* 35*—Lease.*

3. Farms on an entailed estate were let in accordance with local custom and the previous usage on the estate, with entry to the houses, grass, and hay lands at Whitsunday, and to the lands under crop at the separation of the crops from the ground. The rents were payable at Martinmas and Whitsunday for the half year preceding. The proprietor died on 18th July 1872. In a question between his executor and the next heir of entail, *held* that the rents payable at Martinmas 1872 were rents accruing at the date of his death, and fell to be apportioned between heir and executor under the Apportionment Act of 1870. Lord Herries v. Maxwell's Curator, Feb. 6, 1873, p. 396.

See *Heir and Executor*, 2—*Landlord and Tenant*, 4.

APPROBATE AND REPROBATE. *Marriage-Contract—General Settlement—Negative Prescription.*

A father executed a trust-deed for payment of certain debts and regulating his succession *in fraudem* of his antenuptial marriage-contract, and to the prejudice of the heir of the marriage, and afterwards another trust-deed, the two forming together a complete settlement of his whole estate, heritable and moveable. The heir made up a title under the marriage-contract, and under it possessed the lands contained in the first trust-deed, and took benefit under the second deed, but in ignorance of the existence of the first trust-deed. *Held* that his trustees and executors were not barred by the negative prescription from challenging the earlier deed, but were entitled to elect either to abide by his approbation of his father's settlement, or to renounce and restore the benefit he had taken, and challenge the first deed. Earl of Glasgow's Trustee v. Earl of Glasgow, &c., Dec. 13, 1872, p. 218.

ARBITER. *Process—Defence—Contract—Clause of Reference.*

Held that an action raised by a contractor against his employer for payment due under a building contract, and for damages from his employer having, as he alleged, illegally taken possession of machinery and materials, was not excluded by a clause of reference in the contract, in respect (1) that it was not clear that the clause of reference gave the arbiter authority to give decree for payment of money; (2) that certain of the questions raised did not fall within the reference; and (3) that the arbiter could not assess damages.

Observed, that if questions arose in the course of the action falling within the reference, the aid of the arbiter must be invoked. Tough v. Dumbarton Water-Works Commissioners, Dec. 20, 1872, p. 236.

ARRESTMENT. *Jurisdictionis fundandæ causa.*

1. A person resident in England intromitted with a Scotch executry estate. *Held* that arrestment of her private funds in Scotland was sufficient to found jurisdiction against her in a question between her and beneficiaries claiming a share of the executry estate. Macadam v. Macadam, July 3, 1873, p. 866.

Preference—Bankruptcy—Act 1696, *c.* 5—19 *and* 20 *Vict. c.* 79 (*Bankruptcy (Scotland) Act*, 1856), *secs.* 10, 11, 12, *and* 108.

2. A person who was insolvent granted a trust-deed for behoof of his creditors to a trustee, who entered into possession of his property. A creditor of the insolvent, who was no party to the trust-deed, used arrestments in the hands of the trustee. Thereafter, within sixty days of granting the trust-deed, the insolvent absconded, and so became notour bankrupt. More than four months after notour bankruptcy he was sequestrated. *Held* that the creditor, being entitled under the Act 1696 to reduce the trust-deed, had secured an effectual preference by using arrestment in the hands of the trustee, which was not affected by the sequestration. Nicolson v. Johnstone and Wright, Dec. 6, 1872, p. 179.

ASSIGNATION. See *Bankruptcy*, 5.

BANK. *Mandate—Bill—Forgery.*

A firm of merchants, by a letter addressed to a bank, granted authority to their manager "to sign, per procuration of their firm, all bills, cheques, cash-orders, and other documents necessary to the conducting of our business, and all vouchers so subscribed will be equally binding as if signed by any member of our firm." They also delivered to their manager a letter of procuration binding themselves to meet all cheques, orders, drafts, bills, &c., endorsed by the manager, and "to keep the parties dealing with you free and skaithless; and we bind ourselves to ratify, homologate, and confirm the actings and doings of you, the manager, in respect of such cheques," &c. This document was delivered by the manager to the bank. The manager, after forging the names of certain real and fictitious firms as acceptors of bills to bills drawn by himself as procurator of his principal's firm, discounted the bills at the bank, and endorsed them per procuratory, and appropriated the money thus obtained to his own use.

Held that, as it was not proved that the bank had failed to exercise due caution in discounting any of the bills, or that the signatures thereto were manifest forgeries, or presented a suspicious appearance which should have put the bank on their guard, the firm were liable to the bank for the amount of the bills. Union Bank v. Makin, March 7, 1873, p. 499.

BANKRUPTCY. *Bankrupty (Scotland) Act*, 19 *and* 20 *Vict. c.* 79, *sec.* 141—*Expenses of Trustee who had resigned office—Composition.*

1. The 141st section of the Bankruptcy Act enacts that in a sequestration, before the Lord Ordinary or the Sheriff shall pronounce the deliverance approving of a composition, "the commissioners shall audit the accounts of the trustee, and ascertain the balance due to or by him, and fix the remuneration for his trouble, subject to the review of the Lord Ordinary or the Sheriff, if complained of by the trustee, the bankrupt, or any of the creditors, and that the expenses attending the sequestration and the remuneration of the trustee shall be paid or provided for to the satisfaction of the trustee and commissioners before such deliverance approving of the composition is pronounced." In a sequestration a trustee resigned office before receiving payment of his account. After a new trustee had been appointed the bankrupt offered a composition to his creditors. The Sheriff approved of the composition, after receiving a report by the trustee, in which he stated that the bankrupt and his cautioner had offered to the first trustee a bill for £20 in full of his claim for £60, and that the commissioners and the reporter thought the offer reasonable, and that the reporter was satisfied therewith. In an appeal by the first trustee against

BANKRUPTCY—*Continued.*

the Sheriff's deliverance, *held* (1) that the first trustee had a sufficient title to appeal, and (2) that he was entitled to have his account audited in terms of the statute. Miller v. Keith, Nov. 30, 1872, p. 164.

Trustee—Petition and Complaint—Competency—Lord Advocate—Statute 19 *and* 20 *Vict. c.* 79, *secs.* 84 *and* 86.

2. A petition and complaint presented to the Lord Ordinary on the Bills by a creditor on a sequestrated estate set forth that the trustee was employing the trust-funds in an improper way, and had not complied with the provisions of sec. 84 of the above Act as to the sederunt-book to be kept by the trustee. The petitioner craved to have the trustee ordained to cease from using his powers and the funds of the sequestrated estate in the way complained of. There was further a prayer for censure of the trustee.

The Lord Ordinary having dismissed the petition as incompetent, the petitioner reclaimed, and moved the Court to allow him to amend the petition by striking out the prayer for censure. *Held* (1) that the amendment could not be allowed; (2) that the petition was not authorised by the Bankruptcy Act; (3) that it was not competent at common law, in respect (1) the Bill-Chamber had no jurisdiction, and (2) that, being of a penal character, it had not the concurrence of the Lord Advocate. Paterson v. Robson, Nov. 16, 1872, p. 76.

Bankrupt—Preference—Illegal Agreement for the purpose of obtaining the Bankrupt's Discharge—Statutory Penalty—Bankruptcy Act, 1856, *sec.* 150.

3. A, one of the creditors on a sequestrated estate, who claimed to have a security for his debt over certain machinery, entered into an arrangement with B, a friend of the bankrupt, without the knowledge of the trustee or of the other creditors, by which he was to receive £500 from B, and to rank on the sequestrated estate for the full amount of his claim, as a condition of his agreeing to a proposed composition-contract. *Held* that the penalty under the above section had been incurred by A, although he had believed that B was acting for the trustee and creditors, and although B had successfully resisted A's claim for payment of the £500. Thomas v. Sandeman, Nov. 22, 1872, p. 81.

Trustee.

4. *Question*, Whether a trustee in a sequestration can in litigation make admissions in points of law. Nicolson v. Johnstone and Wright, Dec. 6, 1872, p. 179.

Fraud—Right in Security—Assignation—Discharge.

5. An undischarged bankrupt obtained a loan from an English assurance company, who, out of the sum lent, paid a former debt due by him to a Scotch assurance company, but not having been made aware of the fact of the bankruptcy, instead of getting an assignation of the securities held by the Scotch assurance company, obtained a discharge of the debt, and took from the bankrupt a new bond and assignation in security over the rights disburdened by the discharge. *Held*, in a competition between the trustee on the bankrupt estate and the second creditor for a sum of money over which the assignation extended, that on grounds of equity the trustee could not be allowed to benefit by the fraud of the bankrupt in concealing from the second creditor the fact of his bankruptcy. Molleson v. Challis, March 11, 1873, p. 510.

Discharge—Bankruptcy (Scotland) Act, 1856, *sec.* 146.

6. Circumstances in which a discharge was granted to a bankrupt convicted of breach of trust and embezzlement after the expiry of the term of his imprisonment, and after the lapse of a year from the date of his application for discharge. Cooper v. Fraser, Nov. 5, 1872, p. 38.

Agent and Principal.

7. A sum of £1000 was sent by clients to a law-agent on 8th June for the purpose of being invested in a heritable security. On 15th June the agent paid it into his own bank account, which shewed a balance in his favour,

BANKRUPTCY—*Continued.*

until the transaction should be formally completed; and he died on the 21st. His estates were thereafter sequestrated, and the trustee claimed the £1000 in bank as part of the bankrupt estate. In a petition at the instance of the clients, under sec. 104 of the Bankruptcy Act, *held* that the £1000 having been sent to the bankrupt for a specific purpose, and being still distinguishable from his funds, fell to be taken out of the sequestration of his estate and paid to the petitioners. Macadam v. Martin's Trustee, Nov. 5, 1872, p. 33.

See *Diligence*, 1.

BILL. See *Agent and Principal*, 3—*Diligence*, 4.

BILL-CHAMBER. See *Bankruptcy*, 2.

BILL OF EXCHANGE. *Pactum de non petendo—Process—Sist.*

1. In an action by a tenant against the representatives of his landlord for payment of certain bills of exchange granted by the latter, the defenders founded on a letter by the tenant in proof of an alleged agreement by the tenant not to ask payment of the bills in consideration of a renewed lease being granted to the tenant. The pursuer, in reply, stated that the lease was threatened to be reduced by the next heir of entail in possession of the estate as in contravention of the entail. After a proof, *held* (*diss.* Lord Benholme) that a *pactum de non petendo* had been proved, and that the pursuer being still in undisturbed possession of the farm was not *in hoc statu* entitled to decree, reserving all further questions on the merits. Macvean v. Maclean, June 26, 1873, p. 764.

Inhibition—Vergens ad inopiam.

2. The creditor in a bill of exchange which was dishonoured at maturity received from his debtor two renewal bills in lieu of the original bill, which, however, he retained in his own possession under an agreement whereby, as he alleged, he was to be entitled "to do such dilligence on the original bill as might be necessary for his security, in the event of other creditors doing diligence against the petitioner or his estate, or of circumstances emerging which should make it proper and advisable for the respondent to take steps that the debt due to him should be paid." The creditor presented a bill in the Bill-Chamber during the currency of the renewal bills, setting forth nothing more than that he was in possession of the original bill, and that it had been dishonoured at maturity, and craving letters of inhibition, which he obtained. In a petition for recall of the letters of inhibition, *held* that the bill upon which they proceeded should have set forth not only the original bill but also the two renewal bills, and a statement that the debtor was *vergens ad inopiam*, and the letters accordingly recalled. Stevens v. Campbell, June 28, 1873, p. 772.

Proof—Discharge—Parole.

3. A proof before answer allowed to explain documents alleged to instruct discharge of a debt contained in two promissory-notes in possession of the creditor in the obligation. Macvean v. Maclean, March 8, 1873, p. 506.

See *Oath*.

BURGH. See *Property*.

CESSIO BONORUM. *Husband and Wife.*

The pursuer in a process of *cessio* refused to execute a revocation of a disposition of a property of the value of £50 which he had granted to his wife when he was solvent. *Held* that his refusal was not a sufficient reason for refusing to grant the *cessio*. Donaldson v. Thomson, Jan. 25, 1873, p. 347.

CHURCH. *Assessment—Manse—Real and Valued Rent—Merksland.*

1. *Held* (*dub.* Lord Justice-Clerk) that in a landward parish, in Shetland, the assessment for alterations and repairs on a manse fell to be assessed upon the heritors liable, according to the number of merksland held by them

CHURCH—*Continued.*

respectively, that having been the rule of assessment from time immemorial and there being no special circumstances in the case to render that rule inequitable. Bruce v. Bruce and Another, June 24, 1873, p. 755.

Erection of quoad sacra Parish—Statute 8 *and* 9 *Vict. c.* 44, *sec.* 8.

2. The Court of Teinds will not sanction the erection of a *quoad sacra* parish merely because a manse and stipend have been provided for the minister, but will only do so when it is necessary for the spiritual interests of the district on account of the distance of the parish church, or the growth of population, or some such circumstance. Irvine v. Maxwell, Feb. 17, 1873, p. 409.

Glebe—29 *and* 30 *Vict. c.* 71 (*Glebe Lands Act*, 1866).

3. The lodging of a minute by a conterminous proprietor, under the 17th section of the above statute, intimating his willingness to purchase the glebe or any part of it, does not conclude a personal contract of sale between him and the minister, it being in the power of the Court, at any time before decree of sale is pronounced, to impose conditions for the protection of the benefice. Gloag v. Rutherford, &c., Jan. 6, 1873, p. 251.

Glebe—Glebe Lands (Scotland) Act, 1866, 29 *and* 30 *Vict. c.* 71.

4. In an application for authority to feu under the Glebe Lands Act, *held* (1) that in fixing the minimum feu-duty the building value and not the agricultural value of the land fell to be taken; and (2) that the price to be paid by a conterminous heritor for lands taken under sec. 17 was twenty-five times the amount of the minimum feu-duty. Campbell v. Morison, Nov. 18, 1872, p. 80.

Erection—Endowment—Lease—Feu—Act 7 *and* 8 *Vict. c.* 44, *sec.* 8 (*Division of Parishes Act*, 1844).

5. The above Act sanctions the erection of *quoad sacra* parishes only in cases when the title to the site of the proposed church is such that it shall be inalienably secured as the church of the new parish. *Held* (*diss.* Lord Justice-Clerk and Lord Ardmillan) that a 999 years' lease of a church site did not satisfy this condition. Donaldson, &c., March 3, 1873, p. 489.

COLLABORATEUR. See *Reparation.*

COLLATION. See *Succession.*

COMPANY. See *Joint-Stock Company.*

CONDITION. *Legacy.*

1. When a bequest is made subject to a condition in favour of a third party, the condition is held to be fulfilled when the third party voluntarily renders its fulfilment impossible. Pirie v. Pirie, July 19, 1873, p. 941.

Testament.

2. A father in his testament gave a direction that a sum of money due to him by one of his sons should be allowed to remain in his hands for eight years, on condition that the executor and residuary legatee should remain a director of the company in which the sum was invested. The executor voluntarily resigned his office as director. *Held* that the condition must be held to have been satisfied, and that the son was entitled to retain the loan. Pirie v. Pirie, July 19, 1873, p. 941.

See *Insurance*, 2.

CONDITIO SI SINE LIBERIS. See *Succession.*

CONFIRMATION. See *Superior and Vassal.*

CONSTRUCTION. See *Statute—Succession.*

CONTRACT. See *Agent and Principal*, 2—*Arbiter—Process—Property*, 13.

CONVERSION. See *Heritable and Moveable.*

CROWN. *Property—Foreshore—Regalia.*

1. The Crown has a right of property in the foreshore not as being one of the *regalia minora*, but as a portion of the *solum* of the country, and may alienate the same, subject to the burden of certain public uses which attach to it, whether held in property by the Crown or by a subject. Agnew v. Lord Advocate, Jan. 21, 1873, p. 309.

Property—Foreshore.

2. The right of the public to use the foreshore for purposes of navigation is vested in the Crown as one of the *regalia majora*. Agnew v. Lord Advocate, Jan. 21, 1873, p. 309.

See *Property—Fishings.*

CULPA. See *Reparation.*

DAMAGES. See *Reparation.*

DEATHBED. See *Minor.*

DECREE. See *Process.*

DEED. See *Writ.*

DEPOSIT-RECEIPT. *Loan—Proof.*

In an action brought for payment of a sum of money, "being the amount contained in a deposit-receipt in name of the pursuer uplifted by the defender," the defender stated that he had received the deposit-receipt bearing the pursuer's endorsation from a third party, the true owner of the money, and to whom he had accounted for it. *Held* (1) that in so far as the action was or might be rested on an alleged loan by the pursuer to the defender such ground of action could not be proved by parole evidence, and that the only writing of the defender founded on in proof of it, being the defender's name written on the back of the deposit-receipt, was not legal proof of such loan, nor sufficient to render parole proof admissible; (2) that, in so far as the action was rested on the defender's alleged intromission with the pursuer's funds, the parole evidence had negatived the pursuer's case. Nimmo v. Nimmo, Feb. 22, 1873, p. 446.

DESTINATION.

1. A deed of entail contained a destination to A and the heirs-male to be procreated of her body, whom failing to the heirs whatsomever descending of her body. The narrative of the deed stated that the entail was to be made in favour of A and the heirs of her body. *Held*, that the whole class of heirs-male must be exhausted before heirs whatsoever could succeed. Erskine v. Earl of Kellie, July 4, 1873, p. 876.

Succession—Heir of Line—Heir of Conquest—Entail.

2. A person purchased an estate and entailed it upon himself and his heirs-male, and, after various substitutions, on his own heirs whatsoever. *Held* that, under the destination to his own heirs whatsoever, the heir of line was to be preferred to the heir of conquest. Mackintosh, &c. v. Ross, May 30, 1873, p. 636.

Opinion (*per Lord Chancellor*) *that general words, purporting to dispose of a man's whole property, in a will or* mortis causa *deed, are (unless there be something in the instrument itself to control that presumption) to be understood as applicable only to property the succession to which, after the death of the testator, is not already regulated by a special destination to a particular class of heirs in a prior instrument, either made by the settlor himself, or under which he holds.*

Observations (per *Lord Chancellor*) *on the admissibility of extrinsic evidence by the law of Scotland in the construction of testamentary deeds.*

Observed (per *Lord Colonsay*) *that from the cases on the effect of a general disposition in evacuating or superseding prior destinations of heritage*

DESTINATION—*Continued.*

the following inferences are deducible:—(1) *That in determining what effect should be given to the words of general disposition the question has always been treated as one of presumption or presumed intention;* (2) *that a general disposition* mortis causa *does not derogate from a prior special destination, unless it be made clear that it was intended so to do;* (3) *that in dealing with such cases the Court has taken into consideration circumstances calculated to throw light on the intention or purpose of the testator, whether found within the deed or collected from external sources.*

Question (per *Lord Colonsay*) *whether a letter written by a testator after the date of his settlement may be referred to as extrinsic evidence in its construction.* Glendonwyn v. Gordon, &c., May 19, 1873, H. L. p. 33.

3. *A deed of strict entail contained a destination to A, "and the heirs-male procreated of the marriage between A and" the entailer's daughter, "and the heirs-male of their bodies respectively; whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively; whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies respectively, &c.* Held (aff. *judgment of the Court of Session*) *that on the succession opening by the death of the eldest son of the said marriage without male issue, his only daughter, as heir whatsoever of his body, was entitled to take in preference to the next heir-male of the said marriage.* Forbes v. Trefusis, June 17, 1873, H. L. p. 44.

Conditional Institution—Substitution.

4. A person conveyed a heritable subject to his children "equally among them, and the lawful issue of their bodies, and failing any of them by death, without lawful issue of their bodies, to the survivors equally." *Held* that this was a conditional institution of the grandchildren, and not a substitution. Stiven v. Brown's Trustees, Jan. 10, 1873, p. 261.

5. The granter of a *mortis causa* settlement disponed his heritable estate "to the heirs of my own body equally among them, share and share alike, whom failing, to A, B, C, and D, equally among them, share and share alike, and their respective heirs in fee." The granter died without leaving any heirs of his body, and the settlement was found in his repositories after his death. *Held* that A, B, C, and D were conditional institutes, and not substitutes, and had right to the property as disponees, without service or declarator. Hutchison v. Hutchison, Dec. 20, 1872, p. 229.

Conditional Institute or Substitute—Service.

6. *Opinion (per cur.)*, that when a person by *mortis causa* conveyance in the ordinary form dispones to the heirs of his body, or the heirs-male of his body, whom failing, to a person named, the person so named (there being no heirs of his body then existing) is conditional institute; and if no heirs of the body of the granter come into existence, or existing, predecease him, the condition is purified, and the person named is, on the death of the granter, without qualification or condition, disponee, and as such is entitled to use the executory clauses of the disposition for the purpose of feudalising his right as disponee without service or declarator.

Observations on the cases of Gordon of Carleton, M. 14,366—14,368, and Peacock v. Glen, 4 S. 742. Hutchison v. Hutchison, Dec. 20, 1872, p. 229.

DILIGENCE. *Execution of Search—Notour Bankrupt.*

1. *Observations* on the terms of execution of search by sheriff-officers as affording *prima facie* evidence of absconding so as to constitute notour bankruptcy. Nicolson v. Johnstone and Wright, Dec. 6, 1872, p. 179.

Inhibition—Bill of Exchange—Vergens ad inopiam.

2. The creditor in a bill of exchange which was dishonoured at maturity received from his debtor two renewal bills in lieu of the original bill, which, however, he retained in his own possession under an agreement whereby, as he alleged, he was to be entitled "to do such diligence on the original

DILIGENCE—*Continued.*

bill as might be necessary for his security, in the event of other creditors doing diligence against the petitioner or his estate, or of circumstances emerging which should make it proper and advisable for the respondent to take steps that the debt due to him should be paid." The creditor presented a bill in the Bill-Chamber during the currency of the renewal bills, setting forth nothing more than that he was in possession of the original bill, and that it had been dishonoured at maturity, and craving letters of inhibition, which he obtained. In a petition for recall of the letters of inhibition, *held* that the bill upon which they proceeded should have set forth not only the original bill but also the two renewal bills, and a statement that the debtor was *vergens ad inopiam*, and the letters accordingly recalled. Stevens v. Campbell, June 28, 1873, p. 772.

Inhibition—Titles to Land Act, 1868, 31 *and* 32 *Vict. c.* 101, *sec.* 156, *schedule QQ thereof—A.S.*, 18*th Nov.* 1871.

3. *Observed* that the above statute had made no change upon the rule that a bill presented in the Bill-Chamber for the purpose of obtaining letters of inhibition must set forth fully and explicitly all the grounds of debt which justify the creditor in craving diligence. Stevens v. Campbell, June 28, 1873, p. 772.

Wrongous Use of Dilgence—Malice—Bill—Issues.

4. In an action of damages for injury alleged to have been caused by the defenders recording a protest for non-payment of a bill, and charging thereon, although the bill had been previously paid eight days after it had become due, *held* that a charge was a diligence and not a judicial act, and that therefore it was not necessary to put malice in the issue (Lord Benholme *diss.*, on the ground that the circumstances shewed fault on the part of the pursuer, and that therefore it was not sufficient for him to prove merely a legal wrong).

Form of issue adjusted. Gibb v. Edinburgh Brewery Co., June 19, 1873, p. 705.

See *Arrestment.*

DISCHARGE. *Alimentary Provision—Judicial Factor.*

1. By trust-settlement an annuity was directed to be paid, and was declared to be alimentary and "not assignable for causes onerous or gratuitous, and not subject to arrestment or other legal diligence, and not subject to the debts or deeds" of the donee. A judicial factor, who was appointed on failure of the trustees, carried out all the purposes of the trust except two. These were payment of the annuity and handing over the estate to the residuary legatee. The judicial factor, the annuitant, and the residuary legatee came to an agreement that the residuary legatee should grant a personal bond for payment of the annuity to the annuitant, who was to grant a discharge to the judicial factor, and that the trust-estate should be wound up and the residue paid over to the residuary legatee. The judicial factor presented a petition praying for exoneration and discharge on this arrangement being carried out. *Held* that the annuitant had not power to grant a discharge of the alimentary provision, and petition refused. Smith and Campbell, May 30, 1873, p. 639.

Annuity—Alimentary.

2. A husband burdened certain lands with an annuity to his widow, declaring that it should be alimentary and not assignable, and should be exclusive of the *jus mariti* of any husband she might marry. He directed his trustees upon the death of his widow to convey the lands to A. The free rents of the lands were insufficient to pay the annuity, and the trustees required to borrow money to pay it on the security of the lands.

The widow and A agreed that she should disburden the lands for a certain sum, and that the trustees should on such payment convey the lands at once to A.

DISCHARGE—*Continued.*

In a special case by A and the trustees, *held* that the widow could not discharge the annuity, and that the trustees were not authorised to convey the lands to A. Cosens v. Stevenson, &c., June 26, 1873, p. 761.

DISPOSITION. See *Destination—Property*, 19—*Succession.*

DIVORCE. See *Husband and Wife.*

DONATION. See *Proof*, 4—*Husband and Wife.*

ENTAIL. *Tract of Future Time—Succession—Testament—Relief.*

1. *A person executed an entail of certain lands, binding himself, his heirs, executors, and successors whomsoever, to free and relieve these lands of all his debts and obligations. Thereafter, by antenuptial contract of marriage, the entailer settled upon his spouse, in the event of her surviving him, an annuity secured over the entailed lands, but with power to himself, his heirs, executors, and successors, to purchase in lieu thereof an annuity from an insurance company, in which case the widow was bound to discharge the entailed estate.* Held, *on a construction of the two deeds* (rev. *judgment of the First Division*), *that the obligation in the first deed to relieve the entailed estate of the granter's debts and obligations applied to the annuity with which the estate was burdened by the second deed, and that the heir of entail was entitled to be relieved of the annuity out of the entailer's general trust-estate.* Mackintosh v. Mackintosh's Trustees, May 19, 1873, H. L. p. 28.

Lease.

2. *Question*, Whether a lease granted by an heir of entail for a longer period than is allowed by the entail is good even for the period allowed. Forbes v. Wilson, Feb. 22, 1873, p. 454.

Heir and Executor—Apportionment—33 and 34 Vict. c. 35—Lease.

3. Farms on an entailed estate were let in accordance with local custom and the previous usage on the estate, with entry to the houses, grass, and hay lands at Whitsunday, and to the lands under crop at the separation of the crops from the ground. The rents were payable at Martinmas and Whitsunday for the half year preceding. The proprietor died on 18th July 1872. In a question between his executor and the next heir of entail, *held* that the rents payable at Martinmas 1872 were rents accruing at the date of his death, and fell to be apportioned between heir and executor under the Apportionment Act of 1870. Lord Herries v. Maxwell's Curator, Feb. 6, 1873, p. 396.

Destination.

4. A deed of entail contained a destination to A and the heirs-male to be procreate of her body, whom failing to the heirs whatsomever descending of her body. The narrative of the deed set forth that it was granted in implement of an obligation to dispone to A and the heirs of her body. *Held* that the narrative and the destination were not inconsistent with each other, and the whole class of heirs-male must be exhausted before heirs whatsoever could succeed. Erskine v. Earl of Kellie, July 4, 1873, p. 876.

Destination—Succession—Heir of Line—Heir of Conquest.

5. A person purchased an estate and entailed it upon himself and his heirs-male, and, after various substitutions, on his own heirs whatsoever. *Held* that, under the destination to his own heirs whatsoever, the heir of line was to be preferred to the heir of conquest. Mackintosh, &c. v. Ross, May 30, 1873, p. 636.

General Disposition—Special Destination—Institute—Presumption.

6. *A lady in possession of an entailed estate, to which she had succeeded as institute, executed a disposition and settlement whereby she specially conveyed to her nephew certain lands of which she was the fee-simple proprietrix, and generally her whole estates, heritable and moveable. After her death it was ascertained that the fettering clauses of the entail were directed merely against "the heirs of entail or substitutes" therein mentioned, and an action*

ENTAIL—*Continued.*

was raised by her disponee to have it declared that, as institute, she was not bound by the fetters, but was absolute fiar of the entailed estate, and that the same was carried to him by the general conveyance in her disposition and settlement. Held (aff. *judgment of Court of Session*) (1) *that the fettering clauses of the entail did not include the institute, and that, as fiar, she had power to dispose of the estate; but* (2) *that the general conveyance in her settlement did not carry the entailed lands.*

Opinion (per *Lord Chancellor*) *that general words, purporting to dispose of a man's whole property, in a will or* mortis causa *deed, are (unless there be something in the instrument itself to control that presumption) to be understood as applicable only to property the succession to which, after the death of the testator, is not already regulated by a special destination to a particular class of heirs in a prior instrument, either made by the settlor himself, or under which he holds.*

Observations *on the cases of Campbell v. Campbell, H.L., M.* 14,855, *and* 1 *Pat.* 343; *Farquharson v. Farquharson, M.* 2290; *Thoms v. Thoms,* ante, *vol. vi. p.* 704.

Observations (per *Lord Chancellor*) *on the admissibility of extrinsic evidence by the law of Scotland in the construction of testamentary deeds.*

Observed (per *Lord Colonsay*) *that from the cases on the effect of a general disposition in evacuating or superseding prior destinations of heritage the following inferences are deducible:*—(1) *That in determining what effect should be given to the words of general disposition the question has always been treated as one of presumption or presumed intention;* (2) *that a general disposition* mortis causa *does not derogate from a prior special destination, unless it be made clear that it was intended so to do;* (3) *that in dealing with such cases the Court has taken into consideration circumstances calculated to throw light on the intention or purpose of the testator, whether found within the deed or collected from external sources.*

Question (per *Lord Colonsay*) *whether a letter written by a testator after the date of his settlement may be referred to as extrinsic evidence in its construction.* Glendonwyn v. Gordon, &c., May 19, 1873, H. L. p. 33.

Destination.

7. *A deed of strict entail contained a destination to A, "and the heirs-male procreated of the marriage between A and" the entailer's daughter, "and the heirs-male of their bodies respectively; whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively; whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies respectively," &c.* Held (aff. *judgment of the Court of Session*) *that on the succession opening by the death of the eldest son of the said marriage without male issue, his only daughter, as heir whatsoever of his body, was entitled to take in preference to the next heir-male of the said marriage.* Forbes v. Trefusis, June 17, 1873, H. L. p. 44.

Prohibitory and Resolutive Clauses—Reservation—Act 1685, *c.* 22—11 *and* 12 *Vict. c.* 56, *sec.* 43.

8. A deed of entail containing prohibitions against alienation and contraction of debt, duly fenced by irritant and resolutive clauses, contained also a reservation of power to the heirs of entail to grant provisions to younger children to the extent of two years' rent, with power to sell portions of the estate sufficient to pay the debts thereby contracted. *Held (rev.* judgment of Lord Mackenzie) (1) that the entail was valid and effectual under the Act 1685, cap. 22; and (2) that being valid, it was not within the provisions of the 43d section of the Act 11 and 12 Vict. c. 36. Malcolm v. Kirk, &c., June 21, 1873, p. 722.

Prohibition—Irritancy.

9. A deed of entail contained prohibitions against alienation, contraction of debt, and altering the order of succession, and declared "all such deeds" null and void, and the person contravening to have lost all right to the estate. *Held* that the word "deeds" was sufficiently comprehensive to

ENTAIL—*Continued.*

embrace all that was contained in the prohibitory clause, and that the entail was valid. Malcolm v. Kirk, &c., June 21, 1873, p. 722.

Aberdeen Act (5 *Geo. IV. c.* 87)—*Provisions to Younger Children—Deductions from Free Rent.*

10. *Held* that in estimating the free rental on which provisions to younger children are to be fixed, under the Act 5 Geo. IV. c. 87, there falls to be deducted the interest of the provisions to which the younger children of a former proprietor may be entitled. Dunbar and Others v. Dunbar, Dec. 7, 1872, p. 200.

Inventory-Duty—23 *and* 24 *Vict. c.* 80—*Discharge—Confusion.*

11. The proprietrix of an estate under a deed of entail granted a bond of annualrent for improvement outlay under the Montgomery Act in favour of herself, her "heirs, executors, successors, and assignees," on which bond infeftment was taken. It was afterwards discovered that the entail was defective, and that she held the property in fee-simple. She thereupon executed a new deed of strict entail, expressly under burden of the above mentioned bond of annualrent, but with the provision that, in the event of her making no separate conveyance of it, it should accrue to the institute or heir of entail succeeding to the estates. She died without making any such separate conveyance.

Held that the bond of annualrent did not fall to be included in the inventory of the deceased's estate, under the statute 23 and 24 Vict. c. 80, as it was not *in bonis* of the deceased, there never having existed a proper relation of debit and credit between the entailed estate and her. Lord Advocate v. Marchioness of Lansdowne, Oct. 15, 1872, p. 6.

See *Heir and Executor.*

ERROR. *Agreement—Reduction—Fraud—Fraudulent Concealment.*

Residuary legatees under a settlement brought an action to reduce an agreement between them and other legatees under the settlement, averring that the defenders, taking advantage of the pursuers' ignorance of their rights and the amount of the succession, had by fraudulent misrepresentation and concealment induced them, greatly to their prejudice, to enter into the agreement. The defenders objected to an issue of fraudulent concealment, on the ground that there was no duty to disclose. *Held* that in entering upon the contract there was a duty of disclosure incumbent on the defenders, and that the pursuers were entitled to an issue of faudulent misrepresentation or fraudulent concealment. Dempsters v. Raes, July 1, 1873, p. 843.

See *Insurance.*

EXPENSES. *Divorce—Husband and Wife—Conjugal Rights Act*, 1861, *sec.* 7.

1. In an action of divorce brought by a husband against his wife and a co-defender with whom the principal defender was proved to have committed adultery, the Court found the co-defender liable to the pursuer in his whole expenses, taxed as between agent and client, including any expenses of his wife for which he might be found liable. Andrews v. Andrews, Feb. 7, 1873, p. 401.

Counsels' Fees.

2. In a question of expenses between party and party in a case in which the evidence was voluminous, and involved difficult questions of medical science—(1) fees to counsel for consultation before the debate in the Inner-House allowed; (2) the fees of medical men examined as experts upon the effect of the whole evidence fixed at ten guineas a-day; (3) fees of medical men called as witnesses to matters of fact, but who were also examined upon questions of medical opinion, also fixed at ten guineas a-day. Stewart v. Padwick and Another, Feb. 26, 1873, p. 467.

3. Where no objection was taken to the competency of an appeal in the Single Bills, but an objection taken by the Court at the hearing was argued and sustained, no expenses were allowed to either party. Shirra v. Robertson, June 7, 1873, p. 660.

EXPENSES—*Continued.*

Procurator-Fiscal—Tweed Fisheries Act, 1857, *sec.* 82; 31 *and* 32 *Vict.* c. 123 (*Tweed Fisheries* (*Scotland*) *Act*, 1868), *secs.* 18, 38, *and* 41; 27 *and* 28 *Vict. c.* 53—*Summary Procedure* (*Scotland*) *Act*, 1864, *sec.* 22.

4. The Tweed Fisheries Act, 1857, authorises an award of expenses against a person convicted of an offence under the Act. The Summary Procedure Act, 1864, provides that expenses shall not be awarded. *Held* that the former Act by implication authorised an award of expenses against a procurator-fiscal when the person accused was acquitted, and that therefore the provision of the Summary Procedure Act did not apply to such cases. Walker v. Bathgate, July 19, 1873, p. 956.

Jury Trial.

5. Circumstances in which the Court found a pursuer in a jury trial, who had failed in four out of five issues, neither entitled to nor liable in expenses.

Observed (*per* Lord President), that where in a jury trial expenses are to be divided according to the success of parties, the mode of effecting that division is not a merely haphazard division, giving a certain proportion to one party and so much to the other, but it must be ascertained through the Auditor what portion of the expenses is applicable to each point. Dean v. Walker, June 26, 1873, p. 759.

See *Process.*

FEU-CONTRACT. See *Superior and Vassal*, 1—*Property*, 5.

FISHINGS. *Prescription—Possession—River—Medium Filum.*

1. *Held* that the right which may be acquired by possession for forty years on a grant of salmon-fishings pertaining to lands situated on one side of a river (1) is not limited to the fishings in that part of the river which is *ex adverso* of the lands; and (2) may extend to fishings beyond the *medium filum* of the river. Earl of Zetland v. Tennent's Trustees, Feb. 26, 1873, p. 469.

Property—Possession—Bounding Charter—Medium Filum.

2. Where a proprietor had a right of salmon-fishings pertaining to lands described as lying within a county bounded by a river, which separated that from another county, *held* that the description applied to the lands and not to an incorporeal right attached to them, and that the possession following upon the title was not limited by the *medium filum* of the river.

Observed that, even if the title were ambiguous, possession, which was the proper interpreter of its meaning, had made it clear.

Observed that the *medium filum* is only of importance in determining rights of property in the *solum*, or making arrangements for the exercise of the right of fishing where opposite proprietors have each rights of fishings, but neither has had exclusive possession. Earl of Zetland v. Tennent's Trustees, Feb. 26, 1873, p. 469.

River—Possession—Prescription.

3. Where the right of salmon-fishing had been exercised from banks on the bed of a river for more than forty years, but, from changes in the river, new banks had been formed, one of which had existed for less than that period, *held* that the possession of the fishings from this new bank was only an exercise of the right of fishing previously exercised from the former banks, —the substantial right of fishing being the matter to be regarded, and not the particular stations from which the right was exercised. Earl of Zetland v. Tennent's Trustees, Feb. 26, 1873, p. 469.

Salmon-fishing—Prescription—Possession.

4. Circumstances in which *held* that a proprietor of a barony and of lands held under a crown grant *cum piscationibus*, had not had such prescriptive possession of salmon-fishings in the sea as to instruct a right of salmon-fishing. Lord Advocate v. M'Douall, June 13, 1873, p. 688.

Salmon-fishings.

5. A barony title which contains no express grant of salmon-fishings in the sea

FISHINGS—*Continued.*

may become a valid title when followed by prescriptive possession, provided that the possession can be ascribed to the title.

Circumstances in which the proprietor of a barony who had no express grant of salmon-fishing was held not to have had sufficient possession of salmon-fishings in the sea to instruct a right of salmon-fishing. Milne's Trustees v. Lord Advocate, July 19, 1873, p. 966.

Salmon-fishing—Possession.

6. *Held* that the proprietor of a barony who had not an express grant of salmon-fishings, had not instructed a right thereto by proving that the tenants of cottages on his estate had been in use to fish for salmon in the sea for their own behoof without paying rent therefor. Lord Advocate v. Hall, July 19, 1873, p. 967.

See *Property.*

FOREIGN. See *Arrestment.*

FORGERY. See *Writ—Agent and Principal*, 3.

FRAUD. *Agreement—Reduction—Fraudulent Concealment—Essential Error.*

Residuary legatees under a settlement brought an action to reduce an agreement between them and other legatees under the settlement, averring that the defenders, taking advantage of the pursuers' ignorance of their rights and the amount of the succession, had by fraudulent misrepresentation and concealment induced them, greatly to their prejudice, to enter into the agreement. The defenders objected to an issue of fraudulent concealment, on the ground that there was no duty to disclose. *Held* that in entering upon the contract there was a duty of disclosure incumbent on the defenders, and that the pursuers were entitled to an issue of fraudulent misrepresentation or fraudulent concealment. Dempsters v. Raes, July 1, 1873, p. 843.

See *Bankruptcy*, 5.

FRIENDLY SOCIETY.

By the rules of a friendly society, divided into lodges, a member who sustained an accident disabling him for life was entitled to a provision, on the lodge of which he was a member reporting in favour of his application therefor, and on the same being approved of by a majority of the whole lodges of the society, in which case the central committee of the society were directed to pay over the sum. *Held* that an action by a member to recover the above provision, directed against the lodge to which he belonged, and not against the society or its central committee, was incompetent.

Question as to the effect of a rule of a friendly society excluding the intervention of Courts of law in questions between the society and its members.

Observed (*per* Lord Deas) that although the society was by its rules the ultimate judge of any claim, a Court of law, notwithstanding the exclusion in the rules, might compel it to adhere to its rules in arriving at a determination. M'Kernan v. Greenock Lodge of United Operative Masons' Association, March 19, 1873, p. 548.

HEIR. *Testament, construction of—Next of Kin.*

1. A testatrix directed her trustees to sell certain heritable property particularly described, and her whole other means and estate, heritable and moveable, and after payment of legacies, &c., to pay over the residue "to my heir-at-law, whom failing, to my next of kin."

In a competition between cousins of testatrix claiming as her next of kin and a cousin's child claiming as her heir-at-law, *held* (*rev.* judgment of Lord Ormidale), that by the term "heir-at-law" the testatrix did not mean to denote her heirs *in mobilibus*, but her heir in heritage. Sillar's Trustees v. Stewart and Others, Nov. 29, 1872, p. 160.

Destination—Succession—Heir of Line—Heir of Conquest—Entail.

2. A person purchased an estate, and entailed it upon himself and his heirs-male, and, after various substitutions, on his own heirs whatsoever. *Held*

HEIR—*Continued.*
that, under the destination to his own heirs whatsoever, the heir of line was to be preferred to the heir of conquest. Mackintosh, &c. v. Ross, May 30, 1873, p. 636.
See *Destination—Entail—Property*, 9—*Succession*, 6, 7—*Trust*, 1.

HEIR AND EXECUTOR. *Tract of Future Time—Succession—Testament—Relief.*
1. *A person properly executed an entail of certain lands, binding himself, his heirs, executors, and successors whomsoever, to free and relieve these lands of all his debts and obligations. Thereafter, by antenuptial contract of marriage, the entailer settled upon his spouse, in the event of her surviving him, an annuity secured over the entailed lands, but with power to himself, his heirs, executors, and successors, to purchase in lieu thereof an annuity from an insurance company, in which case the widow was bound to discharge the entailed estate.* Held, *on a construction of the two deeds* (rev. *judgment of the First Division*), *that the obligation in the first deed to relieve the entailed estate of the granter's debts and obligations applied to the annuity with which the estate was burdened by the second deed, and that the heir of entail was entitled to be relieved of the annuity out of the entailer's general trust-estate.* Mackintosh v. Mackintosh's Trustees, May 19, 1873, H. L. p. 28.
Entail—Apportionment—33 and 34 Vict. c. 35—Lease.
2. Farms on an entailed estate were let in accordance with local custom and the previous usage on the estate, with entry to the houses, grass, and hay lands at Whitsunday, and to the lands under crop at the separation of the crops from the ground. The rents were payable at Martinmas and Whitsunday for the half year preceding. The proprietor died on 18th July 1872. In a question between his executor and the next heir of entail, *held* that the rents payable at Martinmas 1872 were rents accruing at the date of his death, and fell to be apportioned between heir and executor under the Apportionment Act of 1870. Lord Herries v. Maxwell's Curator, Feb. 6, 1873, p. 396.
See *Apportionment*, 3—*Succession*, 12.

HERITABLE AND MOVEABLE. *Succession—Bequest of Interest—Tract of Future Time.*
1. *Held* that a legacy of the annual interest for a series of years of a capital sum bequeathed to another legatee was a moveable right in the person of the legatee and of his heir *in mobilibus*, and that, on the death of the latter, his mother was entitled to participate in future payments of interest to the extent of a third under the Moveable Succession Act of 1855. Hill v. Hill, Dec. 21, 1872, p. 247.
Conversion—Trust—Power of Sale.
2. A testator directed his trustees, after certain liferents were satisfied, to divide his estate, which consisted chiefly of house property, into nine equal shares, and to "dispone, assign, and pay over" one of these shares to each of nine persons. The trustees were empowered to sell the whole or such part of the heritable property as they might think proper. *Held* that as a division of the estate was practically impossible without a sale, conversion took place, and that the shares of the beneficiaries formed part of their moveable succession. Fotheringham's Trustees, &c., July 2, 1873, p. 848.

HOMOLOGATION. See *Landlord and Tenant.*

HUSBAND AND WIFE. *Presumption—Pater est quem nuptiæ demonstrant—Parent and Child.*
1. In an action of filiation and aliment brought by a married woman against a man not her husband *held* that the presumption *pater est quem nuptiæ demonstrant* had been redargued, although there was possibility of access.
Question, Whether it was competent to call the pursuer's husband as a witness to prove non-access. Brodie v. Dyce, Nov. 29, 1872, p. 142.
Promise subsequente copula.
2. A man gave to a woman with whom he was cohabiting a written promise of

HUSBAND AND WIFE—*Continued.*

marriage in the following terms:—"I, A, do hereby promise to marry B, and provide for her according to my means until circumstances warrant such marriage—always providing that in the interim she continues to lead a virtuous and exemplary life." *Held* that the subsequent cohabitation did not prove *de præsenti* matrimonial consent, and that no marriage had been constituted. Surtees v. Wotherspoon, Feb. 6, 1873, p. 384.

Divorce—Mora.

3. *Held* that a husband who, while resident in Australia, had been cognisant of his wife's adultery at home for ten years before raising an action of divorce, was not barred by *mora*, since the adultery was continued till close on his return, immediately after which the action was raised.

Mora as a bar to an action of divorce must be such as to infer a *remissio injuriæ*. Hellon v. Hellon, Jan. 14, 1873, p. 290.

Divorce—Proof—Extrajudicial Confession—Adultery.

4. Circumstances which, coupled with evidence of extrajudicial acknowledgment of the illegitimacy of a child, *held* (*rev.* judgment of Lord Shand) sufficient to infer adultery on the part of a wife, and to entitle the husband to decree of divorce. Fullerton v. Fullerton, June 20, 1873, p. 720.

Annuity—Alimentary—Discharge.

5. A husband burdened certain lands with an annuity to his widow, declaring that it should be alimentary and not assignable, and should be exclusive of the *jus mariti* of any husband she might marry. He directed his trustees upon the death of his widow to convey the lands to A. The free rents of the lands were insufficient to pay the annuity, and the trustees required to borrow money to pay it on the security of the lands.

The widow and A agreed that she should disburden the lands for a certain sum, and that the trustees should on such payment convey the lands at once to A.

In a special case by A and the trustees, *held* that the widow could not discharge the annuity, and that the trustees were not authorised to convey the lands to A. Cosens v. Stevenson, &c., June 26, 1873, p. 761.

Marriage-Contract.

6. A husband in his antenuptial marriage-contract disponed lands in favour of himself and the heirs to be procreated of his body, and his or their assignees. *Held* that the heir of the marriage had a protected right of succession, which his father was not entitled to defeat gratuitously. Earl of Glasgow's Trustee v. Earl of Glasgow, &c., Dec. 13, 1872, p. 218.

General Settlement—Approbate and Reprobate—Negative Prescription.

7. A father executed a trust-deed for payment of certain debts and regulating his succession *in fraudem* of his antenuptial marriage-contract, and to the prejudice of the heir of the marriage, and afterwards another trust-deed, the two forming together a complete settlement of his whole estate, heritable and moveable. The heir made up a title under the marriage-contract, and under it possessed the lands contained in the first trust-deed, and took benefit under the second deed, but in ignorance of the existence of the first trust-deed. *Held* that his trustees and executors were not barred by the negative prescription from challenging the earlier deed, but were entitled to elect either to abide by his approbation of his father's settlement or to renounce and restore the benefit he had taken, and challenge the first deed. Earl of Glasgow's Trustee v. Earl of Glasgow, &c., Dec. 13 1872, p. 218.

Trust-disposition—Revocation.

8. By mutual trust-disposition and settlement a husband and wife, who had no antenuptial marriage-contract, disponed to trustees the whole property heritable and moveable, which should belong to them or either of them at the death of the first deceaser, with directions that upon that event the trustees should take an inventory of the whole estate, and should hold

HUSBAND AND WIFE—*Continued.*

one-half thereof subject to the liferent of the survivor for behoof of the relatives of the first deceaser. The spouses reserved full power to alter the deed during their joint lives, and the wife declared the provisions in her favour to be in full of her legal claims. *Held* that the trust-deed was not revocable by the surviving husband, and that the right of the relatives of the wife vested in them at her death. Kerr v. Ure, &c., June 28, 1873, p. 780.

Divorce—Conjugal Rights Act, 1861, *sec.* 7.

9. In an action of divorce brought by a husband against his wife and a co-defender with whom the principal defender was proved to have committed adultery, the Court found the co-defender liable to the pursuer in his whole expenses, taxed as between agent and client, including any expenses of his wife for which he might be found liable. Andrews v. Andrews, Feb. 7, 1873, p. 401.

Cessio Bonorum.

10. The pursuer in a process of *cessio* refused to execute a revocation of a disposition of a property of the value of £50 which he had granted to his wife when he was solvent. *Held* that his refusal was not a sufficient reason for refusing to grant the *cessio*. Donaldson v. Thomson, Jan. 25, 1873, p. 347.

See *Poor—Succession—Writ—Delivery.*

INHIBITION. See *Diligence*, 2.

INSURANCE. *Warrandice—Error—Failing to disclose material facts.*

1. In a reduction of a policy of life assurance *held* (1) that a warranty by the assured of the truth of her statements in regard to her health was not a warranty that she had no disease, known or unknown, but merely that, so far as within her own knowledge, she had none; and (2) that the failure to disclose a material fact was not a ground for reduction of the policy, in respect that she did not know it to be material, and that persons without medical knowledge could not be expected to know that it was so. Life Association of Scotland v. Foster, Jan. 31, 1873, p. 351.

Conditions.

2. A and Co., a firm of manufacturing chemists, consisting of A, B, and C, obtained in name of the firm a policy of fire insurance over their works, which contained a condition that the policy should "cease to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by will or operation of law, unless notice thereof be given" to the insurance company. After an agreement had been entered into by the partners to transfer the works to B, and after a notice had been published in the "Gazette" that A had retired from the firm, and that the business would in future be carried on by B and C under a different name, but before notice had been given to the insurance company, a fire took place.

In an action raised in name of the old firm against the insurance company under the policy, *held* that the irritancy had not been incurred, in respect that the main interest under the policy had continued to be from the first in B, and that the conditions on which the right of the new firm to a transfer of the works depended had not yet been purified. Forbes and Co. v. Border Counties Fire Office, Jan. 14, 1873, p. 278.

See *Ship*, 2.

INTERDICT.

1. In an application for interdict against the use of a trade mark, *held* that it was not necessary to prove actual injury sustained, but merely reasonable ground for the apprehension of injury. Singer Manufacturing Co. v. Kimball and Morton, Jan. 14, 1873, p. 267.

River—Pollution—Verdict—Declaratory conclusions—Motion for Decree.

2. Riparian proprietors on a private stream brought an action of declarator and

INTERDICT—*Continued.*

interdict against the owners and tenants of paper-mills on the stream to prevent pollution, and upon issues whether the defenders did by discharging refuse into the stream pollute the same to the nuisance of the pursuers obtained a verdict of a jury in 1866. The defenders thereafter, under an agreement with the pursuers, conducted experiments with a view to abate the nuisance. In 1873 the pursuers moved for decree. *Held* (1) that they were entitled to declarator; and (2) after a statement by the defenders that they had no proposals to make, that the pursuers were entitled to interdict. Duke of Buccleuch, &c. v. Cowan, &c., June 10, 1873, p. 675.

Trade Mark—Maker's name.

3. The manufacturer of a sewing machine of a certain construction, which was not patented, had been in use to sell it, under his own name, for a series of years, and the name had thus obtained an exclusive meaning in the trade as signifying a machine of his manufacture. *Held* that the name had become the property of the manufacturer as a trade mark, and that no one else was entitled to use it. Singer Manufacturing Co. v. Kimball and Morton, Jan. 14, 1873, p. 267.

INVENTORY. *Inventory Duty—23 and 24 Vict. c. 80—Discharge—Confusion—Entail.*

The proprietrix of an estate under a deed of entail granted a bond of annualrent for improvement outlay under the Montgomery Act in favour of herself, her "heirs, executors, successors, and assignees," on which bond infeftment was taken. It was afterwards discovered that the entail was defective, and that she held the property in fee-simple. She thereupon executed a new deed of strict entail, expressly under burden of the above mentioned bond of annualrent, but with the provision that, in the event of her making no separate conveyance of it, it should accrue to the institute or heir of entail succeeding to the estates. She died without making any such separate conveyance.

Held that the bond of annualrent did not fall to be included in the inventory of the deceased's estate, under the statute 23 and 24 Vict. c. 80, as it was not *in bonis* of the deceased, there never having existed a proper relation of debit and credit between the entailed estate and her. Lord Advocate v. Marchioness of Lansdowne, Oct. 15, 1872, p. 6.

ISSUE. *Agreement—Reduction—Fraud—Fraudulent Concealment—Essential Error.*

1. Residuary legatees under a settlement brought an action to reduce an agreement between them and other legatees under the settlement, averring that the defenders, taking advantage of the pursuers' ignorance of their rights and the amount of the succession, had by fraudulent misrepresentation and concealment induced them, greatly to their prejudice, to enter into the agreement. The defenders objected to an issue of fraudulent concealment, on the ground that there was no duty to disclose. *Held* that in entering upon the contract there was a duty of disclosure incumbent on the defenders, and that the pursuers were entitled to an issue of fraudulent misrepresentation or fraudulent concealment. Dempsters v. Raes, July 1, 1873, p. 843.

Slander—Counter Issue—Veritas Convicii.

2. Circumstances in which *held* that it was necessary for a defender in an action of damages for slander who pleaded *veritas* to put in his counter issue the words used in the libel. Ogilvy v. Paul and Others, June 28, 1873, p. 776.

Process—Slander—Veritas.

3. A visitor at a hotel made an entry in the visitors' book to the effect that he had visited most of the hotels in Scotland, but that he had nowhere "encountered so much drinking or so much squalid untidiness and dirt."

In an action of damages brought by the hotel-keeper against the writer the latter pleaded *veritas*. In adjusting issues, *held* that while the pur-

ISSUE—*Continued.*

suer was entitled to the issue, whether the entry falsely, maliciously, and calumniously, represented that the pursuer kept his hotel in a state of squalid untidiness and dirt, and permitted persons to drink therein to excess, all to such a degree as to distinguish it in these respects from most of the hotels in Scotland, and to cause discomfort and annoyance to visitors to and residents in the hotel, the defender did not require to put in his counter issue more than whether on or about the date of the entry there was an excessive amount of drinking in the hotel, and whether the hotel on said days was in a state of much squalid untidiness and filth. M'Iver v. M'Neill, June 28, 1873, p. 777.

Wrongous Use of Diligence—Malice—Bill.

4. In an action of damages for injury alleged to have been caused by the defenders recording a protest for non-payment of a bill, and charging thereon, although the bill had been previously paid eight days after it had become due, *held* that a charge was a diligence and not a judicial act, and that therefore it was not necessary to put malice in the issue (Lord Benholme *diss.*, on the ground that the circumstances shewed fault on the part of the pursuer, and that therefore it was not sufficient for him to prove merely a legal wrong).

Form of issue adjusted, Gibb v. Edinburgh Brewery Co., June 19, 1873, p. 705.

JOINT ADVENTURE.

Observed (*per* Lord Neaves), that when parties are engaged mutually in promoting an object of common interest, and the expenses entailed in furthering that object are thrown on one of the parties, then, when that expenditure fails of obtaining the end aimed at, the party-disburser must be recompensed, as being the disburser for a common object. Dobie v. Lauder's Trustees, June 24, 1873, p. 749.

JOINT STOCK COMPANY. *Reparation—Director.*

1. By the contract of copartnery of a joint stock banking company it was declared that no shareholder could be legally a director who resided permanently more than ten miles distant from the head office, and that a director ceased to be one if he had not attended a meeting of directors for six months. In an action by the bank and its liquidators against a shareholder who had been elected and occasionally acted as a director for loss said to have been caused by his gross negligence, *held* that the defender, having assumed the position of a director, and acted as such, could not plead these clauses of the contract in bar of the action. Western Bank v. Baird's Trustees, Nov. 22, 1872, p. 96.

Director—Reparation—Negligence—Personal Bar—Process.

2. In an action brought by a joint stock banking company and its liquidators against a person who had been a director for payment of "the amount of loss and damage due by the defender to the bank" as at the date when he ceased to be a director (five years before the stoppage of the bank) *Held* (1) that the books of the bank referred to in the summons were to be regarded as part of the pursuer's statement; (2) that with regard to alleged loss by advances on accounts-current which were closed at the time when the defender ceased to be a director the pursuer had set forth a case sufficiently relevant to be admitted to probation; (3) that the defender could not be made liable for loss on advances on accounts-current to those persons to whom the bank had continued to make advances after the defender had left office, and further, that the pursuer had not made a relevant averment of the loss on these earlier advances; (4) that any liability which the defender might have incurred in allowing the advances by way of discounts on bills had been extinguished by the subsequent actings of the bank in renewing the bills and in making new advances; (5) that any liability for loss by insurances on the lives of debtors of the bank had been extinguished by the

JOINT STOCK COMPANY—*Continued.*

sale of the policies by the bank, without notice to the defender; (6) that as the summons, with the books referred to in it, disclosed facts which excluded the action *quoad* certain items the proper form of interlocutor was one dismissing the action to that extent. Western Bank v. Baird's Trustees, Nov. 22, 1872, p. 97.

JUDICIAL FACTOR. *A. S. 13th February* 1730—*Penalty.*

1. *Held* that under the Act of Sederunt a factor who has failed to lodge accounts annually is liable to a minimum penalty of half a year's salary for each year in which he has so failed. Lowe (Petitioner), Oct. 19, 1872, p. 17.

Process—Petition—Tutor.

2. In an action of giving up tutorial inventories the tutors called as defenders the nearest relatives of the pupil resident in Scotland, and presented a petition to the Court to dispense with the citation of the next of kin who were resident in England. The Court expressed some doubt as to the necessity of the application, but after inquiry, ordered intimation in common form. Buchan, &c., June 7, 1873, p. 662.

JURISDICTION. 25 *and* 26 *Vict. c.* 35.

1. When an inferior Court exceeds its power the Court of Session may reduce the decree, although bearing to be under an Act which excludes reduction. Ashley v. Magistrates of Rothesay, June 20, 1873, p. 708.

Administration of Justice—Corruption—Irregularity—Valuation Act.

2. Allegations of private communications between the Judges of the Valuation Appeal Court and the assistant Solicitor of Inland Revenue which *held* irrelevant to support a conclusion for the reduction of judgments following thereon, it being the duty of the Solicitor of Inland Revenue to lay the special case for appeal before the Judges and get their opinion thereon. Stirling and Sons v. Holm and Others, Feb. 28, 1873, p. 480.

Valuation of Lands (Scotland) Acts—Valuation Appeal Court.

3. The Valuation Appeal Court is a Supreme Court, and its proceedings cannot be set aside by the Court of Session on the ground that they are *ultra vires* and incompetent. Stirling and Sons v. Holm and Others, Feb. 28, 1873, p. 480.

Title to Sue—Sheriff—Servitude—Thirlage—Petitory and Possessory Actions—Statute 1 *and* 2 *Vict. c.* 119, *sec.* 15.

4. *Held* that an action by the tenant of a mill for abstracted multures, involving a question as to the extent of the thirl, was competent in the Sheriff-court under the 15th section of the Sheriff-court Act, 1838 (1 and 2 Vict. c. 119), being an action relative to a question touching the constitution of a prædial servitude—Lord Deas dissenting, on the ground that the section did not apply, the action not being raised by a person who had a title to try a question relative to the constitution of a heritable right; but holding that it was competent in the Sheriff-court as a possessory action.

Observations (*per* Lord Deas) on the distinction between petitory and possessory actions.

Question, whether an action of declarator of the constitution of a right of thirlage is competent in the Sheriff-court. Stobbs v. Caven, March 14, 1873, p. 530.

Reparation—Wrongous Apprehension—Limitation of time for raising Action—Statutes—Summary Procedure Act, 1864, 27 *and* 28 *Vict. c.* 53, *sec.* 35—*Day Trespass Act*, 2 *and* 3 *Wm. IV. c.* 68, *sec.* 11.

5. A complaint, instituted under the Summary Procedure Act, charged a contravention of the Day Trespass Act (which authorises a Justice of Peace to grant warrant for the apprehension of a person accused, before service of the complaint, "if he shall have reason to suspect from information upon oath that the party is likely to abscond"), and set forth that the two persons accused were found trespassing in search of game and had refused to give their names or addresses. On a deposition on oath by one witness to the

JURISDICTION—*Continued.*

truth of these statements a Justice of the Peace, before the complaint had been served, issued a warrant for the apprehension of the accused, and they were accordingly apprehended. Five months after one of the accused raised an action of damages for wrongous apprehension against the complainers' law agent and two officers of police, on the ground that the Justice was not entitled under the Day Trespass Act to issue the warrant of apprehension before the complaint was served, without having information on oath that the accused was likely to abscond. *Held* that, although the proceedings had been irregular, there had not been such a deviation from the statute as to deprive the defenders of the protection of sec. 35 of the Summary Procedure Act, which requires that all actions arising out of proceedings under it shall be brought within two months, and therefore that the action fell to be dismissed. Murray v. Allan, Nov. 29, 1872, p. 147.

JUS RELICTÆ. See *Mora.*

LANDLORD AND TENANT. *Lease—Constitution—Rei interventus—Homologation—Removing—A. S. 14th December* 1756.

1. *Held,* in an action of removing, brought on the footing that the tenancy was yearly, that a valid and binding lease for years had been constituted by a written offer from the intending tenant, stating rent and ish, combined with circumstances, both before and after its date, which inferred acceptance by the landlord or his agents, and followed by such outlay on the tenant's part as amounted to *rei interventus.* Forbes v. Wilson, Feb. 22, 1873, p. 454.

Entail—Lease.

2. *Question,* Whether a lease granted by an heir of entail for a longer period than is allowed by the entail is good even for the period allowed. Forbes v. Wilson, Feb. 22, 1873, p. 454.

Draft Lease—Rei Interventus.

3. Circumstances in which *held* that a draft lease of a farm had been validated *rei interventu,* so as to constitute a valid lease for nineteen years. Bathie v. Lord Wharncliffe, March 6, 1873, p. 490.

*Entail—Heir and Executor—Apportionment—*33 *and* 34 *Vict. c.* 35*—Lease.*

4. Farms on an entailed estate were let in accordance with local custom and the previous usage on the estate, with entry to the houses, grass, and hay lands at Whitsunday, and to the lands under crop at the separation of the crops from the ground. The rents were payable at Martinmas and Whitsunday for the half year preceding. The proprietor died on 18th July 1872. In a question between his executor and the next heir of entail, *held* that the rents payable at Martinmas 1872 were rents accruing at the date of his death, and fell to be apportioned between heir and executor under the Apportionment Act of 1870. Lord Herries v. Maxwell's Curator, Feb. 6, 1873, p. 396.

Subject of Lease—Rent—Retention.

5. A gas company let to a tenant a piece of ground adjoining their works, with right to the whole ammoniacal liquor and tar produced at their gas-work, at a rent of £130. *Held* that an averment by the tenant that the company had not implemented the contract by supplying the whole tar, &c. was a relevant defence in a petition for sequestration for the stipulated rent. Kilmarnock Gas-Light Co. v. Smith, Nov. 9, 1872, p. 58.

Nuisance.

6. An action was brought by A against B, a neighbouring proprietor, and C, his tenant, for declarator that they were not entitled to carry on at the premises occupied by C a manufacture whereby a nuisance was created to the pursuer. B, in the missives of lease between him and C, had stipulated that C should "not erect any buildings or others at the farina works carried on by him without the express permission of the proprietor in writing, and should not have anything about said premises that should be a nuisance

LANDLORD AND TENANT—*Continued.*

to the property or to the public." *Held* that as B did not prevent the use of the water and the erection of buildings, &c. by C, and as he had appeared and defended the actions, on grounds implying the assertion of more serious rights than those claimed by the tenant, the findings as to nuisance and expenses must be directed against him as well as the tenant. Robertson v. Stewarts and Livingston, Dec. 6, 1872, p. 189.

Minerals—Reparation—Lease—Relief.

7. By an agreement between a railway contractor and a landed proprietor the former was allowed to take building-stone for a viaduct from any part of certain lands, at a certain rate per superficial yard, of whatever depth, the contractor being bound to make good all surface damages, and fill up the quarry when his contract was completed. The contractor opened a quarry near the bank of a river, and in consequence of his operations water flowed into the quarry and thence into an old coal-waste which communicated with going coal-mines on the estate of the same proprietor. The lessee of the minerals brought a process of suspension and interdict, in which the contractor was ordered to execute certain works, and was found liable in the expenses of process. In an action of relief brought by the contractor against the proprietor, *held* that the agreement was not a lease, and the pursuer was not entitled to be relieved by the proprietor, either of the sums which he had been obliged to expend for the protection of the coal-mines, or of the expenses of the former process. Brand and Son v. Bell's Trustees, Nov. 6, 1872, p. 42.

Lease—Sterility.

8. Held (*in* aff. *judgment of the Court of Session*) *that a tenant was not entitled to reduce a lease of minerals on the ground that they could not be worked to profit, even if no rent were to be paid.*

Observations *on sterility as a ground for reducing agricultural and mineral leases.* Gowans v. Christie, Feb. 14, 1873, H. L. p. 1.

Lease—Testament—Titles to Land Act, 1868, 31 *and* 32 *Vict. c.* 101, *sec.* 20.

9. A person who carried on the business of an innkeeper, in premises of which he held a long lease, left testamentary writings in these terms:—"I do hereby bequiath, in event of my death before my wife H. E., the whole of property ether in money, bonds, debets, bussness, and other affects whatsoever, ... and I appoint H. E., my wife, heir and executor of this my last will and testament." *Held* (*diss.* Lord Ardmillan) that the words could not be so construed as to include the lease of the inn. Edmond v. Edmond, Jan. 30, 1873, p. 348.

LEASE. See *Landlord and Tenant—Church—Entail*, 2, 3—*Heir and Executor*, 2.

LEGITIM. See *Parent and Child.*

LIFERENT AND FEE. See *Trust*, 4, 9.

LOAN. *Proof—Deposit-Receipt.*

1. In an action brought for payment of a sum of money, "being the amount contained in a deposit-receipt in name of the pursuer uplifted by the defender," the defender stated that he had received the deposit-receipt bearing the pursuer's endorsation from a third party, the true owner of the money, and to whom he had accounted for it. *Held* (1) that in so far as the action was or might be rested on an alleged loan by the pursuer to the defender such ground of action could not be proved by parole evidence, and that the only writing of the defender founded on in proof of it, being the defender's name written on the back of the deposit-receipt, was not legal proof of such loan, nor sufficient to render parole proof admissible; (2) that, in so far as the action was rested on the defender's alleged intromission with the pursuer's funds, the parole evidence had negatived the pursuer's case. Nimmo v. Nimmo, Feb. 22, 1873, p. 446.

LOAN—*Continued.*

Writ—Resting Owing—Donation.

2. *Held* that a loan of money was not instructed by letters in which the acknowledgment of the receipt of money was qualified by the statement that it was received in payment of a debt of honour.

Opinion (*per* Lord Neaves) that proof of the receipt of money by the writ of the receiver only raises a presumption of loan in cases where the acknowledgment is contained in a document delivered to the disburser by the recipient as a record of the transaction. Duncan's Trustees v. Shand, Jan. 7, 1873, p. 254.

MANDATE. See *Agent and Principal*, 3—*Usage.*

MARCHES, STRAIGHTENING OF. See *Property.*

MARRIAGE. See *Husband and Wife.*

MARRIAGE-CONTRACT. See *Husband and Wife—Parent and Child—Approbate and Reprobate.*

MASTER AND SERVANT. *Statute* 30 *and* 31 *Vict. cap.* 141 (*Master and Servant Act*, 1867), *secs.* 4, 9, 13—*Fine.*

1. The Master and Servant Act, 1867, empowers the Court before whom a complaint is laid, if the same is found proven, to award compensation to the complainer or to impose a fine, and if a fine is imposed, they may direct that a part, but not exceeding one-half, be applied to compensate the complainer. In a conviction under the statute, the Justices adjudged the person complained against to pay a fine to the complainer. *Held*, in a suspension of the sentence, that the conviction was bad, in respect that the entire fine was directed to be paid to the complainer, contrary to the terms of the statute. Galt v. Ritchie, July 19, 1873, p. 971.

Complaint—Alternative Penalties.

2. A complaint simply praying that the employed be summoned and adjudicated upon under sections 4 and 9 of the Master and Servant Act, 1867, is unobjectionable, although various alternative penalties are set forth in section 9. Galt v. Ritchie, July 19, 1873, p. 971.

See *Reparation.*

MEMBER OF PARLIAMENT. *Franchise—Parish Schoolmaster*—24 *and* 25 *Vict. c.* 107 (*Parochial and Burgh Schools* (*Scotland*) *Act*, 1861), *sec.* 18.

1. By sec. 18 of the above Act it is provided that in any arrangement for the retirement of a schoolmaster the schoolmaster's house, &c. shall be made over "to the person actually discharging the duties of schoolmaster." *Held* that the proviso did not apply to the case of a schoolmaster who had, on account of bad health, been allowed to employ an assistant for a period of years to discharge his duties, but had not retired. Home v. Paterson, Oct. 21, 1872, p. 1.

Franchise—Valuation-Roll—Proof of Value—Valuation Act, 1856, 17 *and* 18 *Vict. c.* 91, *sec.* 34.

2. Certain subjects were entered on the valuation-roll of 1871-72 as of the annual value of £12, and on the valuation-roll of 1872-73 as of the annual value of £16. The assessor stated that the value for 1871-72 was truly £14, and that it should have been so stated in the valuation-roll. *Held* that the statement of the assessor that the valuation-roll was wrong could not be admitted to contradict the valuation-roll. Sandilands v. Home, Oct. 21, 1872, p. 3.

Franchise—Tenancy—Precarious Possession.

3. A person occupied a house, garden, and lands belonging to his brother under a verbal agreement that he should pay the taxes and feu-duties, and keep them in repair, with power to sublet. *Held* that the occupant had right to the franchise as tenant of the subjects. Rutherford v. Dunn, Oct. 21, 1872, p. 4.

MINERALS. *Landlord and Tenant—Reparation—Agreement to allow building stone to be taken out of lands at a specified rate—Lease—Relief.*

1. By an agreement between a railway contractor and a landed proprietor the former was allowed to take building stone for a viaduct from any part of certain lands, at a certain rate per superficial yard, of whatever depth, the contractor being bound to make good all surface damages, and fill up the quarry when his contract was completed. The contractor opened a quarry near the bank of a river, and in consequence of his operations water flowed into the quarry and thence into an old coal-waste which communicated with going coal-mines on the estate of the same proprietor. The lessee of the minerals brought a process of suspension and interdict, in which the contractor was ordered to execute certain works, and was found liable in the expenses of process. In an action of relief brought by the contractor against the proprietor, *held* that the agreement was not a lease, and the pursuer was not entitled to be relieved by the proprietor, either of the sums which he had been obliged to expend for the protection of the coal-mines, or of the expenses of the former process. Brand and Son v. Bell's Trustees, Nov. 6, 1872, p. 42.

Landlord and Tenant—Lease—Sterility.

2. Held (*in* aff. *judgment of the Court of Session*) *that a tenant was not entitled to reduce a lease of minerals on the ground that they could not be worked to profit, even if no rent were to be paid.*

Observations *on sterility as a ground for reducing agricultural and mineral leases.* Gowans v. Christie, Feb. 14, 1873, H. L. p. 1.

Superior and Vassal—Feu-Contract.

3. *A superior bound his vassal to build and maintain on his feu a house of a certain value, and reserved to himself the minerals, with power to work them at pleasure, and to remove as much stone, &c., as might be necessary for the proper working of the minerals, it being expressly agreed that he should not be liable for any damage to the vassal that might happen through the working of the coal, &c., by longwall workings or otherwise.* Held (reversing *judgment of the Second Division*) *that the vassal was not entitled to an interdict against the superior working the minerals under his house on the ground that the workings would probably injure or destroy it.* Buchanan, &c. v. Andrew, March 10, 1873, H. L. p. 13.

Property—Title—Precept of Clare Constat—Reservation.

4. A was infeft upon a feu-contract by which certain lands were conveyed to him without reservation of mines and minerals. Upon A's death his son B was infeft in the lands upon a precept of *clare constat*, which contained an express exception and reservation of the mines and minerals to the superior. Upon B's death his son C, having been infeft in the said lands, sold them. Subsequently D, having served heir in special in the mines and minerals to A, brought an action of declarator of his right to them against the superior and the proprietors of the *dominium utile* of the lands, on the ground that they still remained *in hæreditate jacente* of A. *Held* that the exception and reservation of mines and minerals in the precept of *clare constat* was inept, and did not limit the precept as a warrant for infeftment in the fee of the lands, and therefore that there was nothing *in hæreditate jacente* of A which D by service to him could take up. Boyd v. Bruce and Others, Dec. 20, 1872, p. 243.

MINOR. *Tutors and Curators—Statute* 1696, *c.* 8—*Deathbed.*

A father appointed his testamentary trustees to be tutors and curators to his children, declaring that if the nomination should fall, a prior nomination of tutors and curators should take effect. The second nomination having fallen as regarded the appointment of curators, not having been executed *in liege poustie*, *held* that the nomination of tutors subsisted, the nomination of tutors and curators being separate. Greig v. Greig, Oct. 19, 1872, p. 20.

MORA. *Taciturnity—Acquiescence—Jus relictæ.*

1. A widow was maintained during the eleven years of her viduity by her eldest

MORA—*Continued.*

son, who was her husband's executor, during which time she made no claim for *jus relictæ*. In an action brought by her representatives fifteen years after her death against the representatives of her son, *held* (1) that the claim was not barred by *mora* and acquiescence; but (2) that sums expended by the son in the widow's maintenance fell to be set off against the claim for *jus relictæ*. Mackenzie v. Mackenzie's Trustees, June 12, 1873, p. 681.

Husband and Wife—Divorce.

2. *Held* that a husband who, while resident in Australia, had been cognisant of his wife's adultery at home for ten years before raising an action of divorce, was not barred by *mora*, since the adultery was continued till close on his return, immediately after which the action was raised.

Mora as a bar to an action of divorce must be such as to infer a *remissio injuriæ*. Hellon v. Hellon, Jan. 14, 1873, p. 290.

NUISANCE. *Property.*

1. Circumstances in which a farina manufactory was held to be a nuisance to a neighbour, in respect both of the discharges therefrom into a stream bounding his property, and of occasional and temporary annoyance from the smell of the settling tanks. Robertson v. Stewarts and Livingstone, Dec. 6, 1872, p. 189.

Landlord and Tenant.

2. An action was brought by A against B, a neighbouring proprietor, and C, his tenant, for declarator that they were not entitled to carry on at the premises occupied by C a manufacture whereby a nuisance was created to the pursuer. B, in the missives of lease between him and C, had stipulated that C should "not erect any buildings or others at the farina works carried on by him without the express permission of the proprietor in writing, and should not have anything about said premises that should be a nuisance to the property or to the public." *Held* that as B did not prevent the use of the water and the erection of buildings, &c., by C, and as he had appeared and defended the actions, on grounds implying the assertion of more serious rights than those claimed by the tenant, the findings as to nuisance and expenses must be directed against him as well as the tenant. Robertson v. Stewarts and Livingston, Dec. 6, 1872, p. 189.

OATH. *Reference to Oath—Bill of Exchange—Discharge.*

In an action on a prescribed bill the defender, on a reference to his oath, deponed that he had received the money and had paid interest for some years, that he offered repayment of the principal sum, but that the creditor told him he did not want it, and that he was to keep it for his own use. The debtor paid no interest after that time, but the bill was not given to him or destroyed. *Held* that the oath was affirmative of the reference, in so far as regarded the capital sum. Balfour v. Simpson, May 16, 1873, p. 604.

See *Proof*, 2.

OBLIGATION. See *Agreement.*

PARENT AND CHILD. *Legitim—Discharge—Marriage-Contract—Provisions—Foreign.*

1. In an action for legitim brought by the only child of a domiciled Scotsman against the executrix of his father, the defender alleged that the pursuer's claim was excluded by an antenuptial marriage-contract executed by his parents when domiciled in England, averring that by this deed two sums of £5000 and £6000 were conveyed by the spouses respectively in trust for behoof of the children of the marriage, and that, according to the law of England, the provisions made in the marriage-contract in favour of the issue of the marriage operated as a full discharge of all legal and other claims which the issue so provided for could prefer against the succession of their parents, or in respect of the death of either of them, and that the pursuer had accepted of these provisions, and by so doing had discharged all other claims against his father's estate. *Held* that the defender's averments

PARENT AND CHILD—*Continued.*

in regard to the terms of the marriage-contract and its effect by the law of England were not relevant averments of such a deed as by the law of Scotland would exclude a claim for legitim. Trevelyan v. Trevelyan, March 11, 1873, p. 516.

Collatio inter liberos.

2. Advances made by a father to his child cannot be imputed to account of legitim, except in a question with other children entitled to legitim. Trevelyan v. Trevelyan, March 11, 1873, p. 516.

Presumption—Pater est quem nuptiæ demonstrant.

3. In an action of filiation and aliment brought by a married woman against a man not her husband *held* that the presumption *pater est quem nuptiæ demonstrant* had been redargued, although there was possibility of access.

Question, Whether it was competent to call the pursuer's husband as a witness to prove non-access. Brodie v. Dyce, Nov. 29, 1872, p. 142.

Marriage-Contract.

4. A husband in his antenuptial marriage-contract disponed lands in favour of himself and the heirs to be procreated of his body, and his or their assignees. *Held* that the heir of the marriage had a protected right of succession, which his father was not entitled to defeat gratuitously. Earl of Glasgow's Trustee v. Earl of Glasgow, &c., Dec. 13, 1872, p. 218.

Legacy—Cumulative Provisions.

5. A father in his daughter's antenuptial marriage-contract bound himself to pay at his death a sum of £1000 to her marriage-contract trustees. He afterwards executed a trust-disposition and settlement, by which he directed his trustees to pay his debts, and divide the residue of his estate equally among his children. *Held* that the provision in the marriage-contract was a debt due by the deceased, and was not to be deducted from the daughter's share of residue. Elliot v. Bowhill, &c., June 21, 1873, p. 735.

PARISH. See *Church.*

PARTNERSHIP. See *Joint Adventure—Joint Stock Company.*

PATENT. *Provisional Specification—15 and 16 Vict. cap. 83.*

1. The title of a patent under the Act 15 and 16 Vict. cap. 83, is explained by the provisional specification, and where it is pleaded that a patent is invalid in consequence of the final specification embracing too much, the final specification is to be compared with the title and the provisional specification read together. Dudgeon v. Thomson, July 4, 1873, p. 863.

Specification—Misrepresentation.

2. A patent was objected to on the ground of misrepresentation in the specification, which set forth that the principle of the invention was expansion of boiler tubes by means of rollers which could be worked by the hand, whereby the use of mauls or sledge hammers could be dispensed with, while, in point of fact, the machine could not be worked without the use of hammers. It was proved that the machine could not be inserted in the tubes without the force of hammers, and that though it was possible to work the machine afterwards without hammers, it could not be used to advantage without the use of small hammers. *Held* that there was no such misrepresentation as to invalidate the patent. Dudgeon v. Thomson, July 4, 1873, p. 863.

Infringement.

3. Circumstances in which held that a patentee of a machine had infringed upon a prior patent, notwithstanding some minor differences, amounting to improvements in construction. Dudgeon v. Thomson, July 4, 1873, p. 863.

POOR. *Settlement—Husband and Wife.*

1. An Irishman residing in Scotland, where he had no settlement, deserted his wife, who was a Scotchwoman, and went to reside in another part of Scotland, concealing his place of residence, and contributing nothing to the support of his wife and family. The wife became insane, and she and the family were supported by the parish in which they were found.

POOR—*Continued.*

Held that the wife's birth parish was bound to relieve that parish of the sums expended, although the husband was able-bodied and resident in Scotland. Johnston v. Wallace, June 13, 1873, p. 699.

Settlement.

2. A pauper born in 1841 in the parish of A removed with his father's family in 1846 to the parish of B, where he lived in family with his father till the death of the latter in 1860. A few weeks after his father's death he enlisted and remained abroad on military service till February 1872, when he returned to Scotland, and became a proper object of parochial relief. *Held*, in conformity with Craig v. Greig and Macdonald (July 18, 1863, *ante*, vol. iii. 1172), and M'Lennan v. Waite (June 28, 1872, *ante*, vol. x. 908), that the parish of his birth was liable for his support, and not the parish of B, in which he had ceased to have a derivative settlement by emancipation at his father's death. Ferrier v. Kennedy, Feb. 8, 1873, p. 402.

PRESCRIPTION, *Negative. Approbate and Reprobate—Marriage-Contract—General Settlement.*

A father executed a trust-deed for payment of certain debts and regulating his succession *in fraudem* of his antenuptial marriage-contract, and to the prejudice of the heir of the marriage, and afterwards another trust-deed, the two forming together a complete settlement of his whole estate, heritable and moveable. The heir made up a title under the marriage-contract, and under it possessed the lands contained in the first trust-deed, and took benefit under the second deed, but in ignorance of the existence of the first trust-deed. *Held* that his trustees and executors were not barred by the negative prescription from challenging the earlier deed, but were entitled to elect either to abide by his approbation of his father's settlement, or to renounce and restore the benefit he had taken, and challenge the first deed. Earl of Glasgow's Trustee v. Earl of Glasgow, &c., Dec. 13, 1872, p. 218.

PRESCRIPTION. See *Fishings—Teinds.*

PRESUMPTION. See *Entail*, 6—*Husband and Wife*, 1—*Proof—Teinds.*

PROCESS. *Jury Trial—All parties not called.*

1. Circumstances in which a pursuer was allowed to proceed with an action without transferring the cause against the representatives of a person deceased who had been called as a defender for his interest but had not appeared in the action. West Calder Oil Co. v. Fell, March 18, 1873, p. 546.

Summons—Amendment.

2. At the end of the pursuer's proof in a reduction on the ground of forgery he craved leave to amend the record by adding an averment and plea of invalid attestation. Leave *granted*, under Court of Session Act, 1868, sec. 29; but expenses found due to the defender down to the date of lodging the minute of amendment. Arnott and Others v. Burt, Nov. 14, 1872, p. 62.

Special Case—Court of Session Act, 1868, *sec.* 63.

3. Parties are not entitled to bring questions before the Court in the form of a special case when they are not in a position to raise these questions under some other mode of procedure known to the law. Parochial Board of Bothwell v. Pearson, Feb. 6, 1873, p. 399.

Special Case.

4. The local authority in a parish, and a ratepayer in a special drainage district therein, presented a special case for the opinion and judgment of the Court on the question whether the local authority was entitled to charge certain expenses against the special district or the whole parish. *Held* that the special case was incompetent, in respect that (no assessment having been imposed or charge threatened) the only form in which the question of law could have been raised was an action of declarator, and that in that case it would have been necessary to call more than a single ratepayer. Parochial Board of Bothwell v. Pearson, Feb. 6, 1873, p. 399.

PROCESS—*Continued.*

Reclaiming Note—Leave of Lord Ordinary—Court of Session Act, 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 53 *and* 54.

5. In an action of multiplepoinding the Lord Ordinary pronounced an interlocutor exhausting all the questions of law between the different claimants, settling the shares of the fund *in medio* (the amount of which had not been ascertained) to which they were respectively entitled, appointing the case to be enrolled for further procedure, and finding no expenses due to or by any of the competing claimants. *Held* that a reclaiming note without leave of the Lord Ordinary was incompetent. Kennedy v. Taylor, May 14, 1873, p. 603.

Competency—Proof.

6. In counter actions arising out of a contract to construct machinery the Court refused to grant diligence for the recovery of letters between the partners of the contractor's firm, but granted diligence to recover letters written to them by their foreman or other workmen employed in the construction of the machinery. Tannett, Walker, and Co. v. Hannay and Sons, July 18, 1873, p. 931.

Interlocutor—Proof before Answer.

7. *Observations* as to the import of the words "before answer." Macvean v. Maclean, March 8, 1873, p. 506.

Sheriff—Appeal.

8. An interlocutor by a Sheriff-substitute repelled the defences in an action as irrelevant. The Sheriff on appeal recalled the interlocutor, and allowed the defender a proof before answer of certain averments by the writ or oath of the pursuer. The pursuer having appealed to the Court of Session, *held* that the Sheriff's interlocutor was not a final judgment within the meaning of the Sheriff-court Act, 1853, section 24, and Court of Session Act, 1868, sections 53, 54, and therefore was not appealable at the instance of the pursuer.

Opinion that the interlocutor was not appealable under the 40th section of the Judicature Act. Shirra v. Robertson, June 7, 1873, p. 660.

Appeal—Competency—50 *Geo. III. c.* 112—16 *and* 17 *Vict. c.* 80.

9. By the 36th section of the Act 50 Geo. III. c. 112, it is enacted that bills of advocation from the Sheriffs and other inferior Judges shall be allowed, *inter alia*, with respect "to an interim decree for partial payment," "provided that leave is given by the inferior Judge."

By the 24th section of the Act 16 and 17 Vict. c. 80, it is enacted that it shall be competent to take to review of the Court of Session, *inter alia*, "any interlocutor of a Sheriff giving interim decree for payment of money." By the said section it is also enacted that the provisions of the Act 50 Geo. III. c. 112, "are, in so far as inconsistent with this enactment, hereby repealed."

Held (after consultation with the Judges of the Second Division) that it is competent to appeal against an interlocutor of the Sheriff giving interim decree for payment of money, without obtaining his leave. Erskine v. Lang, Dec. 18, 1872, p. 229.

Proof—Leave to Appeal—48 *Geo. III. c.* 151, *sec.* 15.

10. An action was raised by the trustees of a deceased partner of a firm for count and reckoning as to his interest in the firm. The remaining partners averred that by certain letters produced an agreement had been entered into between the firm and the partner, by which he ceased to be a partner, and became entitled only to an annuity from the firm. The Court unanimously held that the letters did not form a concluded agreement, and ordered production of the balance-sheets of the firm, and the deceased partner's account with the firm. The firm presented a petition craving leave to appeal, and offered to secure payment of the annuity to the family of the deceased pending the appeal. Petition (Lord Benholme *diss.*) refused. Lawson v. Lawson's Trustees, Nov. 30, 1872, p. 168.

PROCESS—*Continued.*

Appeal to House of Lords.

11. After a judgment had been pronounced by the House of Lords containing a remit to the Court of Session, the parties compromised the case, and the Court, upon a joint minute in manuscript, applied the judgment and assoilzied the defenders. Anstruther, &c. v. Anstruther's Trustees, July 19, 1873, p. 955.

Appeal to House of Lords.

12. *Observed* that when, after or in consequence of a judgment of the House of Lords, anything remains to be done in the case in the Court of Session, the proper mode of bringing the case before the Court is by petition. Anstruther, &c. v. Anstruther's Trustees, July 19, 1873, p. 955.

Expenses—Appeal to House of Lords.

13. Where an interlocutor of the Inner-House, recalling an interlocutor of the Lord Ordinary, was reversed by the House of Lords, without any affirmance of the latter, and without any finding as to expenses, but with a remit to the Court "to do therein as shall be just and consistent with this judgment," *held* (*diss.* Lord Benholme) that, the House of Lords not having exhausted the case, the Court took it up, in applying the judgment, as if the Lord Ordinary's interlocutor had never been recalled, and were entitled to deal with the question of expenses from the date thereof. Sawers' Executors v. Sawers' Trustees, Feb. 22, 1873, p. 451.

Proof—Commission—Criminating Question.

14. Where a criminating question was proposed to be put to a witness to be examined before a foreign commissioner, *held* that the commissioner should be instructed (1) to intimate to the witness that he was entitled to decline to answer the question; and (2), in the event of the witness electing to answer the question, to allow all competent questions bearing on the matter to be put with a view to test his credibility. Muir v. Muir, March 14, 1873, p. 529.

Reparation—Wrongous apprehension—Limitation of time for raising Action—Statutes—Summary Procedure Act, 1864, 27 *and* 28 *Vict. c.* 53, *sec.* 35—*Day Trespass Act*, 2 *and* 3 *Wm. IV. c.* 68, *sec.* 11.

15. A complaint, instituted under the Summary Procedure Act, charged a contravention of the Day Trespass Act (which authorises a Justice of Peace to grant warrant for the apprehension of a person accused, before service of the complaint, "if he shall have reason to suspect from information upon oath that the party is likely to abscond"), and set forth that the two persons accused were found trespassing in search of game and had refused to give their names or addresses. On a deposition on oath by one witness to the truth of these statements a Justice of the Peace, before the complaint had been served, issued a warrant for the apprehension of the accused, and they were accordingly apprehended. Five months after one of the accused raised an action of damages for wrongous apprehension against the complainers' law-agent and two officers of police, on the ground that the Justice was not entitled under the Day Trespass Act to issue the warrant of apprehension before the complaint was served, without having information on oath that the accused was likely to abscond. *Held* that, although the proceedings had been irregular, there had not been such a deviation from the statute as to deprive the defenders of the protection of sec. 35 of the Summary Procedure Act, which requires that all actions arising out of proceedings under it shall be brought within two months, and therefore that the action fell to be dismissed. Murray v. Allan, Nov. 29, 1872, p. 147.

25 *and* 26 *Vict. c.* 35, *sec.* 35—*Computation of Time.*

16. Under a statute requiring all actions arising from procedure under it to be commenced within two months after the cause of action shall have arisen, *held* that Magistrates who were sued for damages on account of a decision pronounced on 15th April were timeously cited by a summons executed on

PROCESS—*Continued.*

15th June following. Ashley v. Magistrates of Rothesay, June 20, 1873, p. 708.

Judicial Referee—Fee—Expenses.

17. A judicial referee and the clerk to the reference are entitled to decree for their fees and expenses against both parties conjunctly and severally. Beattie, &c., July 19, 1873, p. 954.

Jury Trial.

18. In general, questions of pedigree are sent to trial by jury. Mackintosh, &c. v. Ross, May 30, 1873, p. 636.

Jury Trial—Enumerated Causes.

19. Motion by the pursuers for a proof before answer, in lieu of jury trial, granted, although it was resisted by the defenders. Life Association of Scotland v. Foster, Jan. 31, 1873, p. 351.

Pactum de non petendo—Sist.

20. In an action by a tenant against the representatives of his landlord for payment of certain bills of exchange granted by the latter, the defenders founded on a letter by the tenant in proof of an alleged agreement by the tenant not to ask payment of the bills in consideration of a renewed lease being granted to the tenant. The pursuer, in reply, stated that the lease was threatened to be reduced by the next heir of entail in possession of the estate as in contravention of the entail. After a proof, *held* (*diss.* Lord Benholme) that a *pactum de non petendo* had been proved, and that the pursuer being still in undisturbed possession of the farm was not *in hoc statu* entitled to decree, reserving all further questions on the merits. Macvean v. Maclean, June 26, 1873, p. 764.

Summons—Reference to Account Books—Decree.

21. In an action brought by a joint stock banking company and its liquidators against a person who had been a director for payment of "the amount of loss and damage due by the defender to the bank" as at the date when he ceased to be a director (five years before the stoppage of the bank) *held* (1) that the books of the bank referred to in the summons were to be regarded as part of the pursuer's statement; (2) that with regard to alleged loss by advances on accounts-current which were closed at the time when the defender ceased to be a director the pursuer had set forth a case sufficiently relevant to be admitted to probation; (3) that the defender could not be made liable for loss on advances on accounts-current to those persons to whom the bank had continued to make advances after the defender had left office, and further, that the pursuer had not made a relevant averment of the loss on these earlier advances; (4) that any liability which the defender might have incurred in allowing the advances by way of discounts on bills had been extinguished by the subsequent actings of the bank in renewing the bills and in making new advances; (5) that any liability for loss by insurances on the lives of debtors of the bank had been extinguished by the sale of the policies by the bank, without notice to the defender; (6) that as the summons, with the books referred to in it, disclosed facts which excluded the action *quoad* certain items the proper form of interlocutor was one dismissing the action to that extent. Western Bank v. Baird's Trustees, Nov. 22, 1872, p. 97.

Petition—Tutor.

22. In an action of giving up tutorial inventories the tutors called as defenders the nearest relatives of the pupil resident in Scotland, and presented a petition to the Court to dispense with the citation of the next of kin who were resident in England. The Court expressed some doubt as to the necessity of the application, but, after inquiry, ordered intimation in common form. Buchan, &c., June 7, 1873, p. 662.

Arbiter—Defence—Contract—Clause of Reference.

23. *Held* that an action raised by a contractor against his employer for payment due under a building contract, and for damages for his employer having, as he alleged, illegally taken possession of machinery and materials, was not

PROCESS—*Continued.*

excluded by a clause of reference in the contract, in respect (1) that it was not clear that the clause of reference gave the arbiter authority to give decree for payment of money; (2) that certain of the questions raised did not fall within the reference; and (3) that the arbiter could not assess damages.

Observed, that if questions arose in the course of the action falling within the reference, the aid of the arbiter must be invoked. Tough v. Dumbarton Water-Works Commissioners, Dec. 20, 1872, p. 236.

Correction of Clerical Error—Judgment.

24. *Observations* on the incompetency of an inferior Judge, *ex proprio motu*, correcting an error in an interlocutor after it had been issued and seen by the parties. White v. M'Ewen's Trustees, May 13, 1873, p. 602.

PROCURATOR FISCAL. See *Expenses*, 4—*Issue*, 3.

PROOF. *Bill of Exchange—Discharge—Parole.*

1. A proof before answer allowed to explain documents alleged to instruct discharge of a debt contained in two promissory-notes in possession of the creditor in the obligation. Macvean v. Maclean, March 8, 1873, p. 506.

Oath on Reference.

2. In an oath on reference, a party having deponed that a statement in an article of his condescendence was true, *held* that the statement was thereby imported into the oath.

Observed, that in order to make documents part of the oath on reference the deponent must be examined specifically on the matters therein contained; but when that is done it is not necessary to engross the whole documents, a reference to them being sufficient. Jackson v. Cochrane, Feb. 27, 1873, p. 475.

Agreement—Parole Evidence—Competency—Damage—Reparation.

3. In an action of damages the pursuer averred that the defenders had arranged to board certain children with her, and that as both parties had contemplated that the arrangement should endure for a term of years she had incurred certain expenditure which she lost by the guardians suddenly bringing the arrangement to a close. *Held* (1) that parole evidence of such an arrangement was competent, and (2) that the pursuer was entitled to be reimbursed for actual loss.

Observed (*per* Lord Neaves), that when parties are engaged mutually in promoting an object of common interest, and the expenses entailed in furthering that object are thrown on one of the parties, then, when that expenditure fails of obtaining the end aimed at, the party-disburser must be recompensed, as being the disburser for a common object. Dobie v. Lauder's Trustees, June 24, 1873, p. 749.

Writ—Resting Owing—Loan—Donation.

4. *Held* that a loan of money was not instructed by letters in which the acknowledgment of the receipt of money was qualified by the statement that it was received in payment of a debt of honour. Duncan's Trustees v. Shand, Jan. 7, 1873, p. 254.

Writ.

5. In a proof by writ, it is competent, in so far as necessary for understanding letters, to look at those to which they are answers.

Opinion (*per* Lord Neaves) that proof of the receipt of money by the writ of the receiver only raises a presumption of loan in cases where the acknowledgment is contained in a document delivered to the disburser by the recipient as a record of the transaction. Duncan's Trustees v. Shand, Jan. 7, 1873, p. 254.

Presumption—Pater est quem nuptiæ demonstrant—Parent and Child.

6. In an action of filiation and aliment brought by a married woman against a man not her husband *held* that the presumption *pater est quem nuptiæ demonstrant* had been redargued, although there was possibility of access.

Question, Whether it was competent to call the pursuer's husband as a witness to prove non-access. Brodie v. Dyce, Nov. 29, 1872, p. 142.

PROOF—*Continued.*

Divorce—Extrajudicial Confession—Adultery.

7. Circumstances which, coupled with evidence of extrajudicial acknowledgment of the illegitimacy of a child, *held* (*rev.* judgment of Lord Shand) sufficient to infer adultery on the part of a wife, and to entitle the husband to decree of divorce. Fullerton v. Fullerton, June 20, 1873, p. 720.

Loan—Deposit-Receipt.

8. In an action brought for payment of a sum of money, "being the amount contained in a deposit-receipt in name of the pursuer uplifted by the defender," the defender stated that he had received the deposit-receipt bearing the pursuer's endorsation from a third party, the true owner of the money, and to whom he had accounted for it. *Held* (1) that in so far as the action was or might be rested on an alleged loan by the pursuer to the defender such ground of action could not be proved by parole evidence, and that the only writing of the defender founded on in proof of it, being the defender's name written on the back of the deposit-receipt, was not legal proof of such loan, nor sufficient to render parole proof admissible; (2) that, in so far as the action was rested on the defender's alleged intromission with the pursuer's funds, the parole evidence had negatived the pursuer's case. Nimmo v. Nimmo, Feb. 22, 1873, p. 446.

Trustee—Judicial Admissions.

9. *Question*, Whether a trustee in a sequestration can in litigation make admissions in points of law. Nicolson v. Johnston and Wright, Dec. 6, 1872, p. 179.

See *Process.*

PROPERTY. *Straightening Marches—Act* 1669, *c.* 17.

1. The procedure laid down in Act 1669, c. 17 (anent enclosing of ground), whereby the Sheriff may be required to visit the marches, is imperative, and cannot be supplied by a remit to a man of skill, even of consent. Lord Advocate v. Sinclair, Nov. 26, 1872, p. 137.

2. The Act does not apply, (1) where there is in existence a natural boundary of steep cliffs, involving little danger of trespass; nor (2) where the expense of erecting the fence would be disproportionate to the value of the pieces of ground to be benefited. Lord Advocate v. Sinclair, Nov. 26, 1872, p. 137.

Title—Error in date of Sasine confirmed.

3. In a charter of confirmation an instrument of sasine was described correctly by its date, but an error was made in stating the date of recording. *Held* that, as the sasine was sufficiently identified otherwise, the error in the date of recording did not invalidate the confirmation of the instrument. Duke of Argyll v. Dalgleish's Trustees, May 23, 1873, p. 616.

Boundary—Proof of Possession—Condition—Singular Successor.

4. In 1858 the owners of a shop, who were tenants of the sunk flat below, obtained, from the owner of the sunk flat, permission to enlarge their shop window by lowering the sill, whereby the window of the sunk flat was diminished in size, on condition that, on demand, the latter window should be restored to its orignal state. The owners of the shop sold their property in 1867.

In an action raised against the purchaser by the owner of the sunk flat to have his window restored to its former condition, *held* that the purchaser's right did not extend beyond the boundary of his property, and that as the titles of the subjects did not define the boundary between the flats, it fell to be determined by the possession of the defenders' authors under their title as proprietors of the shop. Girdwood v. Paterson, June 3, 1873, p. 647.

Feu-Contract—Real Burden—Mutual Gable—Sequestration—Preference.

5. A and B feued two adjoining stances, both feu-contracts declaring that the gables should be mutual, and should be built to the extent of one-half on the adjoining feus. This provision was declared to be a real burden on the feu. *Held* that A, having built a mutual gable which was made use of by

PROPERTY—*Continued.*

B, was entitled to be ranked preferably on B's sequestrated estate for one-half of its price. Rodger v. Russell, June 10, 1873, p. 671.

Foreshore—Regalia.

6. The Crown has a right of property in the foreshore not as being one of the *regalia minora*, but as a portion of the *solum* of the country, and may alienate the same, subject to the burden of certain public uses which attach to it, whether held in property by the Crown or by a subject. Agnew v. Lord Advocate, Jan. 21, 1873, p. 309.

Foreshore.

7. The right of the public to use the foreshore for purposes of navigation is vested in the Crown as one of the *regalia majora*. Agnew v. Lord Advocate, Jan. 21, 1873, p. 309.

Servitude—River.

8. *Held* that a riparian proprietor, who had, by possession for more than forty years, acquired a right of diverting water from a stream for the use of his mill, was not bound to continue the exercise of this right; but that if he abandoned it, and restored the water to its original channel, he was bound to do so in such a manner as not to expose the servient tenement to injury. Bridges v. Lord Saltoun, March 20, 1873, p. 588.

Trust for Creditors—Radical Right—Conveyance—Service—Heir.

9. An infeftment on a trust-disposition bearing to be for behoof of creditors does not divest the granter of the radical right of property, and his heir cannot complete his title by conveyance from the trustee. Gilmour v. Gilmours, July 3, 1873, p. 853.

Title—Designation of Procurator.

10. *Question*, Whether in an instrument of resignation *ad remanentiam* the procurator must be designed. Duke of Argyll v. Dalgleish's Trustees, May 23, 1873, p. 616.

Common Property.

11. *Held* that the proprietor of the upper floor of a house and under-ground cellars had no right to carry a flue from the cellar to the roof through a staircase in which he had not an exclusive right of property. Taylor v. Dunlop, Nov. 1, 1872, p. 25.

Floor—Roof—Common Interest.

12. The proprietor of a house containing two square storeys and an unoccupied space between the upper storey and the roof sold and conveyed the "upper flat," inserting in his disposition an obligation on the purchaser to maintain the roof, and on the seller to maintain the street pavement. *Held* (*diss* the Lord President) that the purchaser had right to the space between the ceiling of his flat and the roof of the house, and was entitled to make rooms in it. Taylor v. Dunlop, Nov. 1, 1872, p. 25.

Implied Contract—Conterminous Proprietors.

13. A, the proprietor of building ground in a burgh held in burgage, disponed in burgage to B, a purchaser, two adjacent lots, No. 3 and No. 4. Lot No. 3 was described as bounded on the north "by the central line of R Street" (an unformed street), "to measure 60 feet in breadth from building line to building line," and lot No. 4 as bounded on the north by other ground belonging to the seller, "on a line coinciding in range with the central line of R Street."

The disposition contained an express obligation on the purchaser as to the completion of the new streets which formed the east and west boundaries of lot 3, but no obligation was expressed with reference to R Street.

Some years after, A and B entered into an agreement that they should mutually furnish the ground for the formation of R Street eastwards along the northern boundary of lot 4, as delineated in a plan which shewed R Street extending along the northern boundary of lot 3; the purchaser subsequently acquired from the seller two additional lots of ground bounded by R Street, one on the east and the other on the west of lot 3, by a

PROPERTY—*Continued.*

disposition which declared that both parties should have right to the whole new streets therein mentioned bounding the subjects disponed.

Held, in a question between persons who represented A and B, that B's representative was under an implied obligation to leave space for the formation of R Street on lot 3.

Free St Mark's v. Taylor's Trustees, Jan. 26, 1869, *ante*, vol. vii. 415, commented on. Dennistoun v. Thomson, Nov. 22, 1872, p. 121.

Possessory Action—Burgh—Sea-shore.

14. Proprietors in a burgh of barony of ground adjoining the sea-shore, whose titles gave them no right thereto but that of access, and who had assisted in reclaiming from the sea *ex adverso* of their properties a piece of ground which had remained unenclosed for more than seven years, *held* in a possessory question to have a sufficient title, without the intervention of the Crown, to object to any part of the said piece of ground being enclosed by another proprietor whose property and titles were in a similar position to theirs, although he was proceeding with the sanction of the Magistrates, who themselves had no title to the sea-shore. Irvine v. Robertson, Jan. 18, 1873, p. 298.

Crown—Foreshore.

15. In a question between the Crown and a vassal, held (1) that when an estate on the sea-shore, whether barony or not, is held under a crown charter which does not, by express grant or specific boundary, extend the right of the vassal beyond the high-water mark, there is no presumption that the foreshore is a pertinent of the land; but (2) that in such a case the charter may be shewn to include the foreshore by such long-continued possession thereof as can only be ascribed to a right of property. Agnew v. Lord Advocate, Jan. 21, 1873, p. 309.

Possession—Crown—Foreshore.

16. Circumstances in which *held* that crown grants of lands on the sea-shore, with parts and pertinents, had been explained by possession of the foreshore as including a grant thereof. Agnew v. Lord Advocate, Jan. 21, 1873, p. 309.

Servitude—Possession.

17. *Observed* that the taking of sea-ware for the purpose of making kelp was to be regarded as the exercise of a right of property, and not of servitude. Agnew v. Lord Advocate, Jan. 21, 1873, p. 309.

River—Salmon-Fishing.

18. A and B were owners of salmon-fishings on the north and south sides respectively of a tidal river, the *medium filum* being the boundary between them. From time immemorial the main stream of the river had flowed in a narrow channel close to the northern bank of the river, in consequence of a gravel bank, partially dry at low water, stretching across the *medium filum* from the south; and it had been the practice of the proprietor of the northern fishings to repair the bank when injured by extraordinary floods, so as to prevent the main channel of the river from being diverted to the injury of his fishing. In a process of declarator and interdict brought by B to prevent A interfering with the operations of nature upon the *alveus* of the river, *held* that the original grant as well as the custom of the river implied a right in each proprietor to keep the stream, so far as practicable, in its normal state, and that A was entitled to restore the *alveus* to its normal condition when altered by extraordinary floods. Mather, &c. v. Macbraire, &c., March 14, 1873, p. 522.

Disposition.

19. *Held* that a *mortis causa* conveyance of heritage executed by a person who died prior to the Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101) was invalid, in respect that the word "dispone" was not used. Kirkpatrick v. Kirkpatrick's Trustees, March 19, 1873, p. 551.

Minister's Stipend.

20. *Held* that a proprietor who has a bare superiority over lands, or one who

PROPERTY—*Continued.*
has a security right over lands on which no possession has followed, and who has not intromitted with the fruits, is not liable for minister's stipend.
Opinion that it is not necessary to enable a minister to use his decree of locality against a possessor of lands localled on that the possessor's name should appear in the locality.
Opinion that a proprietor whose name appears in the decree of locality ceases to be liable for stipend when he ceases to be proprietor. Jackson v. Cochrane, Feb. 27, 1873, p. 475.
See *Fishings—Minerals—Nuisance—Statute—Superior and Vassal.*

PROVING THE TENOR. See *Teinds*, 14.

PROVISIONS. See *Aliment—Husband and Wife—Parent and Child.*

PUBLIC HEALTH. *Public Health (Scotland) Act*, 1867 (30 *and* 31 *Vict. c.* 101) *—Board of Supervision—Title to Insist—Petition and Complaint.*
Held that whenever a local authority "shall refuse or neglect" to construct the necessary system of drainage in the district under their supervision, the Board of Supervision has a right to present a petition to have them compelled to do so. On a petition and complaint by the Board of Supervision the Court sisted procedure to allow a local authority reasonable time to discover the most suitable system of drainage, and to have it executed. Board of Supervision v. Local Authority of Montrose, Dec. 3, 1872, p. 170.

PUBLIC-HOUSE. *Certificate—Hours of Opening and Closing—Statutes* 9 *Geo. IV. c.* 58 (*Home Drummond Act*); 16 *and* 17 *Vict. c.* 67 (*Forbes Mackenzie Act*, 1853), *secs.* 11, 12; 25 *and* 26 *Vict. c.* 35 (*Public-Houses Amendment Act*, 1862), *secs.* 4, 2.
The Magistrates of a burgh, at a meeting for renewing certificates for the sale of exciseable liquors within the burgh, came to a resolution that, within a particular district, which included nearly the whole burgh and all the inns and public-houses in the burgh, the hour of closing inns and public-houses should be 10 instead of 11 as required by the above Acts, and they granted certificates accordingly. By sec. 2 of 25 and 26 Vict., the Magistrates are allowed to insert in the certificates a different hour for closing and opening "in any particular locality within any county or burgh requiring other hours for opening and closing." *Held* that the Magistrates were not entitled to change the hours of closing throughout the whole burgh, and remit made to the clerk to alter the certificates. Ashley v. Magistrates of Rothesay, June 20, 1873, p. 708.

RADICAL RIGHT. See *Service.*

RAILWAY. See *Reparation.*

REDUCTION. *Agreement—Fraud—Fraudulent Concealment—Essential Error.*
Residuary legatees under a settlement brought an action to reduce an agreement between them and other legatees under the settlement, averring that the defenders, taking advantage of the pursuers' ignorance of their rights and the amount of the succession, had by fraudulent misrepresentation and concealment induced them, greatly to their prejudice, to enter into the agreement. The defenders objected to an issue of fraudulent concealment, on the ground that there was no duty to disclose. *Held* (1) that in entering upon the contract there was a duty of disclosure incumbent on the defenders, and that the pursuers were entitled to an issue of fraudulent misrepresentation or fraudulent concealment. Dempsters v. Raes, July 1, 1873, p. 843.
See *Issue—Landord and Tenant—Teinds*, 3—*University.*

REI INTERVENTUS. See *Landlord and Tenant.*

REPARATION. *Contributory Negligence—Railway.*
1. In an action of damages against a railway company raised by a passenger for injuries received in alighting from a train at a railway station it was proved that the carriage in which the pursuer was seated had been stopped short of the platform, that in consequence of the darkness of the night and the

REPARATION—*Continued.*

absence of artificial light the pursuer had not observed this, and in leaving the carriage backwards had fallen and injured himself. The jury returned a verdict for the pursuer.

In a motion for a new trial, on the ground that the verdict was against evidence, *held* (1) that it was the duty of the railway company to have given the passengers some notice or warning of the danger, or assistance in alighting; and (2) that the question of contributory negligence on the part of the pursuer was one for the jury. Potter v. North British Railway Co., June 7, 1873, p. 664.

Damages—Perishable Goods—Railway Company.

2. Goods marked perishable were delivered to a railway company, whose custom it was to forward those so marked in preference to others. The truck in which they were was not marked perishable, and was taken off the train along with others in order to lighten it, while goods not of a perishable nature were forwarded. In an action brought against the company for damage incurred in consequence of the detention of the goods, *held* that the company had failed to forward the goods with reasonable expedition, in respect, according to ordinary practice, perishable goods were sent on preferably to goods not perishable, whereas, on the occasion in question, goods not perishable had been sent on in preference to the pursuers' goods, and that the company were liable for the damage caused by the delay. Macdonald and Co. v. Highland Railway Co., May 20, 1873, p. 614.

Master and Servant—Collaborateur.

3. In an action of damages for personal injury raised by a workman in a paper-work against his master it was proved that the pursuer had been injured in consequence of the machine at which he was employed being in a defective state through the negligence of the manager and a mechanic employed in the works, and that there had been no personal negligence on the part of the master. *Held* that the master was not liable for the fault of those employed by him, seeing that he had taken reasonable care to employ competent workmen. Balleny v. Cree, May 23, 1873, p. 626.

Collaborateur.

4. In an action of damages brought by a sailor against his employers, the shipowners, on the ground of personal injury caused by the fault of the captain, *held* that the captain and he were collaborateurs, and that, consequently, the owners were not responsible. Leddy v. Gibson and Co., Jan. 18, 1873, p. 304.

Railway—Negligence.

5. In an action of damages brought against a railway company by a passenger who had been injured by a fall from a train in consequence of the carriage door against which he was leaning flying open it was proved that neither the injured party nor any one else in the compartment opened the door. *Held* that the accident had been caused by the fault of the servants of the defenders in failing to fasten the door, and that the defenders were liable in damages. Cassidy v. North British Railway Company, Jan. 23, 1873, p. 341.

Slander.

6. In an action of damages for slander *held* that the words "damned puppy" were not actionable. Jameson v. Bonthrone, June 13, 1873, p. 703.

Slander—Counter Issue—Veritas Convicii.

7. Circumstances in which *held* that it was necessary for a defender in an action of damages for slander who pleaded *veritas* to put in his counter issue the words used in the libel. Ogilvy v. Paul and Others, June 28, 1873, p. 776.

Process—Issues—Slander—Veritas.

A visitor at a hotel made an entry in the visitors' book to the effect that he had visited most of the hotels in Scotland, but that he had nowhere "encountered so much drinking or so much squalid untidiness and dirt."

In an action of damages brought by the hotel-keeper against the writer the latter pleaded *veritas*. In adjusting issues, *held* that while the pur-

REPARATION—*Continued.*

suer was entitled to the issue, whether the entry falsely, maliciously, and calumniously, represented that the pursuer kept his hotel in a state of squalid untidiness and dirt, and permitted persons to drink therein to excess, all to such a degree as to distinguish it in these respects from most of the hotels in Scotland, and to cause discomfort and annoyance to visitors to and residents in the hotel, the defender did not require to put in his counter issue more than whether on or about the date of the entry there was an excessive amount of drinking in the hotel, and whether the hotel on said days was in a state of much squalid untidiness and filth. M'Iver v. M'Neill, June 28, 1873, p. 777.

Wrongous Use of Diligence—Malice—Bill—Issues.

9. In an action of damages for injury alleged to have been caused by the defenders recording a protest for non-payment of a bill, and charging thereon, although the bill had been previously paid, eight days after it had become due, *held* that a charge was a diligence and not a judicial act, and that therefore it was not necessary to put malice in the issue (Lord Benholme *diss.*, on the ground that the circumstances shewed fault on the part of the pursuer, and that therefore it was not sufficient for him to prove merely a legal wrong).

Form of issue adjusted. Gibb v. Edinburgh Brewery Co., June 19, 1873, p. 705.

Proof—Agreement—Parole Evidence—Competency—Damage.

10. In an action of damages the pursuer averred that the defenders had arranged to board certain children with her, and that as both parties had contemplated that the arrangement should continue for a term of years she had incurred certain expenditure which she lost by the guardians suddenly bringing the arrangement to a close. *Held* (1) that parole evidence of such an arrangement was competent, and (2) that the pursuer was entitled to be reimbursed for actual loss. Dobie v. Lauder's Trustees, June 24, 1873, p. 749.

Joint Stock Company—Director.

11. By the contract of copartnery of a joint stock banking company it was declared that no shareholder could be legally a director who resided permanently more than ten miles distant from the head office, and that a director ceased to be one if he had not attended a meeting of directors for six months. In an action by the bank and its liquidators against a shareholder who had been elected and occasionally acted as a director, for loss said to have been caused by his gross negligence, *held* that the defender, having assumed the position of a director, and acted as such, could not plead these clauses of the contract in bar of the action. Western Bank v. Baird's Trustees, Nov. 22, 1872, p. 96.

Director—Negligence—Personal Bar—Process.

12. In an action brought by a joint stock banking company and its liquidators against a person who had been a director for payment of "the amount of loss and damage due by the defender to the bank" as at the date when he ceased to be a director (five years before the stoppage of the bank) *held* (1) that the books of the bank referred to in the summons were to be regarded as part of the pursuer's statement; (2) that with regard to alleged loss by advances on accounts-current which were closed at the time when the defender ceased to be a director the pursuer had set forth a case sufficiently relevant to be admitted to probation; (3) that the defender could not be made liable for loss on advances on accounts-current to those persons to whom the bank had continued to make advances after the defender had left office, and further, that the pursuer had not made a relevant averment of the loss on these earlier advances; (4) that any liability which the defender might have incurred in allowing the advances by way of discounts on bills had been extinguished by the subsequent actings of the bank in renewing the bills and in making new advances; (5) that any liability for loss by insurances on the lives of debtors of the bank had been extinguished by the sale of the policies by the bank, without notice to the defender; (6) that as

REPARATION—*Continued.*

the summons, with the books referred to in it, disclosed facts which excluded the action *quoad* certain items the proper form of interlocutor was one dismissing the action to that extent. Western Bank v. Baird's Trustees, Nov. 22, 1872, p. 97.

Minerals—Landlord and Tenant—Lease—Relief.

13. By an agreement between a railway contractor and a landed proprietor the former was allowed to take building stone for a viaduct from any part of certain lands, at a certain rate per superficial yard, of whatever depth, the contractor being bound to make good all surface damages, and fill up the quarry when his contract was completed. The contractor opened a quarry near the bank of a river, and in consequence of his operations water flowed into the quarry and thence into an old coal-waste which communicated with going coal-mines on the estate of the same proprietor. The lessee of the minerals brought a process of suspension and interdict, in which the contractor was ordered to execute certain works, and was found liable in the expenses of process. In an action of relief brought by the contractor against the proprietor, *held* that the agreement was not a lease, and the pursuer was not entitled to be relieved by the proprietor, either of the sums which he had been obliged to expend for the protection of the coal-mines, or of the expenses of the former process. Brand and Son v. Bell's Trustees, Nov. 6, 1872, p. 42.

See *Jurisdiction*, 5—*Process—Statute*, 2.

RES JUDICATA. See *Teinds*, 9.

RETENTION. *Payment by Instalments.*

Where work was contracted to be done for a price payable by instalments during its progress, and at the sight of an architect, who was appointed arbiter in case of dispute between employer and contractors, and an instalment had been sent, for behoof of a contractor, to the architect, who returned it to the employer, with a request that he would send it direct to the contractor, *held* that the employer had no right to retain the instalment so sent in extinction of a claim of damages for non-fulfilment of the work, and that it was liable to arrestment in his hands by a creditor of the contractor. Field and Allan v. Gordon, Nov. 23, 1872, p. 132.

See *Ship—Arrestment.*

REVOCATION. See *Husband and Wife*, 8—*Succession*, 4, 18, 24.

RIVER. *Pollution—Verdict—Declaratory conclusions—Motion for Decree.*

1. Riparian proprietors on a private stream brought an action of declarator and interdict against the owners and tenants of paper-mills on the stream to prevent pollution, and upon issues whether the defenders did by discharging refuse into the stream pollute the same to the nuisance of the pursuers obtained a verdict of a jury in 1866. The defenders thereafter, under an agreement with the pursuers, conducted experiments with a view to abate the nuisance. In 1873 the pursuers moved for decree. *Held* (1) that they were entitled to declarator; and (2) after a statement by the defenders that they had no proposals to make, that the pursuers were entitled to interdict. Duke of Buccleuch, &c. v. Cowan, &c., June 10, 1873, p. 675.

Servitude.

2. *Held* that a riparian proprietor, who had, by possession for more than forty years, acquired a right of diverting water from a stream for the use of his mill, was not bound to continue the exercise of this right; but that if he abandoned it and restored the water to its original channel, he was bound to do so in such a manner as not to expose the servient tenement to injury. Bridges v. Lord Saltoun, March 20, 1873, p. 588.

Salmon-Fishing.

3. A and B were owners of salmon-fishings on the north and south sides respectively of a tidal river, the *medium filum* being the boundary between them. From time immemorial the main stream of the river had flowed in a narrow channel close to the northern bank of the river, in consequence of

RIVER—*Continued.*

a gravel bank, partially dry at low water, stretching across the *medium filum* from the south; and it had been the practice of the proprietor of the northern fishings to repair the bank when injured by extraordinary floods so as to prevent the main channel of the river from being diverted to the injury of his fishing. In a process of declarator and interdict brought by B to prevent A interfering with the operations of nature upon the *alveus* of the river, *held* that the original grant as well as the custom of the river implied a right in each proprietor to keep the stream, so far as practicable in its normal state, and that A was entitled to restore the *alveus* to its normal condition when altered by extraordinary floods. Mather, &c. v. Macbraire, &c., March 14, 1873, p. 522.

See *Fishings.*

ROAD. See *Statute.*

SALE. *Delivery—Risk.*

1. A person sold a number of carcases of whales in Shetland at a price per ton, to be delivered at the buyers' wharf at Newcastle. The carcases became unfit for use on the voyage. *Held* that the risk was with the seller, as (1) neither the quantity sold nor the price could be ascertained till delivery; and (2) as the seller had undertaken to deliver at the buyers' wharf. Walker v. Langdales Chemical Company, July 16, 1873, p. 906.

Agreement—Reduction—Fraud—Fraudulent Concealment—Essential Error.

2. Residuary legatees under a settlement brought an action to reduce an agreement between them and other legatees under the settlement, averring that the defenders, taking advantage of the pursuers' ignorance of their rights and the amount of the succession, had by fraudulent misrepresentation and concealment induced the pursuers to agree to give the defenders shares of the residue for a very inadequate consideration. The defenders objected to an issue of fraudulent concealment, on the ground that there was no duty to disclose. *Held* that in entering upon the contract there was a duty of disclosure incumbent on the defenders, and that the pursuers were entitled to an issue of fraudulent misrepresentation or fraudulent concealment. Dempsters v. Raes, July 1, 1873, p. 843.

SCHOOL. *Schoolmaster—Dismissal*—24 *and* 25 *Vict. c.* 107, *sec.* 19—1 *and* 2 *Vict. c.* 87.

Held that the 19th section of the Parochial and Burgh Schoolmasters (Scotland) Act, 1861, providing for the removal or dismissal of "the schoolmaster of any parish," was not applicable to the case of a schoolmaster of a parliamentary school appointed under 1 and 2 Vict. cap. 87 (1838). Macpherson v. Minister and Heritors of Kilmallie, Jan. 21, 1873, p. 309.

SEA. *Crown—Property—Foreshore—Regalia.*

1. The crown has a right of property in the foreshore not as being one of the *regalia minora*, but as a portion of the *solum* of the country, and may alienate the same, subject to the burden of certain public uses which attach to it, whether held in property by the Crown or by a subject. Agnew v. Lord Advocate, Jan 21, 1873, p. 309.

Property—Foreshore.

2. The right of the public to use the foreshore for purposes of navigation is vested in the Crown as one of the *regalia majora*. Agnew v. Lord Advocate, Jan. 21, 1873, p. 309.

See *Property*, 14.

SERVICE. *Trust—Trust for Creditors—Radical Right—Conveyance—Heir.*

An infeftment on a trust-disposition, bearing to be for behoof of creditors, does not divest the granter of the radical right in the reversion, and his heir cannot complete his title by conveyance from the trustee. Gilmour v. Gilmours, July 3, 1873, p. 853.

See *Destination*, 6.

SERVITUDE. *Thirlage—Usage.*

1. In the titles of lands which were thirled to a barony mill the thirl was described as of "the whole grindable corn growing on the said lands except teind and seed corn," or "except teind and horse corn." In a decree-arbitral pronounced in 1787, in a submission entered into between the proprietor of the mill and the proprietors of the lands it was found that the lands were astricted for their whole growing corns, seed and horse corn excepted. *Held*, upon consideration of the terms of the titles, and of the decree-arbitral and other evidence of usage, that the ambiguous terms "grindable corn" had been construed by usage to mean *omnia grana crescentia*. Stobbs v. Caven, March 14, 1873, p. 530.

Title to Sue—Jurisdiction—Sheriff—Thirlage—Petitory and Possessory Actions—Statute 1 *and* 2 *Vict. c.* 119, *sec.* 15.

2. *Held* that an action by the tenant of a mill for abstracted multures, involving a question as to the extent of the thirl, was competent in the Sheriff-court under the 15th section of the Sheriff-court Act, 1838 (1 and 2 Vict. c. 119), being an action relative to a question touching the constitution of a prædial servitude—Lord Deas dissenting, on the ground that the section did not apply, the action not being raised by a person who had a title to try a question relative to the constitution of a heritable right; but holding that it was competent in the Sheriff-court as a possessory action.

Observations (*per* Lord Deas) on the distinction between petitory and possessory actions.

Question, whether an action of declarator of the constitution of a right of thirlage is competent in the Sheriff-court. Stobbs v. Caven, March 14, 1873, p. 530.

River.

3. *Held* that a riparian proprietor, who had, by possession for more than forty years, acquired a right of diverting water from a stream for the use of his mill, was not bound to continue the exercise of this right; but that if he abandoned it, and restored the water to its original channel, he was bound to do so in such a manner as not to expose the servient tenement to injury. Bridges v. Lord Saltoun, March 20, 1873, p. 588.

Possession.

4. *Observed* that the taking of sea-ware for the purpose of making kelp was to be regarded as the exercise of a right of property, and not of servitude. Agnew v. Lord Advocate, Jan. 21, 1873, p. 309.

SETTLEMENT. See *Poor.*

SHERIFF. *Jurisdiction—Servitude—Thirlage—Petitory and Possessory Actions—Title to Sue—Statute* 1 *and* 2 *Vict. c.* 119, *sec.* 15.

1. *Held* that an action by the tenant of a mill for abstracted multures, involving a question as to the extent of the thirl, was competent in the Sheriff-court under the 15th section of the Sheriff-court Act, 1838 (1 and 2 Vict. c. 119), being an action relative to a question touching the constitution of a prædial servitude—Lord Deas dissenting, on the ground that the section did not apply, the action not being raised by a person who had a title to try a question relative to the constitution of a heritable right but holding that it was competent in the Sheriff-court as a possessory action.

Observations (*per* Lord Deas) on the distinction between petitory and possessory actions.

Question, whether an action of declarator of the constitution of a right of thirlage is competent in the Sheriff-court. Stobbs v. Caven, March 14, 1873, p. 530.

Clerk of Court.

2. *Held* that it was incompetent for a Sheriff-clerk, or his depute, who was his partner in business, to act as clerk in a process to which the Sheriff clerk was a party.

Observed, that the proper course was to apply to the Sheriff to appoint

SHERIFF—*Continued.*

a clerk to act in his stead for that process. Macbeth v. Innes, Feb. 8, 1873, p. 404.

Appeal—Competency—50 Geo. III. c. 112—16 *and* 17 *Vict. c.* 80.

3. By the 36th section of the Act 50 Geo. III. c. 112, it is enacted that bills of advocation from the Sheriffs and other inferior Judges shall be allowed, *inter alia*, with respect "to an interim decree for partial payment," "provided that leave is given by the inferior Judge."

By the 24th section of the Act 16 and 17 Vict. c. 80, it is enacted that it shall be competent to take to review of the Court of Session, *inter alia*, "any interlocutor of a Sheriff giving interim decree for payment of money." By the said section it is also enacted that the provisions of the Act 50 Geo. III. c. 112, "are, in so far as inconsistent with this enactment, hereby repealed."

Held (after consultation with the Judges of the Second Division) that it is competent to appeal against an interlocutor of the Sheriff giving interim decree for payment of money, without obtaining his leave. Erskine v. Lang, Dec. 18, 1872, p. 229.

Appeal.

4. An interlocutor by a Sheriff-substitute repelled the defences in an action as irrelevant. The Sheriff on appeal recalled the interlocutor, and allowed the defender a proof before answer of certain averments by the writ or oath of the pursuer. The pursuer having appealed to the Court of Session, *held* that the Sheriff's interlocutor was not a final judgment within the meaning of the Sheriff-court Act, 1853, section 24, and Court of Session Act, 1868, sections 53, 54, and therefore was not appealable at the instance of the pursuer.

Opinion that the interlocutor was not appealable under the 40th section of the Judicature Act. Shirra v. Robertson, June 7, 1873, p. 660.

Process-Caption—Sheriff-clerk—Sheriff-clerk-depute—Contempt of Court—Damage.

5. A procurator presented a petition to the Sheriff for interdict, and after the Sheriff had pronounced an adverse judgment, carried off the petition, so as to prevent the Sheriff-clerk-depute writing the Sheriff's interlocutor thereon, notwithstanding the Sheriff's intimation that he desired the petition to remain with the clerk. The Sheriff-clerk-depute thereupon carried into execution a warrant in the form of an ordinary process-caption, without any notice or special warning to the procurator, and incarcerated him thereon. In an action for reduction of the said caption, and damages, at the procurator's instance, *held* (1) (*diss.* Lord Justice-Clerk) that the course taken by the Sheriff-clerk-depute was inappropriate and irregular; (2) that it was unnecessary to reduce the caption, as no further action could be taken upon it; (3) that the pursuer was not entitled to damages, in respect that it was by his own culpable conduct and contempt of the Sheriff's authority that any warrant against him had been necessary. Watt v. Ligertwood and Another, July 19, 1873, p. 960.

Property—Straightening Marches—Act 1669, *c.* 17.

6. The procedure laid down in Act 1669, c. 17 (anent enclosing of ground), whereby the Sheriff may be required to visit the marches, is imperative, and cannot be supplied by a remit to a man of skill, even of consent. Lord Advocate v. Sinclair, Nov. 26, 1872, p. 137.

SHIP. *Liability of Owners for Master—Merchant Shipping Act*, 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 246.

1. Section 246 of the Merchant Shipping Act, 1854, confers on "the master, or any mate, or the owner, ship's-husband, or consignee" of a vessel power to apprehend a seaman who deserts; and provides that, if the apprehension is made on improper or insufficient grounds, the person who makes the same, or causes it to be made, should incur a penalty, which, if inflicted, should "be a bar to any action for false imprisonment in respect of such

SHIP—*Continued.*

apprehension." *Held* that the powers conferred by this section upon masters, &c., were conferred upon them in their individual capacity, and not as acting for the owners, and consequently that the owners were not responsible for any misuse of these powers. O'Neil v. Rankin and Sons, March 18, 1873, p. 538.

Advance against freight—Charter-party—Insurance.

2. *A charter-party contained this clause—"Sufficient cash for ship's ordinary disbursements to be advanced to the master against freight, subject to interest, insurance, and 2½ per cent commission." The charterer made advances to the master, but did not insure the freight, and the vessel was lost on the voyage. In an action raised by the charterer against the owners* held (*affirming judgment of the Court of Session*) *that the charterer, having stipulated that he should be entitled to insure freight at the owners' expense to an amount corresponding to the amount of his advances, must be held to have made such insurance a part of his security, and not having effected any such insurance must be held to have relinquished, in the event of the ship being lost, any claim against the owners for repayment.*

Question (per *Lord Chancellor*), *whether in ordinary cases advances against freight are recoverable in the event of a loss of the ship and cargo.* Watson and Co. v. Shankland *et al.*, May 16, 1873, H. L. p. 51.

Lien for Repairs—Possession.

3. A vessel was placed in a patent slip belonging to a firm of shipbuilders for repair. When certain outside repairs were completed she was removed into a public wet dock, into which the patent slip opened, and the repairs were there completed, the vessel being attached to pawls situated within the premises of the shipbuilders, and lying close to their slip. From time to time she was moved for the convenience of those using the slip and an adjacent crane, this being done at the order of the harbour-master, but chiefly by the shipbuilders' men. During the whole time the master was present in the ship during the day, and at night a ship-keeper. *Held* (*rev.* judgment of Lord Gifford) that the lien which the shipbuilders had for the cost of the repairs while the vessel was in their slip ceased when she was removed into the public wet dock, and became subject to the orders of the harbour-master, the power of detention being absolutely necessary to the right of lien. Cooper v. Barr and Shearer, June 6, 1873, p. 651.

Ship-Measurement—Merchant Shipping Act, 1854, *sub-sections* 4 *and* 5 *of section* 21.

4. A ship was constructed with an awning deck above the main or tonnage deck, and separated from the forecastle and poop by two gaps or cuttings extending completely across the vessel, the cuttings being closed by moveable planks or hatches not fastened down or rendered water-tight. *Held* (1) that the space between the awning deck and main deck was not "a permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew," in terms of sub-section 4 of section 21 of the Merchant Shipping Act 1854 (17 and 18 Vict. c. 104); and (2) that the vessel had not "a third deck, commonly called a spar deck," within the meaning of the provisions of sub-section 5 of section 21 of the said Act. Lord Advocate v. The Clyde Steam Navigation Co. Feb. 22, 1873, p. 440.

Ship-Measurement—Merchant Shipping Act, 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 21, *sub-sec.* 4—*Hurricane Deck—Permanent closed-in space.*

5. A steamship was constructed with a bridge extending across the vessel and connected with the bulwarks on either side, and below the bridge at its centre there was a small round house. A hurricane deck or covering was subsequently added, extending from the forecastle to the bridge. The space below this covering was not entirely closed in, there being a passage on either side of the round house, and no means for closing these passages in. It being proved that this hurricane deck did not prevent the shipment of

SHIP—*Continued.*

seas, and that the working of the ship was almost entirely conducted on the main deck, *held* (by Lord Gifford) that the space below the hurricane deck was not "a closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew," within the meaning of sub-section 4 of section 21 of the Merchant Shipping Act, 1854, and therefore did not fall to be included in the measurement of the ship. Leith, Hull, and Hamburg Steam-Packet Co. v. Lord Advocate, March 20, 1873, p. 597.

SLANDER. See *Issue—Reparation.*

SPECIAL CASE. See *Process*, 3, 4.

STATUTE. *Expenses—Procurator-Fiscal—Statutes* 20 *and* 21 *Vict. c.* 148 (*Local*) (*Tweed Fisheries Act*, 1857), *sec.* 82; 31 *and* 32 *Vict. c.* 123 (*Tweed Fisheries* (*Scotland*) *Act*, 1868), *secs.* 18, 38, *and* 41; 27 *and* 28 *Vict. c.* 53 (*Summary Procedure* (*Scotland*) *Act*, 1864, *sec.* 22.

1. The Tweed Fisheries Act, 1857, authorises an award of expenses against a person convicted of an offence under the Act.

The Summary Procedure Act, 1864, provides that expenses shall not be awarded to or against any public procurator or party prosecuting under the authority of any Act of Parliament for the public interest, unless such award of expenses is authorised by such Act.

Held that the former Act by implication authorised an award of expenses against a procurator-fiscal when the person accused was acquitted, and therefore that the provision of the Summary Procedure Act did not prohibit it. Walker v. Bathgate, July 19, 1873, p. 956.

Reparation—Culpa—Machinery—Factory Acts, 7 *and* 8 *Vict. c.* 15, *sec.* 21; 19 *and* 20 *Vict. c.* 38, *sec.* 4.

2. The Act 7 and 8 Vict. c. 15, requires all parts of the mill gearing in a factory to be securely fenced.

The Act 19 and 20 Vict. c. 38, limits the obligation to fencing those parts of the mill gearing "with which children and young persons and women are liable to come in contact, either in passing or in their ordinary occupations in the factory."

Held that there is still an obligation to fence such mill gearing as is accessible to women and children, and not merely such as they are liable to come in contact with in the regular course of their employment.

Question as to the age at which a person can be guilty of contributory negligence. Traills v. Small and Boase, July 4, 1873, p. 888.

Glasgow Police Act, 1866 (29 *and* 30 *Vict. c. cclxxxiii*)—*Dean of Guild.*

3. By the Glasgow Police Act, 1866, sec. 384, the Master of Works may by notice require any proprietor of lands and heritages to fence the same, and a form of notice is provided to which the proprietors may lodge objections, to be disposed of by the Dean of Guild or Magistrate. Upon failure to comply with the notice, or with the order of the Dean of Guild or Magistrate, the Procurator-Fiscal in the Dean of Guild Court may by sec. 325 enforce the same by applying to the Dean of Guild for a warrant to execute the work therein specified . . . . and the Dean of Guild may grant a warrant to execute such work, and shall thereafter ascertain and fix the cost thereof, and decern against the proprietor or proprietors to whom notice was given for the proportion of such cost due by them. *Held*, in an application requiring the owner of a mill-lade to fence it, (1) that it was irrelevant to allege as a defence that the mill-lade ran alongside of a public road, the trustees vested with which were bound and had been in use to fence it; and (2) that, after the failure of the defenders to comply with the notice, the Dean of Guild had erred in ordaining the proprietor to fence the mill-lade, and that a warrant ought to have been granted to the Master of Works to fence the mill-lade, after which the Dean of Guild should fix and decern for the cost thereof. Lang v. Bruce, Feb. 5, 1873, p. 377.

STATUTE—*Continued.*

Police Commissioners—Property—Improvement of Street—Solum of Street.

4. The Aberdeen Police and Water-Works Act, 1862, authorised the commissioners under it to "allow, upon such terms as they think fit, any building within the limits of this Act to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated." *Held*, in a question between two neighbouring proprietors in a street, that this clause authorised the police commissioners, within reasonable limits, to allow proprietors to build beyond the limits of their property upon the *solum* of the street. Michie's Trustees v. Grant and Others, Nov. 8, 1872, p. 51.

Police—General Police Act—Statute 25 *and* 26 *Vict. c.* 101 (*General Police and Improvements* (*Scotland*) *Act*, 1862), *secs.* 3, 150, 396, 397—*Private Street.*

5. A piece of ground within a burgh, which had been originally intended to form a continuation of a street, and had been enclosed by walls marking out the line of the intended street, was held by three joint proprietors, whose titles conferred right on any one of their number at any time to insist upon it being thrown open as a public thoroughfare. It was used as an access to workshops and yards belonging to the several joint proprietors, and occupied by various tenants. For a long time it was shut off from the street of which it formed a continuation by a wall with a locked gate therein; the wall was, however, broken down and the gate removed about fourteen years before the present action, but the ground was never thrown open as a public thoroughfare. The General Police and Improvement Act having been adopted in the burgh, the Police Commissioners, after giving the statutory notice, caused a portion of the ground to be paved. *Held*, in an action at the instance of two of the joint proprietors against the Police Commissioners, that the ground was a private street in the sense of sec. 3 of the Act, and as such fell under the regulations of the Act applicable to private streets, and that consequently the pursuers, who had failed to object to the execution of the work in the manner prescribed by the Act, were barred from complaining thereof. Millar's Trustees, &c. v. Leith Police Commissioners, July 19, 1873, p. 932.

Edinburgh and Leith Sewerage Act, 1864, *sec.* 47—*General Police and Improvement* (*Scotland*) *Act*, 1862, *sec.* 3—*Supplementary Assessment—Owner—Sequestration.*

6. The 47th section of the Edinburgh and Leith Sewerage Act, 1864, enacts that "the owners of all lands, &c. any sewer, outfall, or drain from which shall, after construction of the said main and branch sewers and works, be connected with the same, shall be liable in payment to the commissioners of a reasonable sum of money for the use of the said main or branch sewers;" and the 3d section of the General Police (Scotland) Act, 1862, incorporated therewith, declares that the word "owner" shall include joint owner, &c., "or other person in the actual possession or receipt of the rents of tenements," &c. *Held* that a trustee in a sequestration was "owner" of the bankrupt's property in the sense of the 47th section, and that the commissioners were not bound to claim in the sequestration an assessment, which had been imposed before the bankruptcy, the trustee being bound to pay it as a condition of his taking possession of the property, or drawing the rents. Macknight v. Oman's Trustees, Nov. 29, 1872, p. 154.

Edinburgh Tramways Act, 1871, 34 *and* 35 *Vict. c. lxxxix.—General Tramways Act*, 1870, 33 *and* 34 *Vict. c.* 78, *sec.* 9—*Provisional Order.*

7. *The Edinburgh Tramways Company were authorised by their special Act and relative plans to lay a double line of tramways in a certain street which at its widest part was not broad enough to afford a clear space of* 9 *feet* 6 *inches between the footpath on each side and the nearest rail. By an agreement incorporated with the special Act the whole provisions of the General Tramways Act*, 1870, *were made to apply as fully as if the special Act had been a provisional order obtained under the General Act. The General Act autho-*

STATUTE—*Continued.*

rised the Board of Trade to grant provisional orders, which should only become effectual when confirmed by an Act of Parliament, and provided (sec. 9)—"No tramway shall be authorised by any provisional order to be so laid that for a distance of 30 *feet or upwards a less space than* 9 *feet and* 6 *inches shall intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway, if one-third of the owners, or one-third of the occupiers of the houses, shops, or warehouses abutting upon the part of the road where such less space shall intervene as aforesaid shall, in the prescribed manner, and at the prescribed time, express their dissent from any tramway being so laid."*

One-third of the occupiers of houses in the said street having applied for interdict against the formation of any line of tramway within 9 *feet* 6 *inches of the footpath, as specified in sec.* 9, held (rev. *judgment of the First Division) that the objection was incompetent, on the ground that the special Act was to be regarded as a provisional order confirmed by Parliament, and that sec.* 9 *applied merely to the granting of orders by the Board of Trade, and not to their construction when granted and confirmed by Parliament.* Edinburgh Tramways Co. v. Black, &c. (in Court of Session Feb. 21, 1873, p. 418), July 8, 1873, H. L. p. 57.

Plans—Sections.

8. *When an Act of Parliament authorises works to be constructed in accordance with deposited plans and sections, these are incorporated with the Act.* Edinburgh Tramways Co. v. Black, &c., July 8, 1873, H. L. p. 57.

SUCCESSION. *Collation between Heir and Executor.*

1. *Held* that when an heir who is also one of the next of kin of an intestate dies without having collated the heritage with the other next of kin his representatives are not entitled to a share of the moveable estate when they cannot collate the heritage. Newbigging's Trustees v. Steel's Trustees, Feb. 20, 1873, p. 411.

Vesting—Collation between Heir and Executor.

2. *Opinion* (*per* Lord Ardmillan), that the right of an heir, being one of the next of kin, is not that of a person primarily entitled to both moveable and heritable estate, but is a primary right to heritage which he may extend by collation so as to obtain a share of the moveables. Newbigging's Trustees v. Steel's Trustees, Feb. 20, 1873, p. 411.

Legacy—Liferent and Fee—Trust.

3. A trust-settlement directed the trustees "to pay" a legacy to a lady, "to be settled by my said trustees on herself and her issue, with power to her of disposal in case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband." *Held*, at a date when the legatee was forty-two years of age, and had been for several years married and had no children (1) that the legatee was not entitled to have the legacy paid to herself absolutely; and (2) in order to give effect to the expressed intention of the truster, the trustees were bound to invest the money and to take the securities in the name of the legatee in fee, exclusive of the *jus mariti* of her husband, and after her death to any children she might have also in fee, subject to the condition that the children's right of succession should not be defeated by any gratuitous act of the legatee, and failing children, to the heirs of the legatee, excluding those of her husband. Massy v. Scott's Trustees, Dec. 5, 1872, p. 173.

Mutual Disposition—Revocation.

4. A person having purchased certain subjects took the disposition to himself and his wife in conjunct fee and liferent, for her liferent use allenarly, and to himself and his heirs and assignees in fee. Thereafter the husband and wife executed a *mortis causa* disposition containing the following clause:—"Reserving always to us during our joint lives our own liferent right and use of the premises, with full power to us at any period during our joint lives to alter, innovate, or revoke these presents in whole or in part." *Held*

SUCCESSION—*Continued.*

that the husband, being absolute fiar under the first deed, was entitled to revoke the mutual disposition after his wife's death. Stiven v. Brown's Trustees, Jan. 10, 1873, p. 261.

Conditional Institution—Substitution.

5. A person conveyed a heritable subject to his children "equally among them, and the lawful issue of their bodies, and failing any of them by death, without lawful issue of their bodies, to the survivors equally." *Held* that this was a conditional institution of the grandchildren, and not a substitution. Stiven v. Brown's Trustees, Jan. 10, 1873, p. 261.

Testament—Construction—Heir-at-law—Next of Kin.

6. A testatrix directed her trustees to sell certain heritable property particularly described, and her whole other means and estate, heritable and moveable, and after payment of legacies, &c., to pay over the residue "to my heir-at-law, whom failing, to my next of kin."

In a competition between cousins of testatrix claiming as her next of kin and a cousin's child claiming as her heir-at-law, *held* (*rev.* judgment of Lord Ormidale), that by the term "heir-at-law" the testatrix did not mean to denote her heirs *in mobilibus*, but her heir in heritage. Sillars' Trustees v. Stewart and Others, Nov. 29, 1872, p. 160.

Testament—Universitas—Heir.

7. A truster left his property "to my own nearest heirs and assignees whomsoever in and through my mother, hereby excluding the relations by my father, and all others except through my said mother." *Held* (1) that the estate was not intended to pass as a *universitas* to his mother's next of kin, but that his mother's heir-at-law succeeded to the heritage and her heirs in moveables to the moveables; and (2) that although part of the property was conquest in the truster the mother's heir of line, not her heir of conquest, succeeded. Mitchell's Trustees v. Waddell, &c., Dec. 7, 1872, p. 206.

Testament—Titles to Land Act, 1868, 31 *and* 32 *Vict. c.* 101, *sec.* 20.

8. A person who carried on the business of an innkeeper, in premises of which he held a long lease, left testamentary writings in these terms:—"I do hereby bequiath, in event of my death before my wife H. E., the whole of property ether in money, bonds, debets, bussness, and other affects whatsoever, ... and I appoint H. E., my wife, heir and executor of this my last will and testament." *Held* (*diss.* Lord Ardmillan) that the words could not be so construed as to include the lease of the inn. Edmond v. Edmond, Jan. 30, 1873, p. 348.

Testament—Confusion.

9. The proprietrix of lands held of the Crown, subject to certain duties payable in kind to a donatary of the Crown, executed a *mortis causa* trust-settlement, in which she directed her trustees to hold the said lands for certain charitable purposes, and to convey to certain persons named "all such lands, houses, or other heritable subjects, of whatever nature or denomination the same may be, which I may acquire or succeed to after the date of these presents." The testatrix subsequently obtained by purchase a disposition from the crown donatary of the said duties, on which she was infeft. *Held* that the duties thus acquired were not to be regarded as a separate heritable subject from the land in the sense of the trust-deed. Dennison v. Fea's Trustees, Feb. 6, 1873, p. 392.

Testament—Legacy—Annuity.

10. A testator appointed his trustees to pay to his widow an annuity of £1000 a-year in lieu of her legal rights and of her claims under an antenuptial marriage-contract, and disposed of the rest of his estate in legacies, some of which he directed to be paid within three months after his death, and others after the death of his widow. The income of the trust-estate was not sufficient to pay the annuity. *Held* that the annuity was preferable to the legacies of which payment had been postponed, and that the widow was entitled to have it paid in full, whether the revenue of the trust-estate

SUCCESSION—*Continued.*

yielded that amount or not. Kinmond's Trustees v. Kinmond, Feb. 5, 1873, p. 381.

Testament—Annuity—Statute 33 *and* 34 *Vict. c.* 35 (*Apportionment Act*, 1870).

11. A testator left an annuity of £200 to his sister "during all the days and years of her life," payable in equal portions at Whitsunday and Martinmas, "commencing the first year's payment" at the first term after his death. He died on 9th November 1866. She survived till 27th October 1871, having received five years' payments of the annuity during the four years and eleven months of her survivance. Her representatives maintained that the testator's direction to make a year's payment at the first term after his death was intended to cover the half year current at the date of his death, and that the annuitant had thus only received four and a half years' payment of the annuity, and was entitled to a proportion for the half year current at the date of her death. *Held* that the testator's intention was that the sister should receive payment for the period during which she should survive him at the rate of £200 per annum, and that she had received full payment. Cuninghame's Trustees v. Duke *et al.*, March 18, 1873, p. 543.

Heir and Executor—Annuity—Tract of Future Time.

12. A testator conveyed his whole estate of every description to trustees, for the purposes of entailing a certain estate on a series of heirs, of realising his other estate, heritable and moveable, of fulfilling and discharging the obligations contained in his antenuptial marriage-contract, of paying legacies, and, lastly, of paying the residue to certain persons. *Held* that an annuity payable to the testator's widow under his marriage-contract was due out of the residue, and was not a burden on the entailed estate. Gordon v. Scott, Jan. 22, 1873, p. 334.

Testament—Vesting—Power.

13. A truster directed his trustees to pay the free yearly interest of the residue of his estate to his widow, and on her death to make over the fee to his two sisters and three nephews, and the heirs of their bodies, in such proportions as his widow should appoint, failing such appointment, to the beneficiaries equally, the share of any nephew dying without issue, or of either sister who should die without settling, or should predecease, the same to be divided equally among the survivors and their issue. One of the sisters survived the testator but predeceased the widow, leaving a settlement of, *inter alia*, her share of the fee of her brother's estate. *Held* (1) that the fee did not vest till the death of the truster's widow; and (2) that the terms of the trust-deed did not authorise the truster's sister to settle her share of the fee until it had vested. Smith's Trustees v. Graham and Others, May 29, 1873, p. 630.

Legacy—Trust.

14. A testator, in his settlement, directed his trustees to divide and pay over the fee of the residue of his estate to and among his whole children, including his daughters, "declaring that the provisions therein made in favour of females shall be purely alimentary to them, and not alienable or assignable, and shall be exclusive of the *jus mariti* and right of administration" of husbands, and not affectable by their own or such husbands' debts or deeds. *Held* that as there was a clear direction to the trustees to pay to the beneficiaries who were alone interested, and as the Court could not consistently therewith create a trust, which was the only mode of rendering the daughters' provisions inalienable, the daughters were entitled to receive payment on their own receipts; but that the receipts should bear exclusion of the *jus mariti* and right of administration. Allan's Trustees v. Allan and Others, Dec. 12, 1872, p. 216.

*Inventory-Duty—*23 *and* 24 *Vict. c.* 80*—Discharge—Confusion—Entail.*

15. The proprietrix of an estate under a deed of entail granted a bond of annualrent for improvement outlay under the Montgomery Act in favour of herself, her "heirs, executors, successors, and assignees," on which bond

SUCCESSION—*Continued.*

Vesting—Alimentary Provision.

22. By trust-disposition and settlement a father conveyed his whole property to trustees, and in particular he assigned to them the leases of four farms, which leases had different periods of endurance. He directed them to carry on the management of these farms, and, after payment of his debts, to divide yearly the annual profits of the farms among his children, and on the expiry of the respective leases to realise and divide the crop and stocking in the same way; declaring also that the annual profits should not be assignable or attachable for the debts of the children, and that the issue of children predeceasing should succeed to their deceased parents' shares. *Held* (1) that the provisions in favour of the children vested *a morte testatoris* both as regarded the crop and stocking of the farms and the annual profits; and (2) that the children's shares in the annual profits, though inalienable and unassignable during their lives, might be assigned by deeds to take effect after death. Elliot v. Bowhill, &c., June 21, 1873, p. 735.

Legacy—Cumulative Provisions.

23. A father in his daughter's antenuptial marriage-contract bound himself to pay at his death a sum of £1000 to her marriage-contract trustees. He afterwards executed a trust-disposition and settlement, by which he directed his trustees to pay his debts, and divide the residue of his estate equally among his children. *Held* that the provision in the marriage-contract was a debt due by the deceased, and was not to be deducted from the daughter's share of residue. Elliot v. Bowhill, &c., June 21, 1873, p. 735.

Testament—Revocation.

24. A testator left a holograph testament containing a nomination of executors and a disposal of his whole means among certain legatees, along with another signed holograph writing of subsequent date, commencing "I desire to bequeath as follows," and containing bequests and annuities to nearly the same parties as were mentioned in the first writing. It concluded, "balance left for further disposal;" but no other deed was discovered. Both writings were found in the testator's travelling bag. *Held* (1) that the second writing was a testamentary writing; and (2) that it did not revoke the first writing, but that both must be read as one writing. Low's Executors and Others, June 21, 1873, p. 744.

Legacy—Uncertainty.

25. Bequests to "charities in Glasgow, £1000. Do. Abdn., £1000"—*held* void from uncertainty. Low's Executors and Others, June 21, 1873, p. 744.

Heir and Executor—Tract of Future Time—Testament—Relief.

26. *A person properly executed an entail of certain lands, binding himself, his heirs, executors, and successors whomsoever, to free and relieve these lands of all his debts and obligations. Thereafter, by antenuptial contract of marriage, the entailer settled upon his spouse, in the event of her surviving him, an annuity secured over the entailed lands, but with power to himself, his heirs, executors, and successors, to purchase in lieu thereof an annuity from an insurance company, in which case the widow was bound to discharge the entailed estate.* Held, *on a construction of the two deeds* (rev. *judgment of the First Division*), *that the obligation in the first deed to relieve the entailed estate of the granter's debts and obligations applied to the annuity with which the estate was burdened by the second deed, and that the heir of entail was entitled to be relieved of the annuity out of the entailer's general trust-estate.* Mackintosh v. Mackintosh's Trustees, May 19, 1873, H. L. p. 28.

Heritable and Moveable—Bequest of Interest—Tract of Future Time.

27. *Held* that a legacy of the annual interest for a series of years of a capital sum bequeathed to another legatee was a moveable right in the person of the legatee and of his heir *in mobilibus*, and that, on the death of the latter, his mother was entitled to participate in future payments of interest to the

SUCCESSION—*Continued.*
extent of a third under the Moveable Succession Act of 1855. Hill v. Hill, Dec. 21, 1872, p. 247.

Husband and Wife—Trust-disposition—Revocation.

28. By mutual trust-disposition and settlement a husband and wife, who had no antenuptial marriage-contract, disponed to trustees the whole property, heritable and moveable, which should belong to them or either of them at the death of the first deceaser, with directions that upon that event the trustees should take an inventory of the whole estate, and should hold one-half thereof subject to the liferent of the survivor for behoof of the relatives of the first deceaser. The spouses reserved full power to alter the deed during their joint lives, and the wife declared the provisions in her favour to be in full of her legal claims. *Held* that the trust-deed was not revocable by the surviving husband, and that the right of the relatives of the wife vested in them at her death. Kerr v. Ure, &c., June 28, 1873, p. 780.

General Settlement—Approbate and Reprobate—Negative Prescription.

29. A father executed a trust-deed for payment of certain debts and regulating his succession *in fraudem* of his antenuptial marriage-contract, and to the prejudice of the heir of the marriage, and afterwards another trust-deed, the two forming together a complete settlement of his whole estate, heritable and moveable. The heir made up a title under the marriage-contract, and under it possessed the lands contained in the first trust-deed, and took benefit under the second deed, but in ignorance of the existence of the first trust-deed. *Held* that his trustees and executors were not barred by the negative prescription from challenging the earlier deed, but were entitled to elect either to abide by his approbation of his father's settlement or to renounce and restore the benefit he had taken, and challenge the first deed. Earl of Glasgow's Trustee v. Earl of Glasgow, &c., Dec. 13, 1872, p. 218.

Trust-Settlement—Codicil—Construction.

30. A truster conveyed his unentailed lands and property, heritable and moveable, to trustees, and directed them, in the third place, for the period of twenty years after his death, to invest and accumulate the whole free rents and proceeds of the trust-estate, and to employ the funds so invested in the purchase of lands. In the fifth place, the truster directed the trustees, at the termination of the twenty years, to settle the estates conveyed by the trust-deed, and the lands purchased by them, in strict entail upon the truster's son and his heirs-male, whom failing, upon the heirs entitled to succeed to the truster's entailed estate. In a codicil the truster directed that the trustees, "instead of investing the free rents of my unentailed estate in manner before mentioned, shall annually pay over the whole free proceeds of the same to my two daughters, equally between them, while both shall be in life, and to the survivor, and shall continue to do the same as long as both or either of them shall be alive." *Held* that provisions in the codicil in favour of the truster's daughters were not limited to the period of twenty years after the truster's death. Breadalbane's Trustees v. Jamieson, &c., July 16, 1873, p. 912.

See *Destination—Entail*, 5, 6, 7—*Heir.*

SUMMARY PROCEDURE ACT. See *Process.*

SUPERIOR AND VASSAL. *Feu-Contract.*

1. *A superior bound his vassal to build and maintain on his feu a house of a certain value, and reserved to himself the minerals, with power to work them at pleasure, and to remove as much stone, &c., as might be necessary for the proper working of the minerals, it being expressly agreed that he should not be liable for any damage to the vassal that might happen through the working of the coal, &c., by longwall workings or otherwise.* Held (reversing *judgment of the Second Division*) *that the vassal was not entitled to an interdict against the superior working the minerals under his house on*

SUPERIOR AND VASSAL—*Continued.*

the ground that the workings would probably injure or destroy it. Buchanan, &c. v. Andrew, March 10, 1873, H. L. p. 13.

Property—Title—Precept of Clare Constat—Minerals—Reservation.

2. A was infeft upon a feu-contract by which certain lands were conveyed to him without reservation of mines and minerals. Upon A's death his son B was infeft in the lands upon a precept of *clare constat*, which contained an express exception and reservation of the mines and minerals to the superior. Upon B's death his son C, having been infeft in the said lands, sold them. Subsequently D, having served heir in special in the mines and minerals to A, brought an action of declarator of his right to them against the superior and the proprietors of the *dominium utile* of the lands, on the ground that they still remained *in hæreditate jacente* of A. *Held* that the exception and reservation of mines and minerals in the precept of *clare constat* was inept, and did not limit the precept as a warrant for infeftment in the fee of the lands, and therefore that there was nothing *in hæreditate jacente* of A which D by service to him could take up. Boyd v. Bruce and Others, Dec. 20, 1872, p. 243.

Writ of Confirmation—(Titles to Land Consolidation Act, 1868), *secs.* 10, 98, 100—*Private Act*, 6 *Geo. IV., c. xxviii.*

3. By a private Act of Parliament the proprietor of an entailed estate had power, under certain conditions, to feu the estate, the Act providing that the conditions should be inserted in all subsequent investitures, and that the heir omitting to do so should incur an irritancy. *Held* (*diss.* Lord Deas, *aff.* judgment of Lord Mure) that notwithstanding the provisions of the 10th, 98th, and 100th sections of the Titles to Land Consolidation Act, 1868, a feuar was not entitled to object to a writ of confirmation which deviated from the statutory form by the insertion of a clause declaring that the writ was granted under the conditions specified in the Act of Parliament. Lauder v. Shiels, May 17, 1873, p. 605.

Mid-superiority.

4. A, who was mid-superior of certain lands, conveyed the mid-superiority to B, the proprietor of the *dominium utile*, by a disposition containing an *a me* manner of holding, and B was infeft thereon. Thereafter A granted to B another disposition of the mid-superiority, bearing to be in supplement of the former disposition, and containing an *a me vel de me* manner of holding, and B was infeft on this also. The over-superior granted a deed confirming both these dispositions, and the infeftments following upon them. *Held* that the two dispositions were to be read together as one conveyance of the mid-superiority, and were both confirmed as one estate. Duke of Argyll v. Dalgleish's Trustees, May 23, 1873, p. 616.

TEINDS. *Valuation—Rental Bolls—Consent of Titular and Heritors.*

1. A sub-commission for the valuation of the teinds in a parish authorised the sub-commissioners to give effect to the practice of payments by rental bolls when the parties consented thereto. In 1629 a report by the sub-commissioners set forth that the parson, who was titular of three-fourths of the teinds of the parish, and tacksman of the remaining fourth, and all the heritors, had consented to the valuation by rental bolls, except the proprietor of the lands of A. The bishop, who was titular of the said remaining fourth, was not directly represented.

In an approbation, brought after the lapse of two hundred years, by the proprietor of A, the titular objected to the valuation as having proceeded without the consent of all the titulars and heritors. *Held* (1) that the titularity had been sufficiently represented by the parson, as titular and tacksman; (2) that the silence of the proprietor of A was not a valid objection to the valuation. Ainslie and Co. v. The Officers of State, Jan. 7, 1873, p. 260.

Locality—Valuation—Surrender—Prescription.

2. By a final decree of locality in 1817 the lands of a heritor were localled on for stipend to the extent of £40, being the full amount of the teinds taken

TEINDS—*Continued.*

at one-fifth of the proven rental. In 1863 the heritor obtained a decree of valuation of his teinds, which fixed them at £32, and subsequently obtained a decree of reduction of the decree of locality, qualified by the condition that it should subsist as the interim rule of payment of stipend until a new decree of locality was obtained.

In a subsequent locality, *held*, in a question between the heritor and the minister, that the former was not precluded by the forty years' payments of £40 from surrendering his teind at the sum fixed by the decree of valuation.

Question, whether the reduction of the former decree of locality was necessary.

Observations on the Locality of Maderty, July 9, 1817, F. C. Chisholm-Batten v. Cameron, Jan. 16, 1873, p. 292.

Sub-valuation—Approbation—Reduction—Decree in Absence.

3. *Held* that it was competent for a heritor who had in absence obtained decree of approbation of a sub-valuation of the teinds of his lands to bring a reduction of the same, on the ground of its being disconform to the sub-commissioners' report, on which it bore to proceed. M'Neill's Trustees v. Campbell, Dec. 9, 1872, p. 211.

Locality—Valuation.

4. In two successive localities the teinds of certain lands were localled on for more than the just proportion of each augmentation, in consequence of a previous decree of valuation not being produced; and the stipend so localled was paid by the heritor. In a subsequent locality the decree of valuation was produced. *Held* that as under the previous decrees of locality the heritor must continue to pay more of the old stipend than was justly due in localling the augmentation, she should be localled on for so much less of the augmentation. Robertson v. Macknight, Feb. 6, 1873, p. 389.

Valuation—Prescription.

5. *Held* (aff. *judgment of the Teind-Court*) *that a decree of valuation of teinds was not a title under which a proprietor could by prescriptive possession acquire a right to teinds of lands not originally included in the valuation.* Paterson v. Macleod, July 10, 1873, H. L., p. 62.

Valuation—Presumption.

6. *Circumstances in which held that terms of a report of sub-commissioners of teinds in* 1629, *decree of approbation thereof in* 1785 *and* 1786, *and relative scheme of division, and the proceedings in a process of augmentation in* 1800, *raised the presumption that the whole lands in a parish had been valued in* 1629, *but that this presumption had been overcome by proof that certain lands were not included in the valuation.* Paterson v. Macleod, July 10, 1873, H. L., p. 62.

Minister's Stipend.

7. *Held* that a proprietor who has a bare superiority over lands, or one who has a security right over lands on which no possession has followed, and who has not intromitted with the fruits, is not liable for minister's stipend.

Opinion that it is not necessary to enable a minister to use his decree of locality against a possessor of lands localled on that the possessor's name should appear in the locality.

Opinion that a proprietor whose name appears in the decree of locality ceases to be liable for stipend when he ceases to be proprietor. Jackson v. Cochrane, Feb. 27, 1873, p. 475.

Valuation and Approbation—Prescription—Derelinquishment—Surrender.

8. (1) When for more than forty years payments of stipend in excess of sub-valuations of lands had been made under final decrees of locality, pronounced prior to decree of approbation, *held* that the minister had acquired right to have these payments continued.

(2) When under a decree of locality payments of stipend in excess of the value of teinds fixed by previous sub-valuation and decree of approbation had been made for more than forty years, *held* that the minister had not acquired right to have these payments continued.

TEINDS—*Continued.*

(3) Where payments of stipend in excess of a subvaluation of lands had been made for more than forty years under a final decree of locality, and the sub-valuation had been abandoned, and a decree of valuation of the High Court obtained, *held* (*dub.* Lord Deas) that the decree of the High Court fixed the amount of the teind, and that the minister had no right to have the overpayments continued.

(4) Where a minister has acquired a right to overpayments of teind in excess of decrees of approbation of sub-valuation, *held* that the heritor could not surrender his teinds.

Observations on the case of Maderty, 9th July 1817, F. C. Colquhoun v. Fogo, July 18, 1873, p. 919.

Locality—Res Judicata.

9. *Held* that a judgment in a question between two heritors given effect to by a final locality was *res judicata* in a subsequent locality in a question between the common agent and one of these heritors. City of Edinburgh v. Montgomery, Oct. 16, 1872, p. 14.

Locality—Old Stipend.

10. *Opinion* (*per* Lord Cowan) that when an augmentation of stipend is granted, the allocation of the old stipend remains fixed, and falls to be taken as the first step in the new locality. City of Edinburgh v. Montgomery, Oct. 16, 1872, p. 14.

Locality.

11. In a process of locality, a heritor whose teinds were not valued for stipend was localled upon an admitted rental of £409. In a subsequent locality he alleged that the rental was now less, and that the teinds were exhausted. The Court *held* that the heritor was entitled to a proof of his averment that the rental was diminished. City of Edinburgh v. Montgomery, Oct. 16, 1872, p. 14.

Locality.

12. Teinds had belonged to a priory before the Reformation, had never been erected into a temporal lordship, but after the Reformation were held *in commendam* by laymen until 1612, when they were regularly united to a bishopric. They were inalienable in the hands of the bishop before the submissions to King Charles I. in 1627 and 1628, and fell to the Crown on the abolition of Episcopacy in 1689. *Held*, in a locality, that these were bishops' teinds in the hands of the Crown and entitled to be postponed to teinds held on heritable right. Lord Advocate v. Earl of Galloway, and Hathorn, July 11, 1873, p. 896.

Valuation.

13. A parson who was titular of three-fourths of the whole teinds of his parish, and tacksman of the other fourth, called the bishop's fourth, appeared and consented to a subvaluation according to the whole rental bolls. *Held* that the titularity had been sufficiently represented, and that it was not a valid objection to the valuation that the bishop had not been called. M'Neill's Trustees v. Campbell, Dec. 9, 1872, p. 211.

Proving the Tenor.

14. A report of the sub-commissoners appointed for the valuation of the stock and teind of the lands within the presbytery of Argyll, dated in 1629, had been repeatedly given effect to in approbations and localities. Part of the original document had become illegible, apparently from damp, and part appeared to have been worn away. A copy of the entire document, supposed to be made about 1720, was preserved in the teind office, but the writer was not known. From this copy, which was not in all respects a faithful transcript, the deficiencies in the original could be supplied. In an action of proving the tenor of a portion of that part of the report which had been destroyed, *held* (1) that in the circumstances no special *casus amissionis* need be proved, and (2) that the tenor had been sufficiently instructed by the proceedings in the localities, &c., together with the copy produced. Duke of Argyll v. Campbell, May 17, 1873, p. 611.

TESTAMENT. See *Succession*, 10.

TITLE TO SUE. See *Jurisdiction.*

TRACT OF FUTURE TIME. *Heir and Executor.*

1. A testator conveyed his whole estate of every description to trustees, for the purposes of entailing a certain estate on a series of heirs, of realising his other estate, heritable and moveable, of fulfilling and discharging the obligations contained in his antenuptial marriage-contract, of paying legacies, and, lastly, of paying the residue to certain persons. *Held* that an annuity payable to the testator's widow under his marriage-contract was due out of the residue, and was not a burden on the entailed estate. Gordon v. Scott, Jan. 22, 1873, p. 334.

Heritable and Moveable—Bequest of Interest.

2. *Held* that a legacy of the annual interest for a series of years of a capital sum bequeathed to another legatee was a moveable right in the person of the legatee and of his heir *in mobilibus*, and that, on the death of the latter, his mother was entitled to participate in future payments of interest to the extent of a third under the Moveable Succession Act of 1855. Hill v. Hill, Dec. 21, 1872, p. 247.

TRADE MARK. *Maker's name.*

The manufacturer of a sewing machine of a certain construction, which was not patented, had been in use to sell it, under his own name, for a series of years, and the name had thus obtained an exclusive meaning in the trade as signifying a machine of his manufacture. *Held* that the name had become the property of the manufacturer as a trade mark, and that no one else was entitled to use it. Singer Manufacturing Co. v. Kimball and Morton, Jan. 14, 1873, p. 267.

TRUST. *Trust for Creditors—Radical Right—Conveyance—Service—Heir.*

1. An infeftment on a trust-disposition, bearing to be for behoof of creditors, does not divest the granter of the radical right in the reversion. His heir cannot complete his title by conveyance from the trustee. Gilmour v. Gilmours, July 3, 1873, p. 853.

Legacy—Discretion of Trustees.

2. A testator left legacies to each of his nieces, to be paid "when my trustees shall find it suitable and convenient to pay the same, and which shall be so secured to said children as my trustees may consider best for their welfare and benefit . . . . which . . . . legacies . . . . are hereby specially provided and given for the liferent alimentary use of my . . . . legatees, exclusive of the *jus mariti* of their husbands;" "and further declaring that the simple receipt and discharge of my said legatees, without the consent or concurrence of their respective husbands, shall be a sufficient exoneration, acquittance, and discharge to my trustees for said . . . . . legacies." *Held* that although the trust-estate was in a condition conveniently to pay the legacies the trustees were not bound to make immediate payment to the daughters of the sums bequeathed. Cuninghame's Trustees v. Duke *et al.*, March 18, 1873, p. 543.

Sale of Trust-estate—Trusts (Scotland) Act, 1867 (30 *and* 31 *Vict. cap.* 97, *sec.* 3).

3. The Trusts Act, 1867, sec. 3, empowers the Court of Session to grant authority to trustees to sell the trust-estate, or part thereof, "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." A truster directed his trustees to hold certain estates for payment of his debts, and in any event for twenty-one years, and for payment of an annuity, also secured by a separate bond, to his nephew, upon whom, and a series of heirs, they were directed to entail the estates when the debt should all be paid off. The trustees were expressly forbidden to sell any part of the landed estates in question. At the truster's death the annual burdens and interest of debts exceeded the rental by £106. *Held* (*rev.* judgment of Lord Gifford) that the Act did not

TRUST—*Continued.*

authorise the Court to grant authority to sell any part of the estate. Hay's Trustees v. Hay Miln, June 13, 1873, p. 694.

Fee and Liferent—Residue—Advances to Children.

4. A testator directed his trustees to hold the residue of his estate for his son in liferent and his children in fee, the children's shares to be paid to them, if under age, at their father's death, or on attaining majority, and, in the case of daughters, on attaining majority or marriage. It was further provided in the trust-deed "that until the respective terms of payment of the said shares, the said trustees, after the death of both parents," should have full power to pay the interest of the trust-estate to the children, or to make advances to them out of the capital for furthering their prospects in life. The son, on his death, left a widow and two pupil children. *Held* (1) that the son's widow was not entitled to a liferent of the residue of the testator's estate; and (2) that the trustees were entitled, but not bound, to make advances from the annual proceeds of the trust-estate for the maintenance and support of the children while their mother survived. Spears' Trustees v. Spears, &c., June 21, 1873, p. 731.

Trust-Settlement—Codicil—Construction.

5. A truster conveyed his unentailed lands and property, heritable and moveable, to trustees, and directed them, in the third place, to invest and accumulate the whole free rents and proceeds of the trust-estate, and to employ the funds so invested in the purchase of lands for the period of twenty years after his death. In the fifth place, the truster directed the trustees, at the termination of the twenty years, to settle the estates conveyed by the trust-deed, and the lands purchased by them, in strict entail upon the truster's son, and his heirs-male. In a codicil the truster directed that the trustees, "instead of investing the free rents of my unentailed estate in manner before mentioned, shall annually pay over the whole free proceeds of the same to my two daughters, equally between them, while both shall be in life, and to the survivor, and shall continue to do the same as long as both or either of them shall be alive. *Held* that provisions in the codicil in favour of the truster's daughters were not limited to the period of twenty years after the truster's death. Breadalbane's Trustees v. Jamieson, &c., July 16, 1873, p. 912.

Agent and Principal—Bankruptcy.

6. A sum of £1000 was sent by clients to a law-agent on 8th June for the purpose of being invested in a heritable security. On 15th June the agent paid it into his own bank account, which shewed a balance in his favour, until the transaction should be formally completed; and he died on the 21st. His estates were thereafter sequestrated, and the trustee claimed the £1000 in bank as part of the bankrupt estate. In a petition at the instance of the clients, under sec. 104 of the Bankruptcy Act, *held* that the £1000 having been sent to the bankrupt for a specific purpose, and being still distinguishable from his funds, fell to be taken out of the sequestration of his estate and paid to the petitioners. Macadam v. Martin's Trustee, Nov. 5, 1872, p. 33.

Aliment—Alimentary Provision—Judicial Factor.

7. By trust-settlement an annuity was directed to be paid, and was declared to be alimentary and "not assignable for causes onerous or gratuitous, and not subject to arrestment or other legal diligence, and not subject to the debts or deeds" of the donee. A judicial factor, who was appointed on failure of the trustees, carried out all the purposes of the trust except two. These were payment of the annuity and handing over the estate to the residuary legatee. The judicial factor, the annuitant, and the residuary legatee came to an agreement that the residuary legatee should grant a personal bond for payment of the annuity to the annuitant, who was to grant a discharge to the judicial factor, and that the trust-estate should be wound up and the residue paid over to the residuary legatee. The judicial factor presented a petition praying for exoneration and discharge on this arrangement being

TRUST—*Continued.*

carried out. *Held* that the annuitant had not power to grant a discharge of the alimentary provision, and petition refused. Smith and Campbell, May 30, 1873, p. 639.

Annuity—Alimentary—Discharge.

8. A husband burdened certain lands with an annuity to his widow, declaring that it should be alimentary and not assignable, and should be exclusive of the *jus mariti* of any husband she might marry. He directed his trustees upon the death of his widow to convey the lands to A. The free rents of the lands were insufficient to pay the annuity, and the trustees required to borrow money to pay it on the security of the lands.

The widow and A agreed that she should disburden the lands for a certain sum, and that the trustees should on such payment convey the lands at once to A.

In a special case by A and the trustees, *held* that the widow could not discharge the annuity, and that the trustees were not authorised to convey the lands to A. Cosens v. Stevenson, &c., June 26, 1873, p. 761.

Legacy—Liferent and Fee.

9. A trust-settlement directed the trustees "to pay" a legacy to a lady, "to be settled by my said trustees on herself and her issue, with power to her of disposal in case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband." *Held*, at a date when the legatee was forty-two years of age, and had been for several years married and had no children (1) that the legatee was not entitled to have the legacy paid to herself absolutely; and (2) in order to give effect to the expressed intention of the truster, the trustees were bound to invest the money and to take the securities in the name of the legatee in fee, exclusive of the *jus mariti* of her husband, and after her death to any children she might have also in fee, subject to the condition that the children's right of succession should not be defeated by any gratuitous act of the legatee, and failing children, to the heirs of the legatee, excluding those of her husband. Massy v. Scott's Trustees, Dec. 5, 1872, p. 173.

Legacy.

10. A testator in his settlement directed his trustees to divide and pay over the fee of the residue of his estate to and among his whole children, including his daughters, "declaring that the provisions therein made in favour of females shall be purely alimentary to them, and not alienable or assignable, and shall be exclusive of the *jus mariti* and right of administration" of husbands, and not affectable by their own or such husbands' debts or deeds. *Held* that as there was a clear direction to the trustees to pay to the beneficiaries who were alone interested, and as the Court could not consistently therewith create a trust, which was the only mode of rendering the daughters' provisions inalienable, the daughters were entitled to receive payment on their own receipts; but that the receipts should bear exclusion of the *jus mariti* and right of administration. Allan's Trustees v. Allan and Others, Dec. 12, 1872, p. 216.

UNIVERSITY. *Right of Women to Study and Graduate.*

Held that in respect of the language of the deeds of foundation of Edinburgh University, and the contemporaneous interpretation by usage, female students were not entitled to study or to graduate in the University, and that regulations made for their admission were *ultra vires* of the University Court; and (2) (*diss.* Lord Justice-Clerk and Lord Gifford) that a reduction of the regulations was unnecessary. Jex-Blake v. Senatus of University of Edinburgh, June 28, 1873, p. 784.

USAGE. *Corporation — Membership — Copartnery — Mandate — Joint Contributors.*

1. In a suspension and interdict brought to try the validity of an election of certain persons as managers of the Edinburgh Royal Infirmary, *held*, in respect of the terms of its charter and Act of Parliament and the usage

USAGE—*Continued.*

which had followed thereon, (1) that firms contributing the necessary amount were entitled to be represented at the meeting of the general court by one, but only one, of their partners, and that no written mandate from the firm was required by such partner; and (2) that votes which were given in respect of joint contributions were valid in cases in which the amount of the contributions when divided by the number of contributors would have been sufficient to have qualified each such contributor, but in no other case. Walker v. Law, Dec. 7, 1872, p. 199.

See *University.*

Servitude—Thirlage.

2. In the titles of lands which were thirled to a barony mill the thirl was described as of "the whole grindable corn growing on the said lands except teind and seed corn," or "except teind and horse corn." In a decree-arbitral pronounced in 1787, in a submission entered into between the proprietor of the mill and the proprietors of the lands it was found that the lands were astricted for their whole growing corns, seed and horse corn excepted. *Held*, upon consideration of the terms of the titles, and of the decree-arbitral and other evidence of usage, that the ambiguous terms "grindable corn" had been construed by usage to mean *omnia grana crescentia.* Stobbs v. Caven, March 14, 1873, p. 530.

VALUATION. See *Teinds.*

VALUATION ACTS. *Administration of Justice—Corruption—Irregularity.*

1. Allegations of private communications between the Judges of the Valuation Appeal Court and the assistant Solicitor of Inland Revenue which *held* irrelevant to support a conclusion for the reduction of judgments following thereon, it being the duty of the Solicitor of Inland Revenue to lay the special case for appeal before the Judges and get their opinion thereon. Stirling and Sons v. Holm and Others, Feb. 28, 1873, p. 480.

Valuation of Lands (Scotland) Acts—Valuation Appeal Court.

2. The Valuation Appeal Court is a Supreme Court, and its proceedings cannot be set aside by the Court of Session on the ground that they are *ultra vires* and incompetent. Stirling and Sons v. Holm and Others, Feb. 28, 1873, p. 480.

VALUATION APPEALS UNDER THE LANDS VALUATION ACTS. See separate Index, page 1052.

VESTING. See *Succession.*

WRIT. *Authentication.*

1. In a reduction of a testament, *ex facie* probative, on the ground that it had been signed by the witnesses *ex intervallo* and after the testator's death, *held*, after a proof, that the deed was not intended by the granter to be completed, and had not been completed.

Question, Whether a deed can be subscribed by the instrumentary witnesses after the death of the granter. Arnott and Others v. Burt, Nov. 14, 1872, p. 62.

Forgery.

2. Observations on the amount of evidence required to prove an averment of forgery in a civil action. Arnott and Others v. Burt, Nov. 14, 1872, p. 62.

Mandate—Forgery.

3. A firm of merchants, by a letter addressed to a bank, granted authority to their manager "to sign, per procuration of their firm, all bills, cheques, cash-orders, and other documents necessary to the conducting of our business, and all vouchers so subscribed will be equally binding as if signed by any member of our firm." They also delivered to their manager a letter of procuration binding themselves to meet all cheques, orders, drafts, bills, &c., endorsed by the manager, and "to keep the parties dealing with you free and skaithless; and we bind ourselves to ratify, homologate, and confirm the actings and doings of you, the manager, in respect of such cheques," &c. This document was delivered by the manager to the bank. The

WRIT—*Continued.*

manager, after forging the names of certain real and fictitious firms as acceptors of bills to bills drawn by himself as procurator of his principal's firm, discounted the bills at the bank, and endorsed them per procuratory, and appropriated the money thus obtained to his own use.

Held that, as it was not proved that the bank had failed to exercise due caution in discounting any of the bills, or that the signatures thereto were manifest forgeries, or presented a suspicious appearance which should have put the bank on their guard, the firm were liable to the bank for the amount of the bills. Union Bank v. Makin, March 7, 1873, p. 499.

Delivery.

4. *Observations* (*per* Lord Deas) on the delivery necessary in the case of gratuitous *inter vivos* deeds granted by a wife in favour of her husband. Kirkpatrick v. Kirkpatrick's Trustees, March, 19, 1873, p. 551.

See *Loan*, 2—*Proof—University.*

INDEX OF CASES UNDER THE LANDS VALUATION ACTS

(17 & 18 VICT., c. 91, 20 & 21 VICT., c. 58).

Annual Payment—Annual Compensation for injury to Fishings.

1. *Held* that an annual payment as compensation for injury to fishings did not fall to be entered on the valuation-roll. Burgh of Renfrew, Case 59, p. 979.

Bridge Dues.

2. *Held* that a bridge was properly entered in the valuation-roll in respect that it yielded a revenue from bridge dues. Burgh of Dumfries, Case 77, p. 984.

3. *Buildings by Crofter.* Duke of Richmond, Case 57, p. 978.

Church and School.

4. *Held* that a parish church and schoolhouse should be entered in the valuation-roll. Heritors of New Monkland, Case 83, p. 986.

Church—Private Chapel.

5. *Held* that a private chapel yielding no revenue was rightly entered in the valuation-roll. Menzies, Case 91, p. 989.

Exemption from Taxation—College.

6. *Held* that the exemption of a college from taxation was not a ground for not entering the college buildings in the valuation-roll. University of Glasgow, Case 72, p. 982.

Farm-House.

7. *Held* that the dwelling-house attached to a farm should not be separately entered in the valuation. Henderson, Case 79, p. 985.

Farm—Conjunct and Confident Person.

8. *Held* that the value of a farm let by a father to his son should be entered at the rent stated in the lease. Bruce, Case 58, p. 978.

Farm—Deductions from Rent.

9. *Held* that deductions from the rent of a farm allowed to the tenant to be spent in drainage fell to be included as part of the rent in the valuation-roll. Udny, Case 86, p. 987.

Farm—Lease—Conjunct and Confident.

10. A proprietor granted a lease of a farm to an old servant at a rent of £50. After the proprietor's death the assessor entered the farm in the valuation-roll at its true value, £70. The trustees of the proprietor appealed, on the

LANDS VALUATION ACTS—*Continued.*
ground that they only received £50 under the lease. *Held* that the entry was right. Kerr's Trustees, Case 75, p. 983.

Farm—Sublease.
11. The rent of a farm let on an improving lease was fixed at £15. A subtenant of part of the farm was entered as occupier at £55. *Held* that the name of the subtenant should not be entered on the roll. Fraser, Case 52, p. 976.

Farm—Dwelling.
12. Value of farm fixed at rent on lease with the addition of interest at 5 per cent on £150 expended by tenant on house and offices for which he had a claim of repetition from the landlord at the end of the lease. Skene, Case 53, p. 976.

Farm—Renewal of Lease—Improving Lease.
13. Before the expiry of an improving lease, at which the rent of a farm was fixed at £11, a renewed lease was taken at £15. *Held*, in the circumstances, that the farm was properly entered in the valuation-roll at £15, the period of the original lease not having expired. Fraser, Case 52, p. 976.

14. *Gasworks—Valuation of Gasworks when occupied by the proprietor.* Inverurie Gasworks, Case 85, p. 986.

15. *Gasworks—Valuation of Gasworks at probable rent to be got for premises.* Renton Gas-Light Co., Case 93, p. 989.

Gasworks.
16. Valuation of gasworks fixed at average sum divided among shareholders for several years. Leven Gas-Light Co., Case 94, p. 990.

Goodwill of a Store.
17. A store kept by an iron company in connection with their works was let at a rent of £90, with an additional annual payment of £60 for goodwill. *Held* that both sums fell to be included in the valuation as rent. The Glasgow Iron Co., Case 90, p. 989.

Harbour.
18. Value of harbour fixed at gross revenue, less 20 per cent for collection and maintenance, and 20 per cent for tenants' profits. Clyde Navigation Trustees, Case 60, p. 979.

19. *House—Mansion-house—Valuation of Mansion-house in the occupation of the Proprietor.* Sir Thomas Gladstone, Case 84, p. 986.

20. *Houses in College Buildings—Valuation of Professors' Houses in College Buildings.* University of Glasgow, Case 82, p. 985.

21. *House—Valuation of Houses in Glasgow.* Binning, Case 88, p. 988.

22. *House—Valuation of Houses in Glasgow.* Macfarlane, Case 81, p. 985.

23. *House—Mansion—Deductions for Furniture and keeping up of Garden.* Duke of Richmond, Case 56, p. 978.

Ironworks—Entry of Notes on Valuation-roll.
24. Notes on valuation-roll stating the number of furnaces of an ironwork which were out of blast objected to. Addie, Case 61, p. 979.

25. *Ironworks—Furnaces out of Blast.* Carnbroe Ironworks, Case 62, p. 980.

Mill.
26. *Held* that a mill was rightly entered in the valuation-roll at 8½ per cent on the price. Thomson, Case 78, p. 984.

Mill—Multures.
27. *Held* that an annuity of 40 bolls of victual, secured on lands in lieu of multures did not fall within the description of "lands and heritages" in the sense of the Valuation Act. M'Leod, Case 65, p. 980.

LANDS VALUATION ACTS—*Continued.*

Mill—Multures.

28. *Held* that payments in commutation of multures were not "lands ar heritages" in the sense of the Valuation Act. Duchess of Sutherlan Case 64, p. 980.

Mill—Machinery.

29. *Held* that the annual value of machinery in a corn mill fell to be includ in the valuation. Chalmers, Case 73, p. 982.

Moss—Fuel.

30. *Held* that the revenue derived from moss lands for fuel should be includ as rent in the valuation-roll. Forbes, Case 95, p. 990.

Oil-Works.

31. *Held* that oil-works connected with a coalfield were properly entered in tl valuation-roll. Drumgray Coal Co., Case 55, p. 977.

Paper-Mill.

32. *Held* that a paper-mill in possession of the proprietor should be valued the probable rent, and not according to output or cost of erection. Anna dale and Son, Case 54, p. 977.

Parish—Farm-House.

33. *Held* that the occupant of lands and a house in different parishes was e titled to have them entered together as one holding, with a view to the being jointly assessed for poor-rates. Glass, Case 87, p. 988.

34. *Print-Works, Valuation of.* Stirling and Sons, Case 69, p. 981, and Ca 104, p. 992.

Public Lunatic Asylum.

35. *Held* that a lunatic asylum supported by public rates should be entered i the valuation-roll. Banffshire District Lunacy Board, Case 71, p. 982.

Shipbuilding Yard.

36. *Held* that saw-mills and sheds erected by the tenant of a shipbuilding yar should be entered in the valuation-roll. Graham Brothers, Case 72, p. 98

37. *Shipbuilding Yard, Valuation of Erections on.* City of Perth, Case 74, 983.

Subtenants—Cottages Sublet.

38. *Held* that a number of cottages held in lease by a firm of fish-curers, ar sublet to fishermen, should be valued at the original rent, but that tl names of the occupiers, with the rents paid by them, should also be entere as a guide to the assessor in making up the roll of voters. Hay and Cc Case 70, p. 981.

39. *Subtenancy under Lease where Subtenants are excluded.* Duke of Richmon Case 66, p. 981.

Tenant.

40. *Held* that when a tenant becomes proprietor of the subjects let, and improv them, the rent stated in the lease cannot be taken as the annual valu Grant, Case 92, p. 989.

Valuation—Appeal Case—21 Vict. c. 58, sec. 2.

41. *Observations* on the form of special case. Bank of Scotland, Case 101, 991.

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